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OKLAHOMA CIVIL PROCEDURE —RECENT DEVELOPMENTS

Charles W. Adams†

I. INTRODUCTION

This article surveys developments relating to Oklahoma civil procedure that have occurred during the past year.¹ The most conspicuous development with respect to Oklahoma civil procedure was the Supreme Court's adoption of the Oklahoma Supreme Court Rules,² which replace the previous Rules of the Supreme Court,³ Rules of Appellate Procedure in Civil Cases,⁴ and Rules on Practice and Procedure in the Court of Appeals.⁵ The prior Rules had not kept up with amendments to the Oklahoma Statutes⁶ adopted in the past five years, and the new set of Supreme Court Rules now conforms to the statutory law. Aside from consolidating three sets of Rules into one and bringing the Rules into line with the Oklahoma Statutes, the new Supreme Court Rules do not make any substantial changes in Oklahoma appellate procedure. Thus, while their adoption is certainly beneficial and probably necessary, the new Rules do not represent an especially significant development.

Although less conspicuous than the adoption of the Supreme Court Rules, there were a number of important and interesting decisions involving various aspects of Oklahoma civil procedure that were issued by the Oklahoma appellate courts in the past year. Two decisions⁷ dealt with the imposition of monetary sanctions against attorneys under section 2011 of title 12,⁸ Oklahoma's

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1. For previous articles in this series, see Charles W. Adams, *Recent Developments in Oklahoma Law—Civil Procedure*, 31 TULSA L.J. 753 (1996); Charles W. Adams, *Recent Developments in Oklahoma Law—Civil Procedure*, 30 TULSA L.J. 485 (1995).

2. OKLA. STAT. ANN. tit. 12, ch. 15, app. 1 (West 1997 Special Pamphlet).

3. OKLA. STAT. tit. 12, ch. 15, app. 1 (Supp. 1996) (repealed 1997).

4. OKLA. STAT. tit. 12, ch. 15, app. 2 (Supp. 1996) (repealed 1997).

5. OKLA. STAT. tit. 12, ch. 15, app. 3 (Supp. 1996) (repealed 1997).

6. OKLA. STAT. tit. 12, §§ 990.2 to 995 (Supp. 1996).

7. See *Hammonds v. Osteopathic Hosp. Founders Ass'n*, No. 82183, 1996 WL 526743, at *4 (Okla. Sept. 17, 1996) (holding sanctions inappropriate); *Warner v. Hillcrest Medical Ctr.*, 914 P.2d 1060 (Okla. Ct. App. 1995) (affirming award of sanctions for \$100,000).

8. OKLA. STAT. tit. 12, § 2011 (Supp. 1996).

analog of Rule 11 of the Federal Rules of Civil Procedure. Several cases were concerned with issues of trial procedure, such as the effect of a juror's false responses to questions during voir dire,⁹ the trial court's discretion to allow jurors to take notes,¹⁰ and the trial court's giving jury instructions in writing, rather than orally.¹¹ In a line of cases,¹² the Oklahoma Supreme Court overruled past precedent and held that a general release did not release tortfeasors who were not specifically named in it. In addition, in two somewhat confusing cases,¹³ both of which were limited to prospective application, the Supreme Court noted the absence of an effective provision for the giving of notice of the date of filing of a judgment.

Also of some significance were a number of statutory changes relating to discovery procedure. These include a "meet and confer" requirement before a party may seek a protective order¹⁴ or move to compel discovery,¹⁵ a provision allowing attorneys to issue subpoenas on behalf of any Oklahoma state court,¹⁶ an amendment concerning the making of objections and the giving of instructions not to answer questions at depositions,¹⁷ and an amendment concerning objections to interrogatories.¹⁸

These and other developments affecting Oklahoma civil procedure are discussed below. Part II deals with pretrial procedure, and it includes discussions of recent Oklahoma cases involving statutes of limitation, pleading, jurisdiction, and joinder of parties, as well as a review of the 1996 amendments to the Oklahoma Discovery Code. Part III covers trial procedure, arbitrations, judgments and settlements. Finally, Part IV deals with appellate procedure, including the adoption of the new Supreme Court Rules.

II. PRETRIAL PROCEDURE

The importance of statutes of limitation in Oklahoma civil litigation is reflected in the number of appellate cases that deal with them each year. Several cases¹⁹ were concerned with the limitation periods in the Oklahoma Govern-

9. See, e.g., *Dominion Bank v. Masterson*, 928 P.2d 291 (Okla. 1996) (reversing and remanding for new trial).

10. See, e.g., *Sligar v. Bartlett*, 916 P.2d 1383 (Okla. 1996) (allowing trial court discretion).

11. See, e.g., *Pine Island RV Resort, Inc. v. Resort Management, Inc.*, 922 P.2d 609 (Okla. 1996) (finding no fundamental error).

12. See *Hoyt v. Paul R. Miller, M.D., Inc.*, 921 P.2d 350 (Okla. 1996); *Kirkpatrick v. Chrysler Corp.*, 920 P.2d 122 (Okla. 1996); *Shadden v. Valley View Hosp.*, 915 P.2d 364 (Okla. 1996); *Carmichael v. Beller*, 914 P.2d 1051 (Okla. 1996); *Cotner v. Cessna Aircraft Co.*, 903 P.2d 878 (Okla. 1995); *Moss v. City of Oklahoma City*, 897 P.2d 280 (Okla. 1995).

13. See *Joiner v. Brown*, 925 P.2d 888 (Okla. 1996); *Bushert v. Hughes*, 912 P.2d 334 (Okla. 1996).

14. See OKLA. STAT. tit. 12, § 3226(C)(1) (Supp. 1996).

15. See *id.* § 3227(A)(2).

16. See *id.* § 2004.1(A)(3).

17. See *id.* § 3230(E)(1).

18. See *id.* § 3233(A).

19. See *Calvert v. Tulsa Pub. Sch., Indep. Sch. Dist. No. 1*, 932 P.2d 1087 (Okla. 1996); *Shanbour v. Hollingsworth*, 918 P.2d 73 (Okla. 1996); *Tyler v. Board of County Comm'rs*, 915 P.2d 951 (Okla. Ct. App. 1996).

mental Tort Claims Act.²⁰ Other cases dealt with Oklahoma's ten year statute of repose²¹ and with the accrual²² and tolling²³ of statutes of limitation.

There were also noteworthy appellate decisions concerned with the Oklahoma Pleading²⁴ and Discovery²⁵ Codes. These included cases dealing with the use of qualified general appearances, the limited subject matter jurisdiction of probate courts,²⁶ monetary sanctions against attorneys,²⁷ and the procedure for substitution of the successor to a defendant who dies during the course of litigation.²⁸

A. Statutes of Limitation

After the Oklahoma Supreme Court abrogated the common law doctrine of sovereign immunity,²⁹ the Oklahoma Legislature adopted the Governmental Tort Claims Act,³⁰ in which it simultaneously adopted and partially waived sovereign immunity. An important aspect of the partial waiver of sovereign immunity was placing strict limits on the time for the presentation of claims to state governmental entities and the commencement of actions against state governmental entities after claims have been denied. Section 156(B) of title 51 requires a claim to be presented within one year after the loss occurs,³¹ and section 157(B) of title 51 bars a claim if an action against a governmental entity is not commenced within 180 days after denial of the claim by the governmental entity.³²

In *Shanbour v. Hollingsworth*,³³ the Oklahoma Supreme Court addressed whether the 180 day limitation period in section 157(B) could be extended for excusable neglect under section 2006(B) of title 12, which gives trial courts the authority to extend various time periods even after they have expired.³⁴ The Supreme Court determined that the 180 day period for commencing an action was not subject to section 2006(B), because the trial court's authority under

20. OKLA. STAT. tit. 51, § 157 (1991).

21. See *O'Dell v. Lamb-Grays Harbor Co.*, 911 F. Supp. 490 (W.D. Okla. 1995) (holding that statute applied to products liability claim involving a fixture); *Lincoln Bank & Trust Co. v. Neustadt*, 917 P.2d 1005 (Okla. Ct. App. 1996) (holding that statute applied to other tort actions in addition to negligence).

22. See *Gallagher v. Enid Regional Hosp.*, 910 P.2d 984 (Okla. 1995) (holding that start of limitation period was a fact question for the jury).

23. See *Freeman v. Alex Brown & Sons, Inc.*, 73 F.3d 279 (10th Cir. 1996) (tolling on account of disability); *Resolution Trust Corp. v. Greer*, 911 P.2d 257 (Okla. 1995) (applying adverse domination doctrine).

