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ARTICLES

RECENT DEVELOPMENTS IN OKLAHOMA CIVIL PROCEDURE

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I. INTRODUCTION

There were a number of interesting developments affecting Oklahoma civil procedure during the past year. One topic that received considerable attention from court clerks and attorneys early in 1997 was the problem of giving notice of the filing of the judgment to the parties to the action. This problem was eventually resolved by a series of amendments to the Judgments Act,[1] which now require the party who files a judgment with the court clerk to mail file-stamped copies of it to all the other parties to the action so that they will know when the time for filing the post-trial motions and an appeal begins to run.

The most significant case law development was the Oklahoma Supreme Court's decision in *YMCA v. Melson*,[2] which allowed discovery of a defendant's financial records when a plaintiff is seeking punitive damages. In another interesting case, *Cary by and through Cary v. Oneok, Inc.*,[3] a divided Supreme Court ruled that a litigant should not be excluded from a trial solely on the grounds that his disfigurement might prejudice the jury.

There were also a number of appellate decisions during the past year that

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1. *See* Act of April 15, 1997, ch. 102, §§ 1-7, 1991 Okla. Sess. Laws 320, 320-27.
2. 1997 OK 81, 944 P.2d 304.
3. 1997 OK 60, 940 P.2d 201.

dealt with a variety of topics such as personal jurisdiction,[4] suits against unincorporated associations,[5] interpleader,[6] and claim and issue preclusion.[7] In addition, the Oklahoma Supreme Court continued to restrict the availability of summary judgments by placing the burden of showing the absence of substantial controversy as to the material facts on the moving party, rather than requiring the party with the burden of proof at trial to produce evidence of a substantial controversy.[8] The Supreme Court also once again expressed its disfavor of interfering with a jury verdict.[9]

Another development concerns the Oklahoma Supreme Court's adoption of the public domain citation system. As a result of amendments to the Supreme Court Rules,[10] attorneys will have to learn new forms for the citation of cases. While the Supreme Court and Court of Civil Appeals have already adjusted to the new citation forms, it may take many attorneys considerably longer to change their ways of citing cases.

These developments are described more fully in the following pages.

I. PUBLIC DOMAIN CITATION

Beginning January 1, 1998, the Oklahoma Supreme Court requires the public domain citation form for all Oklahoma appellate decisions promulgated after May 1, 1997, and it is strongly encouraged for decisions promulgated before then pursuant to Rule 1.200(e).[11] The public domain citation system conforms with the system that has been proposed by the American Association of Law Libraries[12] and the American Bar Association.[13] Oklahoma was the first state to adopt the public domain citation system for its entire body of case law.[14] The Oklahoma Supreme Court is in the process of providing public access to all Oklahoma case law on its Oklahoma Supreme Court Network ("OSCN") web-site at "www.oscn.net".[15]

The public domain citation system is tied to the database of Oklahoma case law on the OSCN. Every opinion of the Oklahoma appellate courts is

4. *See* Ferrell v. Prairie Int'l Trucks, Inc., 1997 OK 6, 935 P.2d 286.

5. *See* A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Compensation Ass'n, 1997 OK 37, 936 P.2d 916; Oliver v. Farmers Ins. Group of Cos., 1997 OK 71, 941 P.2d 985.

6. *See* Stanford v. Fidelity & Guar. Life Ins. Co., 1996 OK CIV APP 156, 936 P.2d 352; Aircraft Equip. Co. v. The Kiowa Tribe, 1997 OK 62, 939 P.2d 1143.

7. *See* Deloney v. Downey, 1997 OK 102, 944 P.2d 312; National Diversified Business Servs., Inc. v. Corporate Fin. Opportunities, Inc., 1997 OK 36, 946 P.2d 622.

8. *See* Ingram v. Wal-Mart Stores, Inc., 1997 OK 11, 932 P.2d 1128.

9. *See* Currens v. Hampton, 1997 OK 58, 939 P.2d 1138.

10. *See In re*: Amendments to the Oklahoma Supreme Court Rules, and Rules on Administration of Courts, 1997 OK 54, 68 OKLA. B.J. 1543 (1997).

11. *See id.*

12. *See The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Case Citation*, 89 L. LIB. J. 7 (1997).

13. *ABA Official Citation Resolutions* at <http://www.abanet.org/citation/resolution.html>.

14. *See Notice, Oklahoma Adopts Public Domain Citation*, 68 OKLA. B.J. 1541 (1997).

15. For a useful article on the Oklahoma Supreme Court Network, see Michael Wilds, *Successfully Navigating the OSCN, A Pragmatic Guide to Legal Research*, 59 OKLA. B.J. 3421 (1997).

being assigned a case number, and the public domain citation system requires the citation to include the name of the case, its year, the designation of the court, the case number, and a parallel citation to West's National Reporter System. The example of a case citation used in the Supreme Court Rules[16] is: *Skinner v. Braum's Ice Cream Store*, 1995 OK 11, 890 P.2d 922. Locations within opinions are to be designated by paragraph number, rather than by page number, because the pagination is keyed to West's National Reporter System.

Opinions that are promulgated after May 1, 1997 include the case and paragraph numbering in their published form that appears in the *Oklahoma Bar Journal* and the Pacific Reporter. Thus, one does not need to navigate the world wide web to find the public domain citation for these opinions. Use of the world wide web is required for earlier opinions, but the public domain citation system is not mandatory, but only strongly encouraged, for pre-May 1, 1997 decisions. By including the parallel citation to West's National Reporter System, the public domain citation system will not make the Pacific Reporter obsolete, and attorneys may still use it for legal research. The public domain citation is meant to provide an alternative to the monopoly that West's National Reporter System has enjoyed for many years.

The Oklahoma Supreme Court's bold steps in establishing the Oklahoma Supreme Court Network and adopting the public domain system provide Oklahoma attorneys with a compelling additional reason to become acquainted with the on-line world.[17] While the adoption of the public domain citation may be the most exciting devopment, there were also a number of case law developments relating to civil procedure, which are discussed on the following pages.

II. JURISDICTION AND VENUE

The Oklahoma Supreme Court examined Oklahoma's far reaching long arm statute at section 2004(F) of title 12 of the Oklahoma Statutes[18] in *Ferrell v. Prairie Int'l Trucks, Inc.*[19] Section 2004(F) extends the jurisdiction of Oklahoma courts over non-residents to the maximum extent that due process allows under the Oklahoma and United States Constitutions. The *Ferrell* case arose out of the plaintiff's purchase of a truck from the defendant corporation, whose principal place of business was in Illinois. The purchase took place in St. Louis, Missouri, but the defendant knew that the plaintiff intended to license it in Oklahoma, and the defendant authorized the plaintiff to have certain repair work on the truck done in Oklahoma. After the truck broke down in Arkansas, the plaintiff brought his action in an Oklahoma state court in which he alleged claims for breach of warranty, conversion, and breach of contract against the

16. *See* R. 1.200(e)(1), *In re*: Amendments to the Oklahoma Supreme Court Rules, and Rules on Administration of Courts, 1997 OK 54, 68 OKLA. B.J. 1543 (1997).

