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Developments in Oklahoma Civil Procedure 1997-98

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DEVELOPMENTS IN OKLAHOMA CIVIL PROCEDURE 1997-98

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I. INTRODUCTION

The Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals issued a number of opinions during the past year that dealt with civil procedure. Two Oklahoma Supreme Court decisions[1] were concerned with aspects of procedural due process. There were also a number of cases[2] involving statutes of limitations including one case interpreting Oklahoma's savings statute,[3] which allows the refiling of an action dismissed other than on the merits. The Oklahoma Legislature, as well, made two significant changes: first, by amending the statute governing interest on judgments[4] to clarify the calculation of interest when the interest rate changes from one year to the next; second, it revised the subpoena duces tecum procedure for document production by third parties.[5] There were also several decisions concerning attorney fees[6] and interest[7] under Oklahoma law.

In a remarkable pair of decisions relating to pleading,[8] the Oklahoma Supreme Court found the trial court abused its discretion by denying motions to dismiss for failure to state a claim.[9] The Oklahoma appellate courts also issued several decisions[10] involving discovery issues. Although the courts did not articulate a

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1. *See* Nelson v. Nelson, 954 P.2d 1219 (Okla. 1998); PFL Life Ins. Co. v. Franklin, 958 P.2d 156 (Okla. 1998).

2. *See* Bruner v. Sobel, 961 P.2d 815 (Okla. 1998); Clements v. ONEOK Resources Co., 946 P.2d 1154 (Okla. 1997); Cortright v. City of Oklahoma City, 951 P.2d 93 (Okla. 1997); Purcell v. Santa Fe Minerals, Inc., 961 P.2d 188 (Okla. 1998); Hodge v. Morris, 945 P.2d 1047 (Okla. Ct. App. 1998); Garrison v. Wood, 957 P.2d 129 (Okla. Ct. App.1998); Newton v. Newton, 956 P.2d 934 (Okla. Ct. App. 1998); Pettyjohn v. Plaster, 956 P.2d 948 (Okla. Ct. App. 1998).

3. *See* OKLA. STAT. tit. 12, § 100 (1991).

4. *See id.* § 727 (Supp. 1998).

5. *See id.* § 2004.1 (Supp.1998).

6. *See* Midwest Livestock Sys. v. Lashley, 967 P.2d 1197 (Okla. 1998); Oneok, Inc. v. Ming, 962 P.2d 1286 (Okla. 1998); Alford v. Garzone, 964 P.2d 944 (Okla. Ct. App. 1998);
Ellison v. Florence, 954 P.2d 1255 (Okla. Ct. App. 1998); Fugate v. Mooney, 958 P.2d 818 (Okla. Ct. App. 1998); Musser v. Musser, 955 P.2d 744 (Okla. Ct. App. 1998).

7. *See* Baker v. Barnes, 949 P.2d 695 (Okla. Ct. App. 1997).

8. *See* Brock v. Thompson, 948 P.2d 279 (Okla. 1997); Gaylord Entertainment Co. v. Thompson, 958 P.2d 128 (Okla. 1998).

9. *See* OKLA. STAT. tit. 12, § 2012(B)(6) (1991) (governing motion to dismiss for failure to state a claim upon which related can be granted).

change in the legal standard for summary judgments, the Oklahoma Supreme Court affirmed three summary judgments in slip and fall cases.[11] Thus, while the Oklahoma Supreme Court has not adopted the federal standard for summary judgment from the *Celotex* line of cases,[12] the Supreme Court demonstrated that summary judgment may be available in particular negligence cases where the proper showing is made. There were also a number of cases[13] involving the joinder of claims and parties including three decisions dealing with the certification of class actions.[14] In addition, there were a number of cases that addressed various issues relating to trials, including the impeachment of expert witnesses,[15] cross-examination of witnesses,[16] the right to jury trial in a civil forfeiture action,[17] peremptory challenges,[18] and jury instructions.[19]

A procedural topic that received an exceptional amount of attention was claim and issue preclusion, concerning which the Oklahoma Supreme Court issued seven opinions, a record number.[20] The Oklahoma Supreme Court also overruled two of its decisions relating to civil procedure.[21] One case concerned the application of Oklahoma's dormancy statute to judgments from other states[22] and the other concerned the use of ordinary mail for the filing of an appeal.[23]

II. DUE PROCESS AND JURISDICTION

Procedural due process is a fundamental requirement of the United States and Oklahoma Constitutions that the Oklahoma Supreme Court has rigorously enforced

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10. *See* Floyd v. Ricks, 954 P.2d 131 (Okla. 1998); Hotels, Inc. v. Kampar Corp., 964 P.2d 933 (Okla. Ct. App. 1998); McCoy v. Black, 949 P.2d 689 (Okla. Ct. App. 1997).