24. OKLA. STAT. tit. 12, §§ 2001-2025 (1991 & Supp. 1996).

25. *Id.* §§ 3226-3237.

26. See *Estes v. Estes*, 921 P.2d 346 (Okla. 1996); *In re Estate of Steen*, 909 P.2d 63 (Okla. Ct. App. 1992).

27. See *Hammonds v. Osteopathic Hosp. Founders Ass'n*, No. 82183, 1996 WL 526743, at *1 (Okla. Sept. 17, 1996) (holding sanctions inappropriate); *Warner v. Hillcrest Medical Ctr.*, 914 P.2d 1060 (Okla. Ct. App. 1995) (affirming award of sanctions for \$100,000).

28. See *Cornog v. Mashburn*, 901 P.2d 824 (Okla. 1995).

29. See *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983).

30. OKLA. STAT. tit. 51, §§ 151-172 (1991 & Supp. 1996).

31. See OKLA. STAT. tit. 51, § 156(B) (Supp. 1996).

32. See *id.* § 157(B).

33. 918 P.2d 73 (Okla. 1996).

34. See OKLA. STAT. tit. 12, § 2006 (Supp. 1996).

section 2006(B) to extend time depended on the timely commencement of an action.³⁵ The limitation period in the Tort Claims Act is similar to other statutes of limitation in this way.

*Tyler v. Board of County Commissioners*³⁶ is another case that was concerned with the 180 day time limit in section 157(B). The plaintiff was a minor whose parent filed the action on her behalf outside the 180 time limit.³⁷ She argued that the time for filing was tolled during her infancy under section 96 of title 12,³⁸ which provides for the tolling of a statute of limitation on account of a legal disability, including infancy. Following the Oklahoma Supreme Court's decision in *Johns v. Wynnewood School Board of Education*,³⁹ the Court of Appeals decided that the 180 day period in section 157(B) was not tolled by section 96.⁴⁰ It distinguished *Cruse v. Atoka County Board of County Commissioners*,⁴¹ in which the Oklahoma Supreme Court ruled that Oklahoma's savings statute⁴² permitted the refile of a timely filed governmental tort claims action, on the ground that the trial court's power to toll the 180 day time limit was not invoked until the action was timely filed.⁴³ The court's distinction of *Cruse* is not convincing, however, because section 96 generally operates to toll other limitation periods before the filing of an action;⁴⁴ otherwise, it would be totally ineffectual. Thus, the Court of Appeals should have decided the 180 day period in section 157(B) was tolled by section 96.

The Oklahoma Supreme Court addressed another issue involving the Governmental Tort Claims Act in *Calvert v. Tulsa Public Schools, Independent School District No. 1*.⁴⁵ The parents of a deceased child presented a claim and brought suit against a governmental entity before they had been appointed as personal representatives of her estate.⁴⁶ After they were appointed, the parents sought to amend their petition to reflect their status as personal representatives of their child's estate, but the trial court granted summary judgment against them on the ground that they had not been appointed until the 180 time limit in section 157(B) had run.⁴⁷ The Oklahoma Supreme Court reversed, holding that the parents were proper claimants under section 152(4) of title 51⁴⁸ because they were performing the functions of a personal representative before their appointment.⁴⁹ The Supreme Court also allowed the parents to amend their petition after they were appointed as personal representatives, even though the

35. See *Shanbour*, 918 P.2d at 75.

36. 915 P.2d 951 (Okla. Ct. App. 1996).

37. See *id.* at 951.

38. OKLA. STAT. tit. 12, § 96 (1991).

39. 656 P.2d 248 (Okla. 1982).

40. See *Tyler*, 915 P.2d at 952.

41. 910 P.2d 998 (Okla. 1995).

42. OKLA. STAT. tit. 12, § 100 (1991).

43. See *Tyler*, 915 P.2d at 952.

44. See *Hamilton v. Vaden*, 721 P.2d 412, 416 (Okla. 1986).

45. *Calvert v. Tulsa Pub. Sch., Indep. Sch. Dist. No. 1*, 932 P.2d 1087 (Okla. 1996).

46. See *id.* at 1088.

47. See *id.*

48. OKLA. STAT. tit. 51, § 152(4) (1991).

49. See *Calvert*, 932 P.2d at 1089.

180 day limitation period had expired before the filing of their motion to amend.⁵⁰

The United States Court of Appeals for the Tenth Circuit decided an important issue concerning the tolling of statutes of limitation under Oklahoma law in *Freeman v. Alex Brown & Sons, Inc.*⁵¹ The suit was brought under the Oklahoma Securities Act by the guardian of the estate of a mentally incompetent person.⁵² The trial court dismissed on statute of limitation grounds, but the Tenth Circuit reversed, ruling that the statute of limitation was tolled under section 96 of title 12,⁵³ until one year after the removal of the plaintiff's legal disability.⁵⁴ The court held that the tolling provision applied even though the person subject to the legal disability had a guardian who could have brought the action within the limitation period.⁵⁵

Oklahoma's savings statute⁵⁶ and the federal savings statute⁵⁷ were the twin subjects of *Pointer v. Western Heights Independent School District*.⁵⁸ The Oklahoma savings statute gives a plaintiff one year from the dismissal of a timely filed action, other than on its merits, in which to refile the case without being barred by a statute of limitation that may have run before the refiling.⁵⁹ Likewise, the federal savings statute tolls a statute of limitation for thirty days after a state law claim is dismissed from a federal court action, where the state law claim was asserted under the federal court's supplemental jurisdiction.⁶⁰ The plaintiff in *Pointer* filed a governmental tort claims action in an Oklahoma state court, and after dismissing it voluntarily after the 180 day time limit in section 157(B) had expired, refiled the governmental tort claim as a supplemental claim to a federal civil rights claim in federal court.⁶¹ The federal court dismissed the governmental tort claim without prejudice after it dismissed the federal claim with prejudice, and the plaintiff then refiled the governmental tort claim in an Oklahoma state court for a second time.⁶² The Oklahoma Supreme Court ruled that neither the Oklahoma nor the federal savings statutes saved the governmental tort claim from section 157(B).⁶³ Following prior authority,⁶⁴ the Oklahoma Supreme Court held that the Oklahoma savings statute permitted only one refiling after the statute of limitation had run; thus, it could not save the second state court filing.⁶⁵ The Supreme Court also held that the federal

50. See *id.* at 1090.

51. 73 F.3d 279 (10th Cir. 1996).

52. See *id.* at 280.

53. OKLA. STAT. tit. 12, § 96 (1991).

54. See *Freeman*, 73 F.3d at 281.

55. See *id.* at 283.

56. OKLA. STAT. tit. 12, § 100 (1991).

57. 28 U.S.C. § 1367(d) (1994).

58. 919 P.2d 4 (Okla. 1996).

59. OKLA. STAT. tit. 12, § 100 (1996).

60. See 28 U.S.C. § 1367 (1994).

61. See *Pointer*, 919 P.2d at 5-6.

62. See *id.* at 6.

63. See *id.*

64. See *Grider v. USX Corp.*, 847 P.2d 779, 782 (Okla. 1993).

65. See *Pointer*, 919 P.2d at 7.

savings statute could only save a claim that was filed within the original statute of limitation, rather than within the additional time allowed by the Oklahoma savings statute.⁶⁶

*Medlin v. Texaco, Inc.*⁶⁷ was another recent case concerned with Oklahoma's savings statute. The plaintiffs voluntarily dismissed a claim against one of several defendants in the case, and then after discovering new information that implicated the dismissed defendant, sought leave of court to add the defendant back in the original case after the governing statute of limitation had expired.⁶⁸ The Oklahoma Court of Appeals ruled that the plaintiffs were not required to commence a separate action against the dismissed defendant and then move to have the new action consolidated with the original action.⁶⁹ Instead, the plaintiffs would be permitted to obtain leave of court to directly add the dismissed defendant to the original action.⁷⁰

Two recent cases applied Oklahoma's ten year statute of repose in section 109 of title 12.⁷¹ *Lincoln Bank & Trust Co. v. Neustadt*⁷² was an action against a neighboring landowner seeking damages arising from the defendant's failure to build a proper retaining wall when the defendant built an office building and parking garage next to the plaintiff's property in 1977. Since the action was not filed until 1994, the Oklahoma Court of Appeals ruled that it was barred by section 109.⁷³ The Court of Appeals determined that even though the action was not based on negligence, it was a tort action to recover damages for the construction of an improvement on real property and therefore it came under section 109.⁷⁴ In *O'Dell v. Lamb-Grays Harbor Co.*,⁷⁵ the United States District Court for the Western District of Oklahoma ruled that section 109 barred a products liability claim against the manufacturer of a slat conveyor at a paper mill.⁷⁶ The court reasoned that the machine was an improvement to real property because it was built into the floor of the paper mill, and therefore, it was permanently attached to the paper mill.⁷⁷

The jury's role in determining the date when a statute of limitation begins to run was the subject of *Gallagher v. Enid Regional Hospital*.⁷⁸ After attempting suicide, the plaintiff was treated at a hospital on two occasions in May, 1991.⁷⁹ In October, 1991, the plaintiff's psychiatrist informed his lawyer that the plaintiff had not received appropriate treatment at the hospital, and then in

66. *See id.*

67. 926 P.2d 804 (Okla. Ct. App. 1996).