17. For a useful article detailing legal information available on-line, see Mike Wilds, *A Practitioner's Guide to Free Legal Information on the Internet*, 33 TULSA L. J. 463 (1997).

18. OKLA. STAT. tit. 12, § 2004(F) (1991).

19. 1997 OK 6, 935 P.2d 286.

defendant.[20] The trial court granted the defendant's motion to dismiss for lack of personal jurisdiction, but the Oklahoma Supreme Court reversed.

Although the defendant did not conduct business in Oklahoma, the Supreme Court found a number of contacts on which to base jurisdiction. These included the defendant's running advertisements for its trucks in a publication that was distributed in Oklahoma and targeted at Oklahoma residents.[21] The advertisements did not give rise to the plaintiff's claim, however, because the plaintiff did not see them before he purchased the truck.[22] Other of the defendant's activities that were more closely connected with the plaintiff's claim appeared to be of greater significance for purposes of jurisdiction. Among these were the defendant's negotiation for the sale of the truck by telephone with the plaintiff, knowing that the plaintiff was in Oklahoma and that the truck would be used in Oklahoma.[23] In addition, the Supreme Court stressed that the defendant created a continuing relationship with Oklahoma by entering into an installment contract with the plaintiff and giving the plaintiff a warranty on the truck.[24] Accordingly, the Oklahoma Supreme Court found that the defendant had subjected itself to the jurisdiction of Oklahoma state courts.

The often subtle distinction between subject matter jurisdiction and venue was the subject of *Robinson v. Oklahoma Employment Security Comm'n.*[25] The plaintiff filed a timely appeal from a denial of unemployment benefits. Unfortunately, he filed the appeal in the wrong county, and by the time he discovered his error, it was too late to file in the proper county.[26] The trial court denied the plaintiff's motion to transfer the appeal to the proper county, but the Oklahoma Supreme Court reversed on the ground that the provision in the statute designating the location for filing an appeal was a matter of venue, rather than subject matter jurisdiction. It adopted the principle that restrictions on the particular county or location within the state that an action must be brought are matters of venue, rather than jurisdiction.[27] Having decided that the statutory limitation did not affect the trial court's jurisdiction, the Oklahoma Supreme Court found that the trial court abused its discretion by denying the plaintiff's motion to transfer the case to the proper venue.[28]

In *Rishell v. Jane Phillips Episcopal Memorial Medical Ctr.*,[29] the Oklahoma Court of Civil Appeals scrutinized a commonly utilized provision in the Oklahoma venue statutes.[30] Section 139 of title 12 provides that a civil action

20. *See id.* at ¶10, 935 P.2d at 287.
21. *See id.* at ¶13, 935 P.2d at 288.
22. *See id.* at ¶6, 935 P.2d at 287.
23. *See id.* at ¶13, 935 P.2d at 288.
24. *See id.*
25. 1997 OK 5, 932 P.2d 1120.
26. *See id.* at ¶1, 932 P.2d at 1121. Under OKLA. STAT. tit. 40, § 2-610 (1991), the appeal should have been filed in the district court of the county where the plaintiff resided, which was Kay County. Instead, the appeal was filed in the district court for Oklahoma County.
27. *See id.* at ¶8, 932 P.2d at 1123.
28. *See id.* at ¶12, 932 P.2d at 1123.
29. 1996 OK CIV APP 112, 934 P.2d 360.
30. *See* OKLA. STAT. tit. 12, § 139 (1991).

may be brought in any county in which any defendant resides or may be "summoned."[31] *Rishell* was a medical malpractice case that was brought against a doctor and a hospital in Washington County. The doctor also maintained an office in Rogers County, and the plaintiff managed to have him served with process there. The Court of Civil Appeals held that venue was therefore proper in Rogers County.[32] A number of years ago Professor Fraser criticized the Oklahoma statute basing venue on where a defendant was summoned, saying that it "is inconsistent with the idea that an action should be brought in a fair and convenient place."[33] Even so, the statute is clear, and the Oklahoma Court of Civil Appeals was correct in finding venue in the county where the doctor was served.

The Oklahoma appellate courts also issued a number of opinions involving other important aspects of pretrial procedure. The decisions dealing with pleading, discovery and summary judgments are covered in the next section.

III. PLEADING, DISCOVERY AND SUMMARY JUDGMENT

The Oklahoma Court of Civil Appeals issued an interesting opinion dealing with the effect of bankruptcy on Oklahoma's savings statute.[34] In *Don Huddleston Constr. Co. v. United Bank & Trust Co.*,[35] the plaintiffs voluntarily dismissed their breach of contract action against the defendants after the defendants filed for bankruptcy protection. Two months after the dismissal of the bankruptcy, the plaintiffs sought to reassert their claims against the defendants. The trial court ruled that the plaintiffs' claims were barred by section 108(c) of the Bankruptcy Code,[36] because both the original three year statute of limitation and the one year savings provision had expired.[37] Under Section 108(c), a creditor has only thirty days after the termination of the automatic stay in bankruptcy in which to file a claim that would otherwise be barred by the applicable statute of limitation. The Court of Civil Appeals reversed, holding that the one year savings provision was suspended during the period that the bankruptcy proceeding was pending.[38] Thus, the plaintiffs had one year, rather than only thirty days, after the termination of the bankruptcy proceeding in which to reassert their claims.

In *Johnson v. Goodman*,[39] the Oklahoma Supreme Court held that an order of a trial court striking a petition is not a dismissal. As a consequence, the underlying action remains open so that the plaintiff can file a new petition

31. *See id.*
32. *Rishell*, 1996 OK CIV APP 112, at ¶7, 934 P.2d at 362.
33. George B. Fraser, *Venue Oklahoma Style*, 23 OKLA. L. REV. 182, 184 (1970).
34. OKLA. STAT. tit. 12, § 100 (1991).
35. 1996 OK CIV APP 133, 933 P.2d 944.
36. 11 U.S.C. § 108(c) (1994).
37. *See Don Huddleston Constr. Co.*, 1996 OK CIV APP 133, ¶¶1-2, 933 P.2d at 945.
38. *See id.* at ¶11, 933 P.2d at 947-48.
39. 1997 OK 77, 941 P.2d 990.

arising from the same set of facts without having to commence a new action.[40] Thus, the Supreme Court ruled in the *Johnson* case that the plaintiff's new petition was not barred by the statute of limitation even though it was filed more than one year after the order striking the petition.[41]

In *Wright v. Parks*,[42] the Oklahoma Court of Civil Appeals applied the provisions in the Oklahoma Pleading Code[43] that require the court to allow a plaintiff leave to amend if it grants a motion to dismiss and the defect can be remedied. The plaintiff did not file his response to the defendants' motion to dismiss within the appropriate time and he failed to appear at the hearing on the motion.[44] Nevertheless, the Court of Civil Appeals ruled that the plaintiff should have been given an opportunity to amend his petition to state a claim and that the trial court should have specified a time within which an amended petition could be filed, instead of dismissing the action.[45]