68. *See id.* at 806.

69. *See id.*

70. *See id.* at 807.

71. OKLA. STAT. tit. 12, § 109 (1991).

72. 917 P.2d 1005 (Okla. Ct. App. 1996).

73. *See id.* at 1008.

74. *See id.*

75. 911 F. Supp. 490 (W.D. Okla. 1995).

76. *See id.* at 494.

77. *See id.* at 493-94.

78. 910 P.2d 984 (Okla. 1995).

79. *See id.* at 985.

September, 1993, the plaintiff filed a medical malpractice action against the hospital and two physicians.⁸⁰ The trial court dismissed the action because it was barred by the two year statute of limitation in section 18 of title 76,⁸¹ but the Court of Appeals reversed, holding that the limitation period did not begin to run until the plaintiff's lawyer advised the plaintiff in October, 1991, that he did not receive appropriate treatment at the hospital.⁸² The Oklahoma Supreme Court decided that the date when the statute of limitation began to run should not have been decided by the Court of Appeals, because it was a fact question for the jury.⁸³ It therefore vacated the Court of Appeals opinion and remanded the case to the trial court with instructions to submit to the jury the issue of when the plaintiff should have known, through the exercise of reasonable diligence, of his potential malpractice claim.⁸⁴

The Oklahoma appellate courts addressed a number of issues involving other aspects of pretrial procedure besides statutes of limitation during the past year. They included pleading,⁸⁵ jurisdiction,⁸⁶ sanctions,⁸⁷ and the intervention⁸⁸ and substitution⁸⁹ of parties. These topics are discussed below.

B. Pleading, Jurisdiction, and Joinder of Parties

Section 2012(A) of title 12 allows a defendant to obtain a twenty day extension of time to respond to a petition if the defendant files an appearance within twenty days of service of the summons and petition.⁹⁰ Section 2012(A) also provides that the filing of an appearance waives a number of defenses, including lack of personal jurisdiction, improper venue, and insufficiency of service of process.⁹¹ The Oklahoma Court of Appeals applied this waiver provision in *First Texas Savings Ass'n v. Bernsen*,⁹² where it held that several defendants waived the defense of personal jurisdiction by filing an appearance under section 2012(A).⁹³ The Court of Appeals added in dictum, however, that if the defendants had wished to preserve this defense, they could have done so by filing a qualified appearance.⁹⁴ It relied on the decision in *Young v. Walton*⁹⁵ in which the Oklahoma Supreme Court ruled that the waiver pro-

80. *See id.*

81. OKLA. STAT. tit. 76, § 18 (1991).

82. *See Gallagher*, 910 P.2d at 985.

83. *See id.* at 986.

84. *See id.*

85. *See First Texas Sav. Ass'n v. Bernsen*, 921 P.2d 1293 (Okla. Ct. App. 1996).

86. *See Estes v. Estes*, 921 P.2d 346 (Okla. 1996); *In re Estate of Steen*, 909 P.2d 63 (Okla. Ct. App. 1992).

87. *See Hammonds v. Osteopathic Hosp. Founders Ass'n*, No. 82183, 1996 WL 526743, at *1 (Okla. Sept. 17, 1996); *Warner v. Hillcrest Medical Ctr.*, 914 P.2d 1060 (Okla. Ct. App. 1995).

88. *See Landrum v. National Union Ins. Co.*, 912 P.2d 324 (Okla. 1996).

89. *See Cornog v. Mashburn*, 901 P.2d 824 (Okla. 1995).

90. *See OKLA. STAT. tit. 12, § 2012(A)* (1991).

91. *See id.*

92. 921 P.2d 1293 (Okla. Ct. App. 1996).

93. *See id.* at 1296.

94. *See id.*

95. 807 P.2d 248, 249 (Okla. 1991).

vision in section 2012(A) did not apply to a qualified or a special appearance. Unfortunately, the *First Texas* dictum and the *Young* decision are problematic, because they are inconsistent with federal authority⁹⁶ interpreting Rule 12(a) of the Federal Rules of Civil Procedure, on which the Oklahoma statute was based.

*Estes v. Estes*⁹⁷ and *In re Estate of Steen*⁹⁸ dealt with the special limited subject matter jurisdiction of district courts in probate cases. In *In re Estate of Steen*, the Court of Appeals held that the district court handling the probate of an estate lacked jurisdiction to determine title to property belonging to one of the heirs that was not part of the estate.⁹⁹ The *Steen* decision was approved for publication by the Oklahoma Supreme Court, and then followed in *Estes v. Estes*,¹⁰⁰ in which the Oklahoma Supreme Court held that a district court sitting in non-probate proceedings had jurisdiction to determine title to personal property in the possession of one of the heirs of an estate that was also claimed by the estate.¹⁰¹ The Probate Committee of the Oklahoma Bar Association has proposed legislation that would overturn the result in the *Steen* case and permit a district court to determine title to property in connection with the probate of an estate,¹⁰² but the Legislature has not adopted the Committee's proposals as yet.

In *In re Estate of Wheeler*,¹⁰³ the specialized nature of probate courts was also emphasized. There the Court of Appeals ruled that the Oklahoma Pleading Code did not apply to a probate proceeding, because a probate proceeding is a special proceeding *in rem* that is controlled by the probate code.¹⁰⁴

Two decisions by the Oklahoma Supreme Court, *Beshara v. Southern National Bank*¹⁰⁵ and *Washington v. State ex rel. Department of Corrections*,¹⁰⁶ were concerned with the procedure in section 2012(B) of title 12¹⁰⁷ for treating a motion to dismiss as a motion for summary judgment when materials outside the pleadings are attached to the motion. The statute provides that the trial court must allow the party against whom such a motion is filed a reasonable opportunity to respond.¹⁰⁸ Because the trial courts in the *Beshara* and

96. See, e.g., *United States v. Republic Marine, Inc.*, 829 F.2d 1399, 1402 (7th Cir. 1987) ("[T]he general rule in civil actions is now (and has been for some time) that any appearance in an action is a general appearance."); *SEC v. Wencke*, 783 F.2d 829, 832 n.3 (9th Cir. 1986) ("Federal Rule of Civil Procedure 12 abolished the distinction between general and special appearances when the Federal Rules were adopted in 1938.").

97. 921 P.2d 346 (Okla. 1996).

98. 909 P.2d 63 (Okla. Ct. App. 1992).

99. See *id.* at 65.

100. 921 P.2d 346 (Okla. 1996).

101. See *id.* at 348.

102. See *OBA Resolutions for 1997 OBA Legislative Program*, 67 OKLA. B.J. 3107, 3114 (1996). See also Marvin C. Emerson, *Legislative Report*, 68 OKLA. B.J. 381, 381 (1997).

103. 919 P.2d 460 (Okla. Ct. App. 1996).

104. See *id.* at 462.

105. 928 P.2d 280 (Okla. 1996).

106. 915 P.2d 359 (Okla. 1996).