YMCA v. Melson[46] was probably the most significant decision relating to civil procedure during the past year. This case involved the discovery of financial records in a case where the plaintiff was seeking punitive damages. For the past twenty years, Oklahoma courts have followed *Cox v. Theus*,[47] which held that a defendant's financial records were not subject to discovery even though the plaintiff was seeking punitive damages. The Oklahoma Supreme Court decided in the *YMCA* case that the holding in *Cox* was no longer controlling, because it was decided before the adoption of the Oklahoma Discovery Code in 1981. Under the discovery procedure that existed at the time of the *Cox* case, a party was allowed to obtain production of documents only on a showing of good cause.[48] With the adoption of the Oklahoma Discovery Code, good cause is no longer required; instead, the party opposing discovery has the burden of showing good cause in order to obtain a protective order to limit discovery.[49] Accordingly, where a party's financial records are relevant to the subject matter of the action, their discovery should be permitted, subject to the court's authority to issue a protective order to safeguard the confidentiality of such records as federal tax returns.[50]

The Oklahoma Supreme Court discussed the procedures for disqualification of counsel in *Piette v. Bradley & Leseberg*.[51] It held that an order disqualifying counsel for a conflict of interest was immediately appealable as a final order under section 953 of title 12.[52] The Supreme Court also required the trial

40. *Id.* at ¶7, 941 P.2d at 991-92.
41. *Id.* at ¶9, 941 P.2d at 992.
42. 1997 OK CIV APP 15, 939 P.2d 20.
43. OKLA. STAT. tit. 12, § 2012(G) (1991).
44. *See Wright*, 1997 OK CIV APP 15, 939 P.2d 20.
45. *See id.* at ¶11, 939 P.2d at 22.
46. 1997 OK 81, 944 P.2d 304.
47. 1977 OK 158, ¶10, 569 P.2d 447.
48. *See Cox*, 1997 OK 81, at ¶10, 944 P.2d at 307.
49. *See id.* at ¶¶14-15, 944 P.2d at 308.
50. *See* I.R.C. § 6103(a) (1997). Federal income tax records are confidential.
51. 1996 OK 124, 930 P.2d 183.
52. OKLA. STAT. tit. 12, § 953 (1991).

court to hold an evidentiary hearing to determine whether the attorney should be disqualified and to make a specific finding as to whether the attorney had knowledge of material and confidential information.[53]

The Oklahoma Supreme Court emphasized the role of the pleadings in framing the issues in the case in *Reddell v. Johnson*.[54] The plaintiff brought a negligence action to recover damages from being shot in the eye during a BB gun war. The defendant denied the allegations of negligence and asserted the affirmative defenses of assumption of the risk and contributory negligence. The defendant then moved for summary judgment, and the trial court granted the motion on the ground that liability was barred by the defense of assumption of risk.[55] On appeal, the Court of Civil Appeals affirmed, but on a different theory. The Court of Civil Appeals decided that the case was for assault and battery, rather than negligence, and therefore, it was barred by the one year statute of limitations.[56] The Supreme Court reversed the Court of Civil Appeals because the defendant had not asserted the statute of limitations defense in his answer, but it affirmed the trial court on the ground that there was no negligence shown.[57]

In *Reddell*, the Court of Civil Appeals relied on the general appellate principle that a trial court should be affirmed on appeal even though it reached its result through incorrect reasoning if there is any correct basis for its decision.[58] This principle saves the courts the trouble of having to send a case back so that the trial court will modify its decision to reflect the correct reasoning. Nevertheless, the Court of Civil Appeals should not have decided the case on a theory that had not been advanced by the parties because it is for the parties rather than the courts to frame the issues in the case.

The main difference between the use of summary judgments in federal and Oklahoma state courts is the Oklahoma Supreme Court's rejection of the *Celotex* line of cases from the federal courts. Under *Celotex Corp. v. Catrett*,[59] a federal court should grant a summary judgment if, after being given sufficient opportunity for discovery, a plaintiff is unable to provide sufficient evidence to put on a prima facie case at trial.[60] In contrast, in Oklahoma state courts, the defendant has the burden of showing that there is no substantial controversy as to any material fact.[61] In a number of cases, neither party is able to offer evidence of a material fact, and a defendant in an Oklahoma state court could not obtain summary judgment in one of these cases, even though the plaintiff would

53. 1996 OK 124, ¶2, 930 P.2d at 184.
54. 1997 OK 86, 942 P.2d 200.
55. *See id.* at ¶3, 942 P.2d at 202.
56. *See id.* at ¶4, 942 P.2d at 202.
57. *See id.* at ¶¶9-10,21, 942 P.2d at 202.
58. *See id.* at ¶5, 942 P.2d at 202.
59. 477 U.S. 317 (1986).
60. *See id.* at 322-323.
61. *See* White v. Wynn, 1985 OK 89, ¶8, 708 P.2d 1126, 1128 ("On a motion for summary judgment under District Court Rule 13 (12 O.S. Ch. 2, App.) all inferences and conclusions to be drawn from the underlying facts contained in such materials, must be viewed in the light most favorable to the party opposing the motion.").

not be able to get past a demurrer to the evidence at trial. *Ingram v. Wal-Mart Stores, Inc.*[62] illustrates the difference between the standard for summary judgment in the federal and Oklahoma state courts. The *Ingram* case involved a slip and fall in a Wal-Mart store in which the trial court granted summary judgment because the plaintiff had no firsthand knowledge of the cause of her fall or that Wal-Mart caused or contributed to the condition that caused her fall. The Supreme Court reversed, and it ruled that the plaintiff's lack of knowledge of the cause of the fall or whether Wal-Mart knew of it was immaterial to the summary judgment motion.[63] Unless Wal-Mart could prove that it did not know of the dangerous condition, there would be a fact question that would preclude granting summary judgment. In contrast, at trial, the plaintiff would have the burden of proving the cause of her fall and Wal-Mart's knowledge of the dangerous condition. Thus, if she was unable to produce any more evidence at trial than she did in response to the summary judgment motion, the trial court would be required to grant a demurrer to the evidence at the close of her case.[64]

The Oklahoma Supreme Court also reversed a summary judgment in *Bookout v. Great Plains Regional Medical Ctr.*[65] In *Bookout*, the Supreme Court stressed the need for a plaintiff to be given a reasonable opportunity to respond to a motion for summary judgment. It found that the trial judge had abused his discretion by denying the plaintiff's motion for a two day continuance in order to respond to a motion for summary judgment. The defendant filed its motion for summary judgment shortly before the Christmas holidays in 1995. After the plaintiff learned that her counsel had failed to secure an expert witness, she retained new counsel who immediately sought a continuance from defense counsel. The defense counsel granted a short continuance, and the new plaintiff's counsel was able to retain two expert witnesses. The plaintiff then filed a motion for another continuance on January 3, and at the hearing on the motion, she requested two additional days to provide the court with affidavits from her expert witnesses.[66] The trial court denied the plaintiff's motion for a continuance and granted the defendant's motion for summary judgment. The Supreme Court ruled that the plaintiff's second attorney was not guilty of a lack of diligence and that a two day continuance was not unreasonable under the circumstances.[67] The shortness of the requested continuance and the holiday season appeared to be important considerations in the Supreme Court's decision.