107. OKLA. STAT. tit. 12, § 2012(B) (1991).

108. See *id.*

Washington cases granted the motions without giving a reasonable opportunity for the opposing party to respond, the Supreme Court reversed and remanded in both cases.¹⁰⁹

Monetary sanctions were imposed on attorneys by the trial courts in *Warner v. Hillcrest Medical Center*¹¹⁰ and *Hammonds v. Osteopathic Hospital Founders Ass'n*.¹¹¹ The award of sanctions was affirmed by the Oklahoma Court of Appeals in the *Warner* case,¹¹² but reversed by the Oklahoma Supreme Court in the *Hammonds* case.¹¹³

In the *Warner* case, the trial court imposed sanctions on an attorney for improperly naming a number of defendants in a lawsuit without any basis in law or fact, and for failing to dismiss them from the case after he failed to develop a viable cause of action against them.¹¹⁴ The Court of Appeals affirmed the award of sanctions in favor of some of the defendants, but it reversed as to others.¹¹⁵ The Court of Appeals found that, as to the first group of defendants, the attorney violated section 2011 of title 12¹¹⁶ by making allegations against them that had no basis in fact, and keeping them in the case after it was apparent that there was no basis in law or fact for them being there.¹¹⁷ With respect to the other defendants, the Court of Appeals found that the attorney's theory of liability was not frivolous even though their demurrer to the evidence was properly sustained on the ground that there was not sufficient objective evidence in the record to support a claim against them.¹¹⁸ The Court of Appeals noted that section 2011 countenances the filing of actions that are warranted by a good faith argument for the modification of existing law, and it cautioned that sanctions should not be used to chill new theories of recovery that may become law in the future.¹¹⁹

In the *Hammonds* case, the attorneys for the plaintiffs moved for sanctions against the defendants in the form of an order striking their answers.¹²⁰ They alleged that the defendants had improperly modified medical records that had been produced in the case, and the defendants retaliated by seeking monetary sanctions against the plaintiff's attorneys.¹²¹ After a three day hearing, the trial court denied the plaintiffs' motion for sanctions, and instead, it sanctioned the plaintiff's attorneys for seeking sanctions against the defendants.¹²² In revers-

109. See *Beshara*, 928 P.2d at 282; *Washington*, 915 P.2d at 363.

110. 914 P.2d 1060 (Okla. Ct. App. 1995).

111. *Hammonds v. Osteopathic Hosp. Founders Ass'n*, No. 82183, 1996 WL 526743, at *1 (Okla. Sept. 17, 1996).

112. See *Warner*, 914 P.2d at 1072.

113. See *Hammonds*, 1996 WL 526743, at *4.

114. See *Warner*, 914 P.2d at 1068.

115. See *id.* at 1072-73.

116. OKLA. STAT. tit. 12, § 2011 (1991).

117. See *Warner*, 914 P.2d at 1067-68.

118. See *id.* at 1070.

119. See *id.* at 1069-70.

120. See *Hammonds v. Osteopathic Hosp. Founders Ass'n*, No. 82183, 1996 WL 526743, at *4 (Okla. Sept. 17, 1996).

121. See *id.* at *1.

122. See *id.*

ing the sanctions order, the Oklahoma Supreme Court repeatedly emphasized that the plaintiff's attorneys had been brought into the case only a month before trial, and there were in fact three different versions of the plaintiff's medical records.¹²³ The Supreme Court concluded that the filing of the motion for sanctions by the plaintiffs' attorneys was not unreasonable as a means for them to attempt to ascertain which version of the medical records was correct.¹²⁴

The Oklahoma Supreme Court limited an intervening party's opportunity to participate in a jury trial in *Landrum v. National Union Insurance Co.*¹²⁵ A workers' compensation carrier was allowed to intervene in a personal injury action as of right under section 2024(A) of title 12,¹²⁶ because it had paid workers' compensation benefits to the plaintiff and was entitled to subrogation under Oklahoma law.¹²⁷ The plaintiff had no objection to the insurer's motion to intervene, but she did object to its participation in the jury trial¹²⁸ due to the potential for prejudice that could arise from informing the jury of the compensation claim.¹²⁹ The trial court refused to let the insurer participate actively in the jury trial, and the Oklahoma Supreme Court affirmed.¹³⁰ It held that the trial court had discretion under section 2018 of title 12¹³¹ to sever the insurer's claim for trial.¹³² The Supreme Court found no abuse of discretion, because the insurer had no right to a jury trial (its claim was equitable), and also because the insurer made no claim that it had been prejudiced by the trial court's decision.¹³³

The Oklahoma Court of Appeals discussed the Oklahoma class action statute¹³⁴ in an unusual context in *House of Sight & Sound, Inc. v. Faulkner*.¹³⁵ The plaintiff sought an injunction and damages for false and malicious advertising against six attorneys who had filed a separate class action suit against it.¹³⁶ The basis of the plaintiff's action was that the attorneys had published two notices addressed to the plaintiff's customers informing them that a class action had been filed against the plaintiff and that they might be entitled to money damages.¹³⁷ The plaintiff claimed that the notice was false, because the class action suit had not yet been certified as a class action.¹³⁸ The Court of Appeals found, however, that the notice was not false, because it did not

123. *See id.*

124. *See id.* at *3.

125. 912 P.2d 324 (Okla. 1996).

126. OKLA. STAT. tit. 12, § 2024(A) (1991).

127. *See Landrum*, 912 P.2d at 328-29.

128. The insurer's reason for wanting to participate in the trial appeared to have been to avoid having to pay an attorney fee to the plaintiff's attorney. *See id.* at 328.

129. *See id.* at 326.

130. *See id.* at 330.

131. OKLA. STAT. tit. 12, § 2018(D) (1991).

132. *See Landrum*, 912 P.2d at 329.

133. *See id.* at 328.

134. OKLA. STAT. tit. 12, § 2023 (1991).

135. 912 P.2d 357 (Okla. Ct. App. 1995).

136. *See id.* at 358.

137. *See id.* at 359.

138. *See id.* at 360.

claim that the class had been certified.¹³⁹ The court also stated that if the plaintiff wanted to restrict the giving of notice to members of the class, the plaintiff should have sought an order in the class action under section 2023(C)(2) and (D) of title 12,¹⁴⁰ instead of filing a separate lawsuit.¹⁴¹

The Oklahoma Supreme Court's decision in *Cornog v. Mashburn*¹⁴² underscores the need for lawyers to be aware of the procedure for substitution of parties under section 2025 of title 12.¹⁴³ Following the defendant's death, his counsel filed a suggestion of death in the case.¹⁴⁴ When the plaintiff failed to substitute the proper party within ninety days as required by section 2025, the defense counsel filed a motion to dismiss, and the trial court granted the motion.¹⁴⁵ The Oklahoma Supreme Court reversed, holding that the suggestion of death would not have been valid if a personal representative for the defendant's estate had not been appointed at the time of its filing.¹⁴⁶ It therefore remanded with directions to the trial court to determine whether a personal representative had been appointed when the suggestion of death was filed.¹⁴⁷

In addition to these case law developments relating to pretrial procedure, there were a number of amendments to the Oklahoma Discovery Code that went into effect on November 1, 1996. These are reviewed below.

C. Discovery

An amendment to section 2004.1 of title 12 facilitates the taking of depositions of nonparty witnesses and the subpoenaing of witnesses, especially for cases pending in counties other than where the attorney's office is located.¹⁴⁸ The amendment authorizes attorneys to issue and sign subpoenas from any Oklahoma state court as an officer of the court.¹⁴⁹ Thus, an attorney may now issue a subpoena without having to obtain a blank subpoena form from the particular court from which the subpoena is issued. This amendment was based on a 1991 amendment to Rule 45 of the Federal Rules of Civil Procedure.

Several amendments to section 3226 of title 12¹⁵⁰ were based on some of the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure. Section 3226(B)(4) of title 12 was amended to require a party who asserts an objection to discovery on privilege grounds to provide a "privilege log" that describes the nature of the documents or communications that are not being dis-

139. See *id.* at 361.

140. OKLA. STAT. tit. 12, § 2023(C)(2), (D) (1991).

141. See *Faulkner*, 912 P.2d at 362.

142. 901 P.2d 824 (Okla. 1995).

143. OKLA. STAT. tit. 12, § 2025 (1991).

144. See *Cornog*, 901 P.2d at 825.

145. See *id.*

146. See *id.* at 826.

147. See *id.*

148. See OKLA. STAT. tit. 12, § 2004.1 (Supp. 1996).

149. See *id.*

150. *Id.* § 3226.

closed.¹⁵¹ The description must not reveal privileged information, but it should be sufficient to enable the discovering party to assess whether a privilege is applicable.¹⁵²

A number of revisions were made in the duty to supplement discovery responses in section 3226(E) of title 12.¹⁵³ Section 3226(E) imposes a duty on a party to supplement a response to a discovery request in certain circumstances when the party obtains additional information.¹⁵⁴ The duty to supplement arises with respect to questions addressed to the identity and location of witnesses, including expert witnesses, or when the responding party obtains information that a prior response to discovery either was incorrect when made, or is no longer true.¹⁵⁵ The 1996 amendments to section 3226(E) limit the duty to supplement to responses to interrogatories, requests for production, and requests for admission; as a result, a party no longer has a duty to supplement responses to questions at depositions.¹⁵⁶ There has also been a materiality requirement added so that newly obtained information must be material in order for the duty to supplement to arise.¹⁵⁷ Finally, there is an exception to the duty to supplement if the other parties have obtained the information by other means.¹⁵⁸

The 1996 amendments to section 3226 do not include the mandatory disclosure provisions in Rule 26 of the Federal Rules of Civil Procedure.¹⁵⁹ The federal mandatory disclosure provisions have been the subject of some controversy for a number of reasons,¹⁶⁰ including that it is not consistent with the adversary system,¹⁶¹ and it increases the cost of litigation.¹⁶² As a consequence, a number of federal courts have opted out of mandatory disclosure,¹⁶³ and the Oklahoma state courts are probably better off without it.