Joinder of claims and parties was another area that the Oklahoma appellate courts addressed, and several of the significant cases in this area are discussed

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62. 1997 OK 11, 932 P.2d 1128.

63. *See id.* at ¶6, 932 P.2d at 1130.

64. *See* Rogers v. Hennessee, 1979 OK 138, ¶7, 602 P.2d 1033, 1035 ("When passing upon a demurrer to the evidence, the trial court must consider as true all evidence favorable to the party against whom the test of sufficiency is directed, together with all reasonably drawn inferences therefrom, and must disregard all conflicting evidence favorable to the demurrant.").

65. 1997 OK 38, 939 P.2d 1131.

66. *See id.* at ¶4, 939 P.2d at 1133.

67. *See id.* at ¶14, 939 P.2d at 1135.

below.

IV. JOINDER OF CLAIMS AND PARTIES

The Oklahoma Supreme Court decided a number of cases during the past year that involved the joinder of claims and parties. *A-Plus Janitorial & Carpet Cleaning v. Employer's Workers' Compensation Ass'n*,[68] involved an action against an unincorporated association by some of its former members. The Oklahoma Supreme Court decided that the action could not be brought as a derivative action under Oklahoma's counterpart to Federal Rule 23.1[69] because the interests of the former members were antagonistic to the unincorporated association. Therefore, they were not acting on its behalf and were adequate representatives of the unincorporated association.[70] However, the Supreme Court remanded the case so that the trial court could determine whether the action should proceed with the former members asserting their individual claims in the same action[71] pursuant to the Oklahoma counterparts to Federal Rules 18 and 20.[72]

Oliver v. Farmers Ins. Group of Companies[73] also involved a suit against an unincorporated association. The Supreme Court ruled that an unincorporated association could be sued under its common name pursuant to section 182 of title 12.[74] Thus, it allowed the plaintiff to assert a bad faith claim against the Farmers Insurance Group of Companies along with its bad faith claim against the Farmers Insurance Company, Inc.[75]

The Oklahoma Supreme Court decided in *Chickasaw Telephone Co. v. Drabek*[76] that the trial court lacked jurisdiction to decide a case that affected an absent person's rights. The case arose out of a dispute concerning the plaintiff's easement across property that was owned by the defendant and his wife. The trial court issued a temporary injunction against both the defendant and his wife from interfering with the plaintiff's rights to the easement. The wife was not served with process, did not enter an appearance in the case or otherwise submit herself to the court's jurisdiction, and she was not represented by counsel in the case.[77] Because the wife was affected by the injunction, the Oklahoma Supreme Court held that she was a necessary party, and since the trial court did not have jurisdiction over her, the temporary injunction was void

68. 1997 OK 37, 936 P.2d 916.
69. OKLA. STAT. tit. 12, § 2023.1 (1991).
70. *See A-Plus Janitorial & Carpet Cleaning*, 1997 OK 37, at ¶15, 936 P.2d at 925.
71. *See id.* at ¶18, 936 P.2d at 926.
72. OKLA. STAT. tit. 12, §§ 2018, 2020 (1991).
73. 1997 OK 71, 941 P.2d 985.
74. OKLA. STAT. tit. 12, § 182 (1991).
75. *See Oliver*, 1997 OK 71, at ¶16, 941 P.2d at 988.
76. 1996 OK 76, 921 P.2d 333.
77. *See id.* at ¶3, 921 P.2d at 335.

as to her.[78] The *Chickasaw* opinion failed to cite to section 2019 of title 12,[79] the Oklahoma counterpart to Federal Rule 19, which appeared to be applicable because of the wife's interest in the land that was burdened by the easement.[80] Nevertheless, it remanded the case for a determination whether she was a necessary party,[81] as section 2019 would require.

Two recent cases involved the use of interpleader. In *Stanford v. Fidelity & Guaranty Life Insurance Co.*,[82] the Oklahoma Court of Civil Appeals held that a life insurer that had been sued by the widow of its insured should have been allowed to file a counterclaim for interpleader in which it joined the insured's ex-wife as a competing claimant. The other interpleader case was *Aircraft Equipment Co. v. The Kiowa Tribe*,[83] where the Oklahoma Supreme Court upheld the use of interpleader in a post-judgment proceeding to enforce a judgment that the plaintiff had obtained against an Indian tribe. The plaintiff sought to collect its judgment from funds belonging to the tribe that were in the possession of the tribe's tax collector and also from oil and gas entities that owed taxes to the tribe.[84] The oil and gas entities interplead the funds owed to the tribe, and the Supreme Court decided that the trial court did not abuse its discretion in ordering these funds paid into the court.[85]

There were a number of decisions dealing with various aspects of trial procedure, including the exclusion of litigants because of their disfigurement, the calling of rebuttal witnesses, and appellate review of new trial orders. These are discussed below along with two decisions involving the compelling of arbitration.

V. TRIAL PROCEDURE AND ARBITRATIONS

The circumstances under which a litigant may be excluded from trial were the subject of *Cary by and through Cary v. Oneok, Inc.*,[86] After a child was severely burned by the explosion of a water heater in the garage of his home, his mother brought an action on his behalf. At trial, the defendant moved for bifurcation of the trial so that the liability phase would be tried separately from the damages phase. The defendant also requested that the child be excluded from the liability phase. The trial court excluded the plaintiff's son, who was 6 years old by the time of trial, from appearing at trial on the ground that his disfigurement would cause undue prejudice to the defendant.[87] The Supreme Court reversed. It was careful not to hold that a party to a lawsuit had an abso-

78. *See id.* at ¶9, 921 P.2d at 337.
79. OKLA. STAT. tit. 12, § 2019 (1991).
80. *See Chickasaw Telephone Co.*, 1996 OK 76, ¶2, 921 P.2d at 335.
81. *See id.* at ¶11, 921 P.2d at 337.
82. 1996 OK CIV APP 156, 936 P.2d 352.
83. 1997 OK 62, 939 P.2d 1143.
84. *See id.* at ¶3, 939 P.2d at 1145.
85. *See id.* at ¶12, 939 P.2d at 1149.
86. 1997 OK 60, 940 P.2d 201.
87. *See id.* at ¶3, 940 P.2d at 202.

lute right to attend a trial, noting that a party's disruptive behavior may warrant exclusion in some circumstances.[88] Nevertheless, the Supreme Court decided that exclusion of a party was disfavored and that a party should not be excluded solely because of disfigurement.[89] Justice Opala (joined by three other Justices) dissented, pointing out that the child was not a party to the action[90] and no prejudice to the plaintiff's case resulted from his exclusion from the liability phase because he was not listed in the pretrial order as a witness.[91] On the other hand, the dissent argued, based on the trial court's finding that the boy's appearance at trial would cause prejudice to the defendant, the trial court acted within its discretion in excluding the child.[92]

In *Aggressive Carriers, Inc. v. Tri-State Motor Transit Co.*,[93] the Oklahoma Court of Civil Appeals addressed the issue of who is a rebuttal witness and therefore may testify at trial, even though the witness is not listed in a pretrial conference order. The case arose out an accident involving two semi-trucks. There was only one eyewitness to the accident other than the two drivers. Although the eyewitness was listed in the accident report, her name did not appear in the pretrial conference order because the plaintiff did not locate her until 8 days before the trial. Once the plaintiff located the eyewitness, it immediately notified the defendant's counsel, but the day before trial the defendant objected to the plaintiff's use of the witness at trial, either as a witness in chief or a rebuttal witness.[94] The trial judge refused to allow the witness to testify on the ground that her testimony would be cumulative to other testimony, and the Oklahoma Court of Civil Appeals affirmed. The standard that the appellate court used in determining whether a witness was a rebuttal witness was whether the testimony was relevant solely on account of the effect it had on evidence introduced by opposing witnesses.[95] The Oklahoma Court of Civil Appeals concluded that the plaintiff's witness was not a rebuttal witness because her testimony was directed to bolstering the plaintiff's case in chief.[96] Consequently, her testimony could have been introduced only in the plaintiff's case in chief.