An amendment to section 3229 of title 12¹⁶⁴ permits greater flexibility in the conduct of discovery. It authorizes parties to stipulate to extensions of the

151. See *id.* § 3226(B)(4).

152. For federal cases requiring the use of such a privilege log, see *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (setting out information to be included in a privilege log); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Taylor v. Florida Atl. Univ.*, 132 F.R.D. 304, 306 (S.D. Fla. 1990) ("The privilege list must clearly identify the individually privileged documents, the privilege claimed, the date of the communication, the source of the information, the identity of the person to whom the communication was made, the nature and general content of the document, and the parties to whom each document was disseminated.").

153. OKLA. STAT. tit. 12, § 3226(E) (Supp. 1996).

154. See *id.*

155. See *id.*

156. See *id.* § 3226(E)(2).

157. See *id.* § 3226(E)(2)(a).

158. See *id.* § 3226(E)(2)(b).

159. See FED. R. CIV. P. 26.

160. See, e.g., *Litigators Reject Disclosure Rule*, INSIDE LITIG., May 1996, at 5.

161. See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) — "Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 760-92 (1995).

162. See Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 785-86 (1995).

163. See, e.g., U.S. D. Ct. R. 26.3 (E.D. Okla.); U.S. D. Ct. R. 26.3 (N.D. Okla.). Surveys have shown that over half of the federal judicial districts have opted out of the mandatory disclosure requirements. See Issacharoff & Loewenstein, *supra* note 162, at 756 n.15.

164. OKLA. STAT. tit. 12, § 3229 (Supp. 1996).

time for responses to interrogatories, requests for production, and requests for admission without having to obtain leave of court, so long as the extensions do not interfere with any discovery deadlines set by the court.¹⁶⁵

Several amendments to section 3230 of title 12¹⁶⁶ are generally based on the 1993 amendments to Rule 30 of the Federal Rules of Civil Procedure. An amendment to section 3230(E) requires objections to questions at depositions to be made in a non-argumentative and non-suggestive manner.¹⁶⁷ This amendment was evidently intended to curtail the "coaching" of deposition witnesses through spurious objections and other comments by counsel (such as the phrase "If you know" to signal that the witness should claim lack of knowledge in response to a deposition question). Another amendment to section 3230(E) prohibits instructions not to answer questions at depositions, except where the information sought is not discoverable by law, or when necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to seek an order terminating the deposition.¹⁶⁸ Prior to the amendments to section 3230(F) of title 12,¹⁶⁹ a witness was required to review and sign the deposition transcript after a deposition, unless the review and signing were waived by the parties or the witness was unavailable. Under the amended version, a witness must be afforded an opportunity to review and sign the deposition transcript, but is not required to do so.¹⁷⁰

Two amendments to the Oklahoma Discovery Code dealt with videotape depositions. Section 3230(G) of title 12 now requires a party who takes a deposition and records it on videotape to furnish a free copy of the videotape, in addition to a copy of the transcript, to the witness upon request.¹⁷¹ The other amendment was to section 3232, which now requires a party who introduces a videotape deposition to also provide the court with a transcript, unless the trial court directs otherwise.¹⁷² A transcript would be needed if the case was later appealed.

The amendments that were made to section 3233 of title 12 were concerned with objections to interrogatories.¹⁷³ One of the amendments requires a party who objects to an interrogatory to state the grounds of objection "with specificity" and to answer "to the extent [that] the interrogatory is not objectionable."¹⁷⁴ Another provides for waiver of grounds for objection that are not timely asserted.¹⁷⁵

165. *See id.*

166. *Id.* § 3230.

167. *See id.* § 3230(E).

168. *See id.*

169. *Id.* § 3230(F).

170. *See id.*

171. *See id.* § 3232(C).

172. *See id.* § 3232(C).

173. *See id.* § 3233.

174. *Id.*

175. *See id.*

Amendments to section 3226(C) and 3237(A)(2) of title 12 have imposed "meet and confer" requirements on motions for protective orders and to compel discovery.¹⁷⁶ The amendment to section 3226(C) requires a party seeking a protective order to "meet and confer" with other parties first in an attempt to resolve their dispute without a court order, and the amendment to section 3237(A) added a similar requirement for motions to compel discovery.¹⁷⁷ Both "meet and confer" requirements may be satisfied either by telephone or a face to face conference.¹⁷⁸

In addition to these statutory amendments to the Oklahoma Discovery Code, there was a brief but significant order relating to discovery issued by the Oklahoma Supreme Court in *McCullough v. Mathews*.¹⁷⁹ The Supreme Court ordered that a plaintiff's attorney should be allowed to be present as a representative at the medical examination of the plaintiff under section 3235 of title 12.¹⁸⁰ It also ruled that the representative's role was passive and limited to that of an observer, and that audio recording of the examination should be allowed as well the taking of handwritten notes by the representative.¹⁸¹

The Oklahoma appellate courts handed down a number of decisions concerning various issues of trial procedure, settlement, and judgments during the past year. In one case, a jury verdict was reversed because of a juror's false answers during voir dire.¹⁸² Note taking by jurors¹⁸³ and the use of written, rather than oral, jury instructions¹⁸⁴ were the subjects of two other opinions. There was also a significant decision dealing with arbitration.¹⁸⁵ These developments are examined below.

III. TRIAL PROCEDURE, SETTLEMENT, AND JUDGMENTS

A. Trial Procedure and Arbitration

*Dominion Bank of Middle Tennessee v. Masterson*¹⁸⁶ involved misconduct by a juror during voir dire. The juror stated in response to a question by the plaintiff's counsel that he had been a party to one lawsuit, when in fact he had been a party to twenty one lawsuits, including one in which the defendant's counsel had obtained a judgment against that juror.¹⁸⁷ The juror was later elected foreman, and the jury returned a verdict for the plaintiff.¹⁸⁸ The Okla-

176. See *id.* §§ 3226(C), 3237(A)(2).

177. See *id.* § 3237(A).

178. See *id.* §§ 3226(C), 3237(A)(2).

179. 918 P.2d 25 (Okla. 1995).

180. OKLA. STAT. tit. 12, § 3235 (1991).

181. See *McCullough*, 918 P.2d at 25.

182. See *Dominion Bank of Middle Tenn. v. Masterson*, 928 P.2d 291 (Okla. 1996).

183. See *Sligar v. Bartlett*, 916 P.2d 1383, 1385 (Okla. 1996).

184. See *Pine Island RV Resort, Inc. v. Resort Management, Inc.*, 922 P.2d 609, 611 (Okla. 1996).

185. See *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996).

186. 928 P.2d 291 (Okla. 1996).

187. See *id.* at 293.

188. See *id.*

homa Supreme Court held that the defendant did not have to prove that the verdict was unjust or the product of prejudice or bias in order to receive a new trial.¹⁸⁹ Regardless of whether the juror's failure to disclose the information concerning the other lawsuits was intentional or accidental, the defendant was entitled to a new trial, because the juror's false response deprived the defendant of the opportunity to delve deeper into the juror's qualifications.¹⁹⁰

The Oklahoma Supreme Court discussed note taking by jurors in *Sligar v. Bartlett*.¹⁹¹ When the plaintiff's counsel informed her that one of the jurors was taking notes during the opening statements, the trial judge assured both parties that the notes would be confiscated before deliberations.¹⁹² Neither counsel reminded the judge to confiscate the notes at the end of the trial, however, and she failed to do so.¹⁹³ Because the jury relied on the notes in reaching its verdict, and because the judge had promised that she would confiscate the notes before deliberations, she granted the plaintiff's motion for new trial.¹⁹⁴ On appeal, the Oklahoma Supreme Court held that the trial judge had discretion in a civil case to allow jurors to take notes during the trial and to use their notes during deliberations.¹⁹⁵ Nevertheless, it affirmed the grant of the new trial, because it was also within the discretion of the trial judge to not allow jurors to use their notes during deliberations.¹⁹⁶

*Pine Island RV Resort, Inc. v. Resort Management, Inc.*¹⁹⁷ dealt with the use of written, rather than oral, jury instructions. Because neither party objected to the use of written instructions when they were given to the jury, the Supreme Court's review was limited to fundamental error.¹⁹⁸ Although the Oklahoma Supreme Court noted its disapproval of the judge's giving the jury written instructions without reading them in open court, it held that no fundamental error occurred, because there was no statutory mandate that the judge must instruct the jury orally.¹⁹⁹

In *Shaffer v. Jeffery*,²⁰⁰ the Oklahoma Supreme Court was presented with the question whether the trial court or the arbitrators should determine if a contract containing an arbitration clause was induced by fraud.²⁰¹ The plain-

189. See *id.* at 294.

190. See *id.*

191. 916 P.2d 1383 (Okla. 1996).