Bloustine v. Fagin[97] concerned the respective roles of the judge and jury in a legal malpractice case. The plaintiff sued his former attorneys for failure to perfect an appeal from a divorce decree. He claimed that if the appeal had been properly perfected, the appellate court would have reversed the trial court's decision. The trial judge in the malpractice action decided, however, that the

88. *See id.* at ¶13, 940 P.2d at 204.
89. *See id.* at ¶14, 940 P.2d at 204.
90. *See id.* at ¶2, 940 P.2d at 206 (Opala, J., dissenting).
91. *See id.* at ¶3, n.8, 940 P.2d at 207 (Opala, J., dissenting).
92. *See id.* at ¶¶17-18, 940 P.2d at 213 (Opala, J., dissenting).
93. 1997 OK CIV APP 31, 941 P.2d 1011.
94. *See id.* at ¶8, 941 P.2d at 1013.
95. *See id.* at ¶15, 941 P.2d at 1013.
96. *See id.* at ¶17, 941 P.2d at 1014.
97. 1996 OK CIV APP 122, 928 P.2d 964.

appeal would not have been successful even if it had been properly perfected.[98] The plaintiff contended that this should have been an issue for a jury, but the Oklahoma Court of Civil Appeals ruled that this was a legal issue, which was correctly decided by the trial judge. The reason that the probable outcome of an appeal is a legal issue is that had the appeal been properly perfected, its outcome would have been determined by the appellate court, rather than a jury.[99]

In *Currens v. Hampton*,[100] the Oklahoma Supreme Court reaffirmed its opposition to interference with a jury's determination of damages, where there is no error of law or showing of bias.[101] After a jury awarded the parents of an 11 year old child who died during an appendectomy $1.5 million, the trial court denied the defendant's motion for a new trial. The Court of Civil Appeals ordered a remittitur of $500,000, but the Oklahoma Supreme Court reversed and affirmed the judgment of the trial court. The Supreme Court stated that the following standard should be applied in evaluating whether a verdict is excessive:

> The established rule is that before a verdict of a jury may be set aside as excessive, it must appear that the verdict is so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, showing the jury to have been actuated by passion, partiality, prejudice or corruption.[102]

Given this standard, it is hard to imagine that any verdict should be set aside as excessive. The Supreme Court also relied on the fact that the trial court had denied the defendant's motion for new trial, and it stressed that the trial court had the advantage in ruling on a motion for new trial of having heard the evidence in the case and seen the witnesses testify.[103]

There were two cases decided during the past year that dealt with arbitrations, which are increasingly being used as an alternative to trial. In *Wilkinson v. Dean Witter Reynolds, Inc.*,[104] a securities broker invoked an arbitration provision when one of its customers sued it over its handling of the customer's IRA account. The Supreme Court decided that the dispute over the IRA account was not subject to arbitration. Although the customer had agreed to arbitrate disputes arising under other accounts with the broker, he had never agreed to submit disputes arising out of the IRA account to arbitration.[105] While there is a strong policy favoring arbitration, this applies only if the parties have agreed to submit their dispute to arbitration. In contrast, in *Pierman v. Green Tree Fin. Servicing Corp.*,[106] the Oklahoma Court of Civil Appeals reversed the trial

98. *See id.* at ¶1, 928 P.2d at 965.
99. *See id.* at ¶5-6, 928 P.2d at 965-66.
100. 1997 OK 58, 939 P.2d 1138.
101. *See* Dodson v. Henderson Properties, Inc., 1985 OK 71, ¶11, 708 P.2d 1064, 1068 ("A court may not substitute its judgment for that of the jury in the exercise of its function as a fact finding body.").
102. 1997 OK 58, ¶10, 939 P.2d at 1141.
103. *See id.* at ¶9, 939 P.2d at 1141.
104. 1997 OK 20, 933 P.2d 878.
105. *See id.* at ¶10, 933 P.2d at 880.
106. 1997 OK CIV APP 2, 933 P.2d 955.

court for not ordering arbitration, because the parties had entered into an agreement with an arbitration provision that covered the claims asserted by the plaintiff. The arbitration provision in the *Pierman* case was included in a financing agreement for the purchase of a boat trailer. The financing agreement called for the purchaser to maintain insurance coverage on the trailer, and it granted the lender the right to purchase insurance if the purchaser failed to do so. Claiming the insurance charged under the financing agreement was excessive, the plaintiff alleged a variety of claims against the lender's assignee that sounded both in tort and contract.[107] Even though some of the claims were based on tort theories, the Court of Civil Appeals decided that they all arose out of the financing agreement and therefore they were covered by the arbitration provision.[108]

Several recent decisions concerned the law of remedies, ranging from *lis pendens* to the award of costs, interest, and attorney fees. These are analyzed below.

VI. REMEDIES

The filing of a *lis pendens* notice is the usual procedure for preventing bona fide purchasers or mortgagors from acquiring an interest in property that is the subject of litigation.[109] In *Breeding v. NJH Enterpris, LLC*,[110] the Oklahoma Supreme Court decided that a mortgagor with actual notice of a prior action was bound by it even though the plaintiff failed to file a *lis pendens* notice. The prior action was a divorce proceeding that was pending at the time the husband executed a mortgage on the marital homestead. In the appeal from the divorce action, the Supreme Court increased the wife's property award by $100,000 and secured it with a lien on the homestead. On the second appeal in the case, the Supreme Court ruled that the wife's lien was superior to the mortgage that was recorded before the appeal was decided because the mortgagor had actual notice of the divorce action.[111] It held that *lis pendens* was an equitable doctrine and that it would be inequitable not to apply the doctrine of *lis pendens* on account of the plaintiff's failure to record the *lis pendens* notice when the mortgagor had actual notice of the prior action.[112]

The Supreme Court struck down a local rule for Tulsa County[113] that assigned all post judgment collection matters to special judges in *Schulmeier v. Honorable Judges of District Court*.[114] It held that the local rule was inconsistent with the limitations on the authority of special judges in section 123 of title

107. *See id.* at ¶3, 933 P.2d at 956.
108. *See id.* at ¶8, 933 P.2d at 957.
109. *See* OKLA. STAT. tit. 12, § 2004.2 (1991).
110. 1997 OK 65, 940 P.2d 502.
111. *See id.* at ¶9, 940 P.2d at 504.
112. *See id.* at ¶11, 940 P.2d at 504.
113. R. 23(5), Rules of the Fourteenth Jud. Dist. (Tulsa and Pawnee Counties).
114. 1996 OK 103, 925 P.2d 63.