192. See *id.* at 1384.

193. See *id.*

194. See *id.*

195. See *id.* at 1387. In contrast, the Court of Criminal Appeals has determined jurors in a criminal case may not use notes during their deliberations. See *White v. State*, 552 P.2d 1161, 1167 (Okla. Crim. App. 1976); *Glazier v. State*, 514 P.2d 87, 91 (Okla. Crim. App. 1973).

196. See *Sligar*, 916 P.2d at 1388.

197. 922 P.2d 609 (Okla. 1996).

198. See *id.* at 612-13; cf. OKLA. STAT. tit. 12, § 2104 (1991).

199. See *Pine Island*, 922 P.2d at 612-13. In contrast, oral instructions are mandated by statute in criminal cases. See OKLA. STAT. tit. 22, § 831(5) (1991).

200. 915 P.2d 910 (Okla. 1996).

201. For an excellent discussion of the *Shaffer* case, as well as *Rollings v. Thermodyne Industries*, 910 P.2d 1030 (Okla. 1996), in which the Oklahoma Supreme Court upheld the constitutionality of arbitration agreements, see Patricia Ledvina Himes, *New Oklahoma Supreme Court Decisions Regarding Arbitration—Sustaining Constitutionality and Expanding the Role of District Courts*, 67 OKLA. B.J. 2887 (1996). See also

tiffs were six couples, each of which was seeking to adopt a child, who filed suit against a lawyer and his former law firm alleging that the defendants had developed a scheme to defraud them by collecting fees in return for false assurances of prospective adoptions.²⁰² The trial court ordered arbitration pursuant to a clause in the plaintiffs' attorney-client fee contracts.²⁰³ On appeal, the plaintiffs argued "that the fee [contracts] containing the arbitration clause were induced by fraud."²⁰⁴ The Oklahoma Supreme Court first decided that an arbitration agreement was voidable under Oklahoma's Uniform Arbitration Act²⁰⁵ if either the arbitration clause itself or the contract containing the arbitration clause was induced by fraud.²⁰⁶ That left the question whether the issue of fraud in the inducement should be decided by the trial court or the arbitrators. The Oklahoma Supreme Court noted that under the separability doctrine, which had been adopted by the United States Supreme Court²⁰⁷ and followed in most other states, the issue of fraud in the inducement of the arbitration clause itself was for the trial court, while the issue of fraud in the inducement of the contract containing the arbitration clause was for the arbitrators.²⁰⁸ The Oklahoma Supreme Court rejected the separability doctrine, however, for the reason that the trial court is better suited to resolve the issue of fraud than the arbitrators.²⁰⁹ Accordingly, it held that the trial court must determine whether there was fraud in the inducement of a contract containing an arbitration clause before ordering arbitration.²¹⁰

B. Settlement and Judgments

The major developments in the area of judgments and settlement were several Oklahoma Supreme Court decisions²¹¹ involving the effect of releases on subsequent litigation with other tortfeasors, which followed its 1995 decision in *Moss v. City of Oklahoma City*.²¹² There were also three cases²¹³ dealing with whether satisfaction of a judgment moots an appeal or motion to vacate

Gregory R.J. Zini, Comment, *The Arbitration Clause Controversy in Oklahoma*, 32 TULSA L.J. 163 (1996) (discussing *Rollings* and other arbitration cases).

202. See *Shaffer*, 915 P.2d at 912.

203. See *id.*

204. *Id.* at 912.

205. See OKLA. STAT. tit. 15, § 802(A) (1991).

206. See *Shaffer*, 915 P.2d at 915.

207. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

208. See *id.* at 403-04.

209. See *Shaffer*, 915 P.2d at 917.

210. See *id.*

211. See *Hoyt v. Paul R. Miller, M.D., Inc.*, 921 P.2d 350 (Okla. 1996); *Kirkpatrick v. Chrysler Corp.*, 920 P.2d 122 (Okla. 1996); *Shadden v. Valley View Hosp.*, 915 P.2d 364 (Okla. 1996); *Carmichael v. Beller*, 914 P.2d 1051 (Okla. 1996); *Cotner v. Cessna Aircraft Co.*, 903 P.2d 878 (Okla. 1995).

212. 897 P.2d 280 (Okla. 1995).

213. See *McMillian v. Holcomb*, 907 P.2d 1034 (Okla. 1995); *Stites v. DUIT Constr. Co.*, 903 P.2d 293 (Okla. 1995); *American Medical Int'l v. Feigel*, 918 P.2d 752 (Okla. Ct. App. 1996).

the judgment. In addition, two cases²¹⁴ were concerned with the vacation of judgments.

In *Moss v. City of Oklahoma City*,²¹⁵ the Supreme Court construed the following language in the Oklahoma version of the Uniform Contribution Among Tortfeasors Act:²¹⁶ "When a release . . . is given in good faith to one of two or more persons liable in tort for the same injury . . . [i]t does not discharge any of the other tort-feasors from liability . . . unless its terms so provide . . ."²¹⁷ Based on this language, the Supreme Court held that a general release would discharge potential tortfeasors who were not parties to the release from liability only if they were expressly designated or otherwise specifically identified in the release.²¹⁸ The Oklahoma Supreme Court expressly overruled its prior decision in *Brown v. Brown*²¹⁹ which had been decided before the adoption of the Uniform Contribution Among Tortfeasors Act, and rejected a Tenth Circuit opinion²²⁰ that had followed *Brown*. After *Moss* was decided, the last clause in section 832(H)(1) that is quoted above was changed from "unless its terms so provide" to "unless the other tort-feasor is specifically named."²²¹

During the past year, the Supreme Court applied the *Moss* holding and the 1995 amendment to section 832(H)(1) in five decisions, which like *Moss* were authored by Justice Lavender. *Moss* was followed in *Cotner v. Cessna Aircraft Co.*,²²² another case involving a general release that purported to release unnamed tortfeasors from liability. *Carmichael v. Beller*²²³ and *Shadden v. Valley View Hospital*²²⁴ involved similar factual situations and resulted in strikingly similar opinions. Both arose out of cases in which the plaintiffs sued both their original tortfeasors and the medical personnel that treated them.²²⁵ After the plaintiffs settled with the original tortfeasors, the defendant medical personnel obtained summary judgments based on the general releases given to the original tortfeasors.²²⁶ The Oklahoma Supreme Court held in both cases that to the extent that the original tortfeasors and the defendant medical personnel shared common liability, the general release was insufficient to release the medical personnel under *Moss*, because they were not specifically named in the release.²²⁷ The same result would obtain to the extent that the original tortfeasors and the defendant medical personnel did not share common liability-

214. See *FDIC v. Jernigan*, 901 P.2d 793 (Okla. 1995); *Campbell v. Pharr*, 916 P.2d 266 (Okla. Ct. App. 1995).

215. 897 P.2d 280 (Okla. 1995).

216. OKLA. STAT. tit. 12, § 832 (1991) (amended 1995).

217. *Id.* § 832(H).

218. See *Moss*, 897 P.2d at 284, 286.

219. 410 P.2d 52 (Okla. 1966).

220. See *Mussett v. Baker Material Handling Corp.*, 844 F.2d 760 (10th Cir. 1988).

221. OKLA. STAT. tit. 12, § 832(H) (1991 & Supp. 1996).

222. 903 P.2d 878 (Okla. 1995).

223. 914 P.2d 1051 (Okla. 1996).

224. 915 P.2d 364 (Okla. 1996).