20.[115]

Bohnefeld v. Haney[116] presented issues involving the calculation of prejudgment interest and the shifting of costs under section 1101 of title 12.[117] The Oklahoma Court of Civil Appeals noted a split of authority between two of its divisions concerning the method for calculating prejudgment interest. One division applied the single annual rate of interest that was in effect at the time of the verdict to all of the years between the date of the filing of the petition and the verdict,[118] while the other division applied the different annual interest rates for each year from the date of the filing of the action.[119] The *Bohnefeld* court adopted the latter approach, reasoning that the plaintiff's loss should be measured by the yearly value of money for each period that the plaintiff was deprived of its use. After the Bohnefeld decision, the Oklahoma Legislature amended section 727 of title 12 to codify its result.[120]

The other issue addressed in *Bohnefeld* was whether the trial judge should compare the defendant's offer of judgment to the jury's verdict or to the judgment, which included prejudgment interest, in determining which party was entitled to costs. Referring to the statutory language,[121] the Court of Civil Appeals decided that the offer of judgment should be compared to the plaintiff's judgment, including prejudgment interest.[122] Accordingly, it decided that the plaintiff was entitled to costs because the judgment exceeded the defendant's offer.

The Oklahoma Court of Civil Appeals examined the attorney fees provisions of section 936 of title 12[123] in *American Superior Feeds, Inc. v. Mason Warehouse, Inc.*[124] It held that an award of attorney fees to the prevailing party is mandatory under section 936, and also that the prevailing party is the one who obtains the greatest affirmative judgment.[125] Thus, a plaintiff can be a prevailing party even if the defendant prevails on some of the claims.

The Oklahoma Supreme Court ruled in *Professional Credit Collections, Inc. v. Smith*[126] that a defendant who succeeded in vacating a default judgment against her was a prevailing party. Consequently, the defendant was entitled to recover her attorney fees from the plaintiff under section 936 of title 12.[127] The Supreme Court decided that a party need not obtain a judgment in its favor in order to be the prevailing party. It stated: "The operative factor under § 936

115. OKLA. STAT. tit. 20, § 123 (1991).
116. 1996 OK CIV APP 141, 931 P.2d 90.
117. OKLA. STAT. tit. 12, § 1101 (1991).
118. *See* McMullen v. Stevens, 1995 OK CIV APP 8, ¶7, 895 P.2d 302, 304-5.
119. *See* Burwell v. Oklahoma Farm Bureau Mutual Ins. Co., 1995 OK CIV APP 50, ¶25, 896 P.2d 1195.
120. *See* OKLA STAT. tit. 12, § 727 (Supp. 1997).
121. *See* OKLA. STAT. tit. 12, § 1101 (1991).
122. *Id.* at ¶9, 931 P.2d at 91.
123. OKLA. STAT. tit. 12, § 936 (1991).
124. 943 P.2d 171 (Okla. Ct. App. 1997).
125. *See id.* at 173.
126. 1997 OK 19, 933 P.2d 307.
127. OKLA. STAT. tit. 12, § 936 (1991).

is success, not the particular stage at which success is achieved."[128] Thus, the Supreme Court would appear to have allowed the defendant to recover attorney fees incurred in vacating the default judgment, even if the plaintiff later obtained a judgment against the defendant. The *Professional Credit* decision would also appear to permit a party who prevailed on a provisional remedy (such as an attachment,[129] prejudgment garnishment[130] or a temporary injunction[131]) to recover attorney fees even though it did not prevail at the trial on the merits. It might even mean that a plaintiff who succeeded in defending a motion to dismiss or a summary judgment motion could be considered a prevailing party.

The Supreme Court's decision is wrong analytically because a party who had an adverse judgment vacated but ultimately lost on the merits could not be considered to have prevailed. Moreover, the decision will likely open a can of worms because it will require trial courts to determine who the prevailing parties are and assess attorney fees at multiple stages in the course of litigation. A better way for the Supreme Court to have decided the case would have been for it to rule that the defendant was the prevailing party on account of the plaintiff's voluntary dismisssal, which terminated the litigation, rather than on account of the order vacating the default judgment, which did not.

Section 696.4(B) of title 12[132] provides a thirty day time limit after the filing of a judgment for filing an application for attorney fees. In *Victore Insurance Co. v. Foster*,[133] a plaintiff's motion for attorney fees was filed more than two years after the entry of a default judgment, but the Oklahoma Court of Civil Appeals ruled that the motion was not barred because section 696.4 was not in effect at the time of the judgment.[134] Section 696.4 did apply, however, in *Ladder Energy Co. v. Intrust Bank, N.A.*[135] The plaintiff in the *Ladder* case filed an initial request for attorney fees within the thirty day time limit, and the trial court granted the request. Then the plaintiff filed a second request for attorney fees after the thirty days had expired, and it argued that the filing of the second request related back to the filing of the initial request. Finding no basis for the relation back argument, the Oklahoma Court of Civil Appeals decided that the second request for attorney fees was barred by section 696.4(B).[136]

128. *Professional Credit Collections, Inc.*, 1997 OK 19, ¶12, 933 P.2d at 311.
129. *See* OKLA. STAT. tit. 12, § 1151 (1991).
130. *See* OKLA. STAT. tit. 12, § 1171(B)(1) (Supp. 1996).
131. *See* OKLA. STAT. tit. 12, § 1384.1 (1991).
132. OKLA. STAT. tit. 12, § 696.4(B) (Supp. 1996).
133. 1997 OK CIV APP 23, 940 P.2d 236.
134. *See id.* at ¶6, 940 P.2d at 237-8.
135. 1996 OK CIV APP 126, 931 P.2d 83.
136. *See id.* at ¶8, 931 P.2d at 86.

VII. JUDGMENT AND SETTLEMENT

Rule 4(e) of the Oklahoma District Court Rules[137] provides that if no brief or list of authorities is filed in opposition to a motion (other than certain specified motions for which no brief or list of authorities is required), "the motion shall be deemed confessed." Nevertheless, the Oklahoma Court of Civil Appeals decided in *Westlake Presbyterian Church, Inc. v. Cornforth*[138] that the lack of a timely response to a motion to vacate a judgment did not prevent a trial court from having discretion to review the motion to ensure that it did not violate the law by granting the relief requested in the motion. The case arose out of a small claims action brought by a church in which the trial court entered a judgment in favor of the church and the judgment was affirmed by the Oklahoma Court of Civil Appeals. After the appeal became final, the church began proceedings to enforce the judgment. The defendant then filed a motion to vacate the judgment, but the church failed to file a timely response to the motion because the defendant had informed the church that he was filing bankruptcy.[139] The trial court denied the motion to vacate, and the Oklahoma Court of Civil Appeals affirmed. It noted that Oklahoma courts had previously ruled that motions for summary judgment, *Spirgis v. Circle K Stores, Inc.*,[140] and for new trial, *Pipes v. Smith*,[141] would not be deemed confessed because of a failure to file a timely response. The Oklahoma Court of Civil Appeals reasoned that the Oklahoma Legislature had specified the grounds for certain motions, such as for new trial and the vacation of judgments, and that Rule 4(e) should not prevent a court from ensuring that these statutory grounds were satisfied.[142]

Nichols v. Mid-Continent Pipe Line Co.[143] turned on two different sorts of waiver. The case dealt with the effect of a settlement of the plaintiff's claim against one party on the plaintiff's claims against other parties and also the settled-law-of-the-case doctrine. The Oklahoma Supreme Court decided that the defendant had in effect waived the right to a credit of the settlement against the judgment because it failed to object to the form of the verdict, which did not list the settling defendant as a tortfeasor.[144] It also ruled that the plaintiff had in effect waived the right to relief from the Court of Appeals decision to credit the settlement against a part of the judgment because the plaintiff failed to seek certiorari from the Court of Appeals decision.[145]

The plaintiffs in *Nichols* brought nuisance and negligence claims against

137. *See* Okla. Dist. Ct. R. 4(e), OKLA. STAT. tit. 12, ch. 2, app. (1991).
138. 940 P.2d 1208 (Okla. Ct. App. 1996).
139. *See id.* at 1209.
140. 1987 OK CIV APP 45, ¶9, 743 P.2d 682 (Approved for Publication by the Supreme Court).
141. 1987 OK CIV APP 66, ¶6, 743 P.2d 1110.
142. *See Westlake Presbyterain Church, Inc.*, 940 P.2d at 1210.
143. 1996 OK 118, 933 P.2d 272.
144. *See id.* at ¶26, 933 P.2d at 281.
145. *See id.* at ¶27, 933 P.2d at 281.

three defendants. One of the defendants settled with the plaintiff before trial. After the jury returned a verdict against the other defendants for both actual and punitive damages, the trial court deducted the amount of the settlement from the verdict. On appeal, the Oklahoma Court of Appeals determined that the trial court should not have credited a portion of the settlement against the punitive damages award, but it sustained the crediting of a portion of the settlement against the actual damages award.[146] One of the defendants sought certiorari to the Supreme Court, but the plaintiffs did not seek certiorari with respect to the actual damages award.[147]

The Oklahoma Supreme Court ruled that the settling defendant was not a joint tortfeasor with the other defendants because the jury verdict exonerated the settling defendant from liability for the plaintiff's injury.[148] It stated that if the defendant who remained in the case had wanted to obtain a credit for the settlement, that defendant should have pressed for the jury to find that the settling defendant was partially liable by objecting to the trial court's form of the verdict that excluded the settling defendant from liability.[149] The Supreme Court concluded that since the settling defendant was not a joint tortfeasor the settlement should not have affected the judgment under the Uniform Contribution Among Tortfeasors Act. As a result, the plaintiff was entitled to collect the full amount from the other defendants, without any credit or reduction for the amount of the settlement pursuant to the Uniform Contribution Among Tortfeasors Act in section 832 of title 12.[150]

The Supreme Court also decided that although the plaintiffs were entitled to relief with respect to the credit for punitive damages they were not entitled to relief with respect to the credit for actual damages because the plaintiffs failed to seek certiorari from the Oklahoma Court of Appeals decision. It held that the plaintiffs were barred by the settled-law-of-the-case doctrine which precludes relitigation of any issues that are either finally settled in the process of appellate review or that an aggrieved party fails to raise in the course of appellate review.[151] The settled-law-of-the-case doctrine was also applied in *Lockhart v. Loosen*.[152]

The Oklahoma Supreme Court held in *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*[153] that the plaintiff was entitled to only one recovery for alternative legal theories that were predicated on the same set of facts. One of the defendants in the *Green Bay* case alleged that the plaintiff's employees made a number of statements to the effect that the defendant and his company were on the verge of business ruin, and the defendant asserted counterclaims for

146. *See id.* at ¶6, 933 P.2d at 275-76.
147. *See id.* at ¶24, 933 P.2d at 281.
148. *See id.* at ¶16, 933 P.2d at 279.
149. *See id.* at ¶19, 933 P.2d at 280.
150. OKLA. STAT. tit. 12, § 832 (1991).
151. *See Nichols*, 1996 OK 118, ¶24, 933 P.2d at 281.
152. 1997 OK 103, ¶3 n.1, 943 P.2d 1074.
153. 1996 OK 121, 932 P.2d 1091.

interference with business relations and defamation on account of these statements. The jury returned verdicts for $3 million on both counterclaims, which the trial court entered, but the Supreme Court reversed as to the defamation counterclaim because it arose of the same facts as the counterclaim for interference with business relations.[154] Accordingly, it was only an alternative theory of relief, rather than a separate cause of action.

In *Deloney v. Downey*,[155] the Oklahoma Supreme Court discussed the doctrines of claim and issue preclusion in the context of a paternity action brought by a minor child against a man who had never been married to her mother. The defendant contended that the paternity action was precluded by the decree in the divorce proceeding between the child's mother and the former husband of the child's mother. The Oklahoma Supreme Court decided that neither claim nor issue preclusion applied. Claim preclusion was not applicable because the child was not a party to the divorce proceeding, nor was the child in privity to the parties to the divorce proceeding.[156] The test that the Supreme Court used to determine whether a person was in privity to a party to a prior action was whether there was an identity of interests between the person sought to be precluded and the party.[157] In the *Deloney* case, the child's interests did not coincide with either her mother's or the former husband's interests because there were several potential benefits, such as possible inheritance or other death benefits, that could flow to the child, but not to her mother, if the defendant's paternity were established. Issue preclusion was not applicable, both because the child was not a party to the divorce proceeding and also because the issue of the child's paternity was not actually litigated in the divorce proceeding.[158]

The Oklahoma Supreme Court also analyzed the doctrine of issue preclusion in *National Diversified Business Services, Inc. v. Corporate Fin. Opportunities, Inc.*[159] Both of the actions that the plaintiff brought against the defendants arose out of a written brokerage agreement between the parties. The plaintiff alleged claims for breach of contract and fraud in its first action, which was filed in an Oklahoma state court. The trial court granted the defendant's motion to dismiss without prejudice on account of a forum selection clause in the contract, which required actions on the contract to be filed in Texas.[160] In the second action, which was also filed in an Oklahoma state court, the plaintiff changed its theory from fraud and breach of contract to statutory violations of the Oklahoma Business Opportunity Sales Act and added two of the original defendant's agents as parties, but it alleged many of the same facts and sought the same relief as in the first suit.[161] The Supreme Court ruled that the second

154. *See id.* at ¶30, 932 P.2d at 1097.
155. 1997 OK 102, 944 P.2d 312.
156. *See id.* at ¶17, 944 P.2d at 318.
157. *See id.* at ¶22, 944 P.2d 319.
158. *See id.* at ¶18, 944 P.2d at 318.
159. 1997 OK 36, 946 P.2d 662.
160. *See id.* at ¶4, 946 P.2d at 664.
161. *See id.* at ¶17, 946 P.2d at 668.

action was barred by issue preclusion. It held that the trial court's decision in the first action that the forum selection clause required dismissal was binding in the second action, even though the earlier dismissal was without prejudice. If the plaintiff wanted to overturn the dismissal it should have filed an appeal, rather than filing a second action arising from the contract that alleged a different theory of liability but sought the same relief.[162]

VIII. APPELLATE PROCEDURE

The most notable developments concerning appellate procedure during the past year concerned the giving of notice of the filing of a judgment to the parties to an action. The date of the filing of a judgment is significant under the Judgments Act,[163] because the time for filing appeals[164] and post-trial motions[165] begins to run from this date. Prior to the statutory amendments that were made during the 1997 Legislative Session, there was no provision for the giving of notice of the filing of the judgment, except in cases that were taken under advisement, where the court was required to cause file stamped copies of the judgment to be mailed to all parties.[166] In *Bushert v. Hughes*,[167] the Oklahoma Supreme Court held that an attorney who approved a judgment or appealable order had a duty to monitor the court clerk's office for the filing of the judgment because the statute had no provision that required the giving of notice of the filing.