225. See *Carmichael*, 914 P.2d at 1054; *Shadden*, 915 P.2d at 366.

226. See *Carmichael*, 914 P.2d at 1054-55; *Shadden*, 915 P.2d at 367.

227. See *Moss v. City of Oklahoma City*, 897 P.2d 280, 288-89 (Okla. 1995).

ty.²²⁸ *Moss* was extended in *Kirkpatrick v. Chrysler Corp.*,²²⁹ to the entry and satisfaction of an agreed or consent judgment based on a compromise or settlement. In such a case, it is important to determine whether the settlement was intended to represent full compensation for all the plaintiff's injuries (which would bar a subsequent suit against other tortfeasors), or the settlement was not intended to discharge other tortfeasors.²³⁰ The *Kirkpatrick* holding was applied in *Hoyt v. Paul R. Miller, M.D., Inc.*²³¹ to a release and satisfaction of judgment filed in a previous case.

The effect of satisfaction of a judgment on an appeal or motion to vacate the judgment was the subject of several decisions.²³² The general rule in Oklahoma is that a voluntarily satisfied judgment moots a challenge to the judgment either by appeal or a motion to vacate.²³³ In contrast, an appeal or a motion to vacate a judgment is not mooted by a coerced or involuntary satisfaction of the judgment.²³⁴ Thus, the Oklahoma Supreme Court ruled in *Stites v. DUIT Construction Co.*²³⁵ that the collection of a judgment against a defendant through garnishment did not bar the defendant from having the judgment vacated and the garnished funds returned.²³⁶ In contrast, the Oklahoma Court of Appeals ruled in *American Medical International, Inc. v. Feigel*,²³⁷ that absent fraud, a defendant who had voluntarily satisfied a judgment could not vacate or modify the judgment.²³⁸

*McMillian v. Holcomb*²³⁹ was a closer case which highlights the need for care in the handling of payments received while a case is still pending either in the trial court or on appeal. In *McMillian*, a landowner received and cashed a check representing an award for condemnation of the landowner's property, and the condemnor moved to dismiss the landowner's appeal on account of the landowner's acceptance of the award.²⁴⁰ The Oklahoma Supreme Court held that the landowner's acceptance of the condemnation award did not require dismissal of the appeal because the landowner did not apply for payment and, although the check was cashed, the funds remained in the trust account of counsel for the landowner.²⁴¹

228. See *Carmichael*, 914 P.2d at 1059; *Shadden*, 915 P.2d at 371.

229. 920 P.2d 122 (Okla. 1996).

230. See *id.* at 133.

231. 921 P.2d 350 (Okla. 1996).

232. See *McMillian v. Holcomb*, 907 P.2d 1034 (Okla. 1995); *Stites v. DUIT Constr. Co.*, 903 P.2d 293 (Okla. 1995); *American Medical Int'l v. Feigel*, 918 P.2d 752 (Okla. Ct. App. 1996).

233. See *Stites*, 903 P.2d at 299; *American Medical Int'l v. Feigel*, 918 P.2d 752, 754 (Okla. Ct. App. 1996) (following *Stites*).

234. See *Stites*, 903 P.2d at 299.

235. 903 P.2d 293 (Okla. 1995).

236. See *id.* at 299-301.

237. 918 P.2d 752 (Okla. Ct. App. 1996).

238. See *id.* at 754.

239. 907 P.2d 1034 (Okla. 1995).

240. See *id.* at 1037.

241. See *id.* at 1038-39.

In a case of first impression, the Oklahoma Court of Appeals held in *Campbell v. Pharr*²⁴² that a trial court had discretion under the term-time provision in section 1031.1 of title 12²⁴³ to vacate a mandatory dismissal of a case. The mandatory dismissal was granted under Rule 9(b) of the Rules for District Courts of Oklahoma²⁴⁴ and section 1083 of title 12,²⁴⁵ which provide for mandatory dismissal for failure to prosecute an action.²⁴⁶ The trial court dismissed the case because the plaintiff's counsel failed to appear at a dispositional hearing, but it vacated the dismissal when it was shown that the reason the plaintiff's counsel did not appear at the hearing was that he had chicken pox.²⁴⁷

The Oklahoma Supreme Court drew an important distinction between intrinsic and extrinsic fraud in *FDIC v. Jernigan*.²⁴⁸ Intrinsic fraud covers fraud that is perpetrated in the course of an adversarial proceeding, such as the presentation of false evidence or the making of false statements to the court.²⁴⁹ In contrast, extrinsic fraud consists of fraud perpetrated outside of an adversarial proceeding that prevents a party from fully and fairly presenting his side of the case.²⁵⁰ The Supreme Court ruled in *Jernigan* that relief from a judgment on grounds of intrinsic fraud can only be sought through vacation of the judgment under section 1031(4) of title 12.²⁵¹ The time limit for seeking relief under section 1031(4) is two years from the date of the judgment.²⁵² In contrast, relief from a judgment on grounds of extrinsic fraud may be sought either through vacation of the judgment in the original action or through a separate action, and the time limit for bringing a separate action is two years from discovery of the fraud.²⁵³ The Supreme Court ruled that the trial court abused its discretion in granting the motion to vacate because the defendant was unable to show extrinsic fraud and his motion to vacate was filed more than two years after the filing of the judgment.²⁵⁴

The final section of this article discusses recent developments in Oklahoma appellate procedure. Foremost among the developments was the adoption of the new Oklahoma Supreme Court Rules.²⁵⁵ There were also important decisions dealing with the appealability of judgments and orders and two decisions²⁵⁶

242. 916 P.2d 266 (Okla. Ct. App. 1995).

243. OKLA. STAT. tit. 12, § 1031.1 (Supp. 1996).

244. OKLA. DIST. CT. R. 9(b), OKLA. STAT. tit. 12, ch. 2, app. (1991).

245. OKLA. STAT. tit. 12, § 1083 (1991).

246. See *Campbell*, 916 P.2d at 267.

247. See *id.*

248. 901 P.2d 793 (Okla. 1995).

249. See *id.* at 797.

250. See *id.* at 798.

251. OKLA. STAT. tit. 12, § 1031(4) (1991).

252. See *id.* § 1038.

253. See *id.* § 95(3).

254. See *Jernigan*, 901 P.2d at 798.

255. OKLA. STAT. ANN. tit. 12, ch. 15, app. 1 (West 1997 Special Pamphlet).

256. See *Joiner v. Brown*, 925 P.2d 888 (Okla. 1996); *Bushert v. Hughes*, 912 P.2d 334 (Okla. 1996).

that highlighted an omission in the Oklahoma Statutes concerning the giving of notice of the filing of a judgment.²⁵⁷

IV. APPELLATE PROCEDURE

A. *The New Oklahoma Supreme Court Rules*

The Oklahoma Supreme Court has promulgated a new set of Oklahoma Supreme Court Rules,²⁵⁸ which has superseded three sets of prior Rules: the Rules of the Supreme Court of Oklahoma,²⁵⁹ the Rules of Appellate Procedure in Civil Cases,²⁶⁰ and the Rules on Practice and Procedure in the Court of Appeals.²⁶¹ All the Rules that govern Oklahoma civil appellate procedure have been consolidated into one set, and the Rules have been reorganized so that it is easier to locate the pertinent ones. The adoption of a new set of Rules was long needed, because the prior Rules did not reflect the numerous amendments that had been made to the Oklahoma Statutes that control Oklahoma appellate procedure.²⁶² The new set of Rules also includes an Appendix that conveniently collects a number of forms for use in connection with appeals.²⁶³

The major substantive changes made by the new Rules are in the provisions for designation of the record on appeal. Rule 1.28(b)²⁶⁴ provides expressly that a designation of record that includes the entire trial court record is not permitted, except if authorized by the Chief Justice. In addition, the Rule lists a number of items which should not be included in the record, such as depositions that have not been admitted into evidence, documents pertaining to service, and procedural motions and orders, unless they are specifically drawn in issue on the appeal.²⁶⁵ Thus, the Supreme Court is expressly discouraging voluminous designations of record.

B. *Appealability of Judgments and Orders*

Several recent cases were concerned with the appealability of various trial court orders. The Oklahoma Supreme Court decided in *Gilliland v. Chronic Pain Associates*²⁶⁶ that an order vacating an arbitration award and directing the parties to proceed to arbitration before a different panel was appealable as a final order under section 953 of title 12,²⁶⁷ because it prevented the award

257. Cf. OKLA. STAT. tit. 12, § 696.2 (Supp. 1996).

258. OKLA. STAT. ANN. tit. 12, ch. 15, app. 1 (West 1997 Special Pamphlet). For a detailed analysis of the changes made by the Oklahoma Supreme Court Rules, see Harvey D. Ellis, Jr., *The New Oklahoma Supreme Court Rules*, 67 OKLA. B.J. 3991 (1996).