Also, in *Joiner v. Brown*,[168] the Oklahoma Supreme Court ruled that the court clerk had a responsibility to mail file-stamped copies of judgments and appealable orders to all parties whose names and addresses were listed on the journal entry when it was filed. The court clerks in the 77 counties in Oklahoma developed different procedures to implement the *Joiner* ruling, but they experienced some practical difficulties in doing so. A series of amendments were made to the Judgments Act during the 1997 Legislative Session,[169] which provided relief for both attorneys and court clerks. These amendments require whoever prepares a judgment to see that file stamped copies are mailed to all parties, who are not in default for failure to appear, within three days after the filing and to file a proof of service.[170] The consequence of failing to mail the file stamped copies of the judgment within three days of the filing is that the time to file appeals and post-trial motions will not begin to run until

162. *See id.* at ¶14, 946 P.2d at 667.
163. OKLA. STAT. tit. 12, §§ 696.2-696.4 (Supp. 1996).
164. *See* OKLA. STAT. tit. 12, § 990A (Supp. 1996).
165. *See* OKLA. STAT. tit. 12, §§ 653 (motions for new trial), 698 (judgment notwithsdanding verdict), 1031.1 (term time motion to vacate judgment), 1038 (motion to vacate judgment) (Supp. 1996).
166. *See* OKLA. STAT. tit. 12, §§ 696.2B (Supp. 1996) (amended 1997).
167. 1996 OK 21, 912 P.2d 334.
168. 1996 OK 112, 925 P.2d 888.
169. Act of April 15, 1997, ch. 102, §§ 1-7, 1997 Okla. Sess. Laws 320, 320-28.
170. *See* OKLA. STAT. tit. 12, § 696.2 (Supp. 1997), Act of April 15, 1997, ch. 102, § 2, 1997 Okla. Sess. Laws 320, 321-22.

the mailing is done.[171]

Under section 994 of title 12,[172] the time to appeal from a judgment does not begin to run until all the claims in the case are resolved. This statute controlled the outcome of two recent decisions of the Oklahoma Court of Civil Appeals. In *Heitman v. Brown*,[173] the trial court granted a partial summary judgment by default in an ejectment action with respect to the issue whether the parties had a common law marriage. The defendant's motion to vacate the partial summary judgment was denied. The trial court later entered judgment in favor of the plaintiff, and the defendant filed a timely appeal from the judgment. The Oklahoma Court of Civil Appeals decided that the denial of the motion to vacate the partial summary judgment was not a final appealable order.[174] Accordingly, it could review the denial of the motion to vacate in the appeal from the judgment. In *Huebert v. Prime Operating Co.*,[175] the trial court granted the defendants' summary judgment motions with respect to the plaintiffs' claims against them, but it did not dispose of a cross-claim by one defendant against another. Because the trial court had not resolved the cross-claim, the Oklahoma Court of Civil Appeals dismissed the plaintiffs' appeal of the summary judgment with respect to their claims.[176]

Bank IV v. Southwestern Bank & Trust Co.[177] was concerned with ascertaining which document constituted a judgment for purposes of commencing the thirty day time to appeal. The trial judge in the *Bank IV* case sustained a motion for summary judgment by filing a handwritten order on a minute order form on which the judge had crossed out the word "minute" and written in the word "order". A copy of the order was sent to the parties, and a journal entry of judgment was later filed. The defendant filed its petition in error more than thirty days after the filing of the judge's order but within thirty days of the filing of the journal entry of judgment. The Supreme Court decided that the appeal was timely because the filing of the judge's order was not an appealable event.[178] It reasoned that the judge's order constituted an order for the prevailing party to prepare a journal entry of judgment on account of Rule 12 of the Local Rules for Oklahoma County,[179] which requires a prevailing party to prepare a journal entry and present it to the other parties within 10 days of the ruling on a motion.[180] Thus, the time to appeal ran from the filing of the journal entry, rather than the filing of the judge's order.[181]

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171. *See, e.g.*, OKLA. STAT. tit. 12, §§ 653, 698, 990A, 1031.1 (Supp. 1997), 1997 Okla. Sess. Laws ch. 102, §§ 1, 3-7, 320, 320-27 (West).
172. OKLA. STAT. tit. 12, § 994 (Supp. 1996).
173. 1996 OK CIV APP 148, 933 P.2d 948.
174. *See id.* at ¶15, 933 P.2d at 950.
175. 1996 OK CIV APP 121, 926 P.2d 810.
176. *See id.* at ¶6, 926 P.2d at 812.
177. 1997 OK 31, 935 P.2d 323.
178. *See id.* at ¶6, 935 P.2d at 325.
179. R. 12, Rules of the Seventh Jud. Dist. (Oklahoma and Canadian Counties).
180. *See Bank IV*, 1997 OK 31, ¶11, 935 P.2d at 326.
181. *See id.* at ¶12, 935 P.2d at 326.

VIII. CONCLUSION

The most noteworthy development relating to civil procedure during the past year was probably the Oklahoma Supreme Court's adoption of the public domain citation form. While citation form is purely a formal exercise, the public domain citation system will appear in all future opinions of the Oklahoma appellate courts and will be required in all future briefs that are submitted to the appellate courts. Undoubtedly, it will spread to trial court briefs and law office memoranda in Oklahoma and eventually to the federal courts and the courts of other jurisdictions.

The statutory amendments relating to the giving of notice of the filing of judgments corrected a problem that had arisen with appellate procedure that was threatening to cause further problems at the trial court level. Because the statute did not provide for the giving of notice of the filing of judgments, some appellants were not receiving this notice, and the Oklahoma Supreme Court had issued an opinion that required the court clerks to provide this notice. The amendments shifted the responsibility for giving notice from the court clerk to the attorney or other person who filed the judgments.

Most of the cases that the Oklahoma appellate courts decided during the past year involved the application of settled legal principles. The notable exception was *YMCA v. Melson*,[182] which overruled a long standing precedent to allow discovery of a defendant's financial records in a case where the plaintiff is seeking punitive damages. Although a number of the other cases are instructive, they did not overrule any prior law or break any significant legal ground.

182. 1997 OK 81, 1997 WL 366099.