259. OKLA. STAT. tit. 12, ch. 15, app. 1 (Supp. 1996) (repealed 1997).

260. OKLA. STAT. tit. 12, ch. 15, app. 2 (Supp. 1996) (repealed 1997).

261. OKLA. STAT. tit. 12, ch. 15, app. 3 (Supp. 1996) (repealed 1997).

262. See OKLA. STAT. tit. 12, §§ 900.2-995 (Supp. 1996).

263. See OKLA. STAT. ANN. tit. 12, ch. 15, app. 1, R. 1.300-1.301 (West 1997 Special Pamphlet).

264. See *id.* R. 1.28(b).

265. See *id.*

266. 904 P.2d 73 (Okla. 1995).

267. OKLA. STAT. tit. 12, § 953 (1991).

from being confirmed by a judgment.²⁶⁸ Similarly, the Supreme Court ruled in *Hammonds v. Osteopathic Hospital Founders Ass'n*²⁶⁹ that an order setting the amount of sanctions imposed on an attorney under section 2011 of title 12²⁷⁰ was appealable as a final order under section 953 of title 12,²⁷¹ because it was an "end-of-the-line disposition" of the only issue involving the attorney, who was not a party to the underlying case.²⁷² The Supreme Court added in dictum²⁷³ that if sanctions had been imposed against a party, the sanctions order would have been appealable as an interlocutory order for the payment of money *pendente lite* under section 993(A)(5) of title 12.²⁷⁴

The Oklahoma Supreme Court discussed the use of certified interlocutory appeals under section 952(b)(3) of title 12²⁷⁵ in *Roach v. Jimmy D. Enterprises, Ltd.*²⁷⁶ A major limitation on the use of certified interlocutory appeals is that the appeal must affect "a substantial part of the merits of the controversy."²⁷⁷ Although this language had been interpreted to exclude issues involving practice, procedure, and evidence, the Supreme Court held in *Roach* that a certified interlocutory appeal was appropriate for the determination of whether punitive damages were recoverable in an action for the wrongful death of a child, because this affected "a substantial part of the merits of the controversy."²⁷⁸

In order for a judgment to be appealable it must resolve all the issues and claims in the case.²⁷⁹ The Oklahoma appellate courts continue to receive appeals from trial court decisions that have not resolved all issues and claims, and these appeals are consistently dismissed as premature. For example, in *LCR, Inc. v. Linwood Properties*²⁸⁰ the Oklahoma Supreme Court dismissed an appeal from a trial court decision in an action to foreclose a second mortgage, because the trial court did not decide the priority rights of the first mortgage holder, the amount of the mortgagor's liability on the underlying notes, and the amount of attorney fees due to the plaintiff.²⁸¹ The Oklahoma Supreme Court also dismissed the appeal in *Liberty Bank & Trust Co. v. Rogalin*,²⁸² another mortgage foreclosure case. Although the trial court decision determined the amount owed and ordered the mortgage foreclosed and the property sold, the court expressly reserved its decision on the mortgagor's counterclaim.²⁸³ The

268. See *Gilliland*, 904 P.2d at 77.

269. 917 P.2d 6 (Okla. 1996).

270. OKLA. STAT. tit. 12, § 2011 (1991).

271. *Id.* § 953.

272. See *Hammonds*, 917 P.2d at 7.

273. See *id.* at 7-8 n.6.

274. OKLA. STAT. tit. 12, § 993(A)(5) (1991).

275. *Id.* § 952(b)(3).

276. 912 P.2d 852 (Okla. 1996).

277. OKLA. STAT. tit. 12, § 952(b)(3) (1991).

278. See *Roach*, 912 P.2d at 855.

279. See OKLA. STAT. tit. 12, § 994 (Supp. 1996).

280. 918 P.2d 1388 (Okla. 1996).

281. See *id.* at 1392 n.12.

282. 912 P.2d 836 (Okla. 1996).

283. See *id.* at 837.

appeal was therefore premature under section 994 of title 12.²⁸⁴ Another appeal was dismissed on account of section 994 in *Shackelford v. American Airlines, Inc.*²⁸⁵ Although the trial court certified its order granting summary judgment on a third party indemnity claim under section 994, the Court of Appeals refused to accept the certification and ruled that the order lacked finality.²⁸⁶ The trial court's decision determined that the third party defendant was liable on the indemnity claim, but it did not determine the amount of damages, and it also failed to address another third party claim based on breach of contract.²⁸⁷

C. Notice of the Filing of Judgments

In two recent decisions,²⁸⁸ the Oklahoma Supreme Court has struggled with a shortcoming in the Judgments Act²⁸⁹ relating to the giving of notice to an appellant of the filing of a judgment. The date of the filing of a judgment is critical under section 990A of title 12,²⁹⁰ because the thirty day limit on the time to appeal begins to run from this date. Section 696.2(B)²⁹¹ states that the court shall cause file-stamped copies of the judgment to be mailed to all parties who have appeared in the action if the judgment was taken under advisement, but it does not require the giving of notice of the filing of the judgment in other cases.²⁹²

In *Bushert v. Hughes*,²⁹³ the Oklahoma Supreme Court held that an appeal was untimely,²⁹⁴ because it was filed more than thirty days after the filing of a judgment taken under advisement, even though the appellant did not receive notice of the filing of the judgment until after the time to appeal had run.²⁹⁵ The Supreme Court reasoned that by approving the form of the judgment, the appellant became obliged to monitor the court clerk's office to determine when the judgment was filed.²⁹⁶ The Supreme Court gave its decision only prospective effect, however, and did not dismiss the appeal.²⁹⁷

In contrast, the Oklahoma Supreme Court held in *Joiner v. Brown*²⁹⁸ that an appeal filed more than thirty days after the filing of an order of dismissal was not untimely even though the judgment was not taken under advisement and the appellant received notice of the filing of the judgment before the dead-

284. See *id.* at 839.

285. 916 P.2d 282 (Okla. Ct. App. 1996).

286. See *id.* at 285.

287. See *id.* at 284-85.

288. See *Joiner v. Brown*, 925 P.2d 888 (Okla. 1996); *Bushert v. Hughes*, 912 P.2d 334 (Okla. 1996).

289. OKLA. STAT. tit. 12, §§ 990.2-995 (Supp. 1996).

290. *Id.* § 990A.

291. *Id.* § 696.2(B).

292. See *id.*

293. 912 P.2d 334 (Okla. 1996).

294. See *id.* at 340-41.

295. See *id.* at 335-36.

296. See *id.* at 338.

297. See *id.* at 335.

298. 925 P.2d 888 (Okla. 1996).

line for filing an appeal had expired.²⁹⁹ The Supreme Court ruled that it was unconscionable for the prevailing party's counsel not to honor opposing counsel's request for a file-stamped copy of the dismissal order.³⁰⁰ It also held that the court clerk had a responsibility to mail file-stamped copies of all judgments and appealable orders to all parties whose names and addresses are listed on the journal entry when it is filed.³⁰¹

Bushert and *Joiner* appear inconsistent, because *Bushert* requires counsel who approves a judgment or appealable order for filing to monitor the court clerk's office to determine when it is actually filed, while *Joiner* permits counsel to rely on the court clerk to mail a copy of the order to all counsel of record. The root of the problem, though, is the lack of a procedure in the governing statutes for the giving of notice to the parties of the date of filing of a judgment.

The Civil Procedure Committee of the Oklahoma Bar Association proposed an amendment³⁰² to section 696.2(B)³⁰³ that went into effect on May 1, 1997. The amendment requires the party who prepares a judgment, or another person designated by the court, to mail a file-stamped copy of the judgment to all other parties no later than three days after it is filed.³⁰⁴ This removes the burden of giving notice of the filing of the judgment from the court clerk in most cases. Amendments to other provisions in the Judgments Act that deal with the timing of appeals and post-trial motions extend the time for filing appeals and post-trials until after the mailing of a file-stamped copy of the judgment, if the court records do not reflect the mailing of notice within three days after the filing of the judgment.³⁰⁵ These amendments give the party seeking to uphold a judgment an incentive to give notice of its filing to other parties, and also assure that a party will not lose the opportunity to file an appeal or post-trial motion without having been given notice of the filing of the judgment.

299. See *id.* at 889.

300. See *id.* at 890.

301. See *id.*

302. H. 1778, 46th Leg., 1st Reg. Sess. (Okla. 1997) (enacted).

303. OKLA. STAT. tit. 12, § 696.2(B) (Supp. 1996).

304. See Okla. H. 1778; see also *OBA Resolutions for 1997 OBA Legislative Program*, 67 OKLA. B.J. 3107, 3109 (1996).

305. See *OBA Resolutions*, *supra* note 304, at 3108-14.