11. *See* Pickens v. Tulsa Metro. Ministry, 951 P.2d 1079 (Okla. 1997); Weldon v. Dunn, 962 P.2d 1273 (Okla. 1998); Williams v. Tulsa Motels, 958 P.2d 1282 (Okla. 1998).

12. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

13. *See* Brandon v. Ashworth, 955 P.2d 233 (Okla. 1998); Watson v. Batton, 958 P.2d 812 (Okla. 1998); Liberty Bank & Trust Co. v. Perimeter Ctr., Ltd. Partnership, 958 P.2d 814 (Okla. Ct. App. 1998); *In re* Estate of King, 955 P.2d 756 (Okla. Ct. App. 1998); Metroplex Properties v. Oral Roberts Univ., 956 P.2d 926 (Okla. Ct. App. 1998).

14. *See* Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998); Greghol Ltd. Partnership v. Oryx Energy Co., 959 P.2d 596 (Okla. Ct. App. 1998); Mayo v. Kaiser-Francis Oil Co., 962 P.2d 657 (Okla. Ct. App. 1998).

15. *See* Holm-Waddle v. William D. Hawley, M.D., Inc., 967 P.2d 1180 (Okla. 1998); Mills v. Grotheer, 957 P.2d 540 (Okla. 1998).

16. *See* McMinn v. City of Okla. City, 952 P.2d 517 (Okla. 1997).

17. *See* State *ex rel.* Zimmerman v. One Black with Purple Trim Ford Flareside Truck, 960 P.2d 844 (Okla. Ct. App. 1998).

18. *See* Rucker v. Mid Century Ins. Co., 945 P.2d 507 (Okla. Ct. App. 1998).

19. *See* Sullivan v. Forty-Second West Corp., 961 P.2d 801 (Okla. 1998).

20. *See* Danner v. Dillard Dep't Stores, 949 P.2d 680 (Okla. 1997); Deloney *ex rel.* Deloney v. Downey, 944 P.2d 312 (Okla. 1997); Hefley v. Neely Ins. Agency, 954 P.2d 135 (Okla. 1998); Hesser v. Central Nat'l Bank & Trust Co. of Enid, 956 P.2d 864 (Okla. 1998); *In re* Estate of Sneed, 953 P.2d 1111 (Okla. 1998); Miller v. Miller, 956 P.2d 887 (Okla. 1998); National Diversified Bus. Servs., v. Corporate Fin. Opportunities, Inc., 946 P.2d 662 (Okla. 1997); *see also* Cox v. Kansas City Life Ins. Co., 957 P.2d 1181 (Okla. 1997) (discussing the effect of a judgment against two defendants).

21. *See* First of Denver Mortgage Investors v. Riggs, 692 P.2d 1358 (Okla. 1984); Rusk v. Independent Sch. Dist. No. 1 of Tulsa, 885 P.2d 1365 (Okla. 1998).

22. *See* Drillevich Constr., Inc. v. Stock, 958 P.2d 1277 (Okla. 1998).

23. *See* Whitehead v. Tulsa Pub. Sch., 968 P.2d 1211 (Okla. 1998).

over the years.[24] It continued to do so this past year in two decisions.[25] The first case, *Nelson v. Nelson*,[26] concerned an Administrative Rule of the Eleventh Judicial District that required divorcing parents with minor children to attend an educational course entitled "Helping Children With Divorce" in order to avoid losing their visitation rights. When the mother in *Nelson* served the father with a petition for divorce, the father decided not to hire an attorney or file an answer, because he believed the divorce would be settled. In the petition, the wife sought custody of the couple's two minor children with reasonable visitation rights for the husband. Nevertheless, the divorce decree, granted by default, denied the father visitation because he had not attended the course. The Oklahoma Supreme Court found a due process violation in the lack of adequate notice to the father that his visitation rights would be affected by failure to attend the course. The supreme court ordered the default judgment vacated, stressing that due process of law "begins with a party's right to notice of the pendency of an action and of *the nature of any relief sought*."[27] While the father was properly served, and had notice of the divorce proceedings and of the requirement to attend the educational course, he was not informed that he would be denied visitation for failure to attend the course, particularly since the divorce petition provided for reasonable visitation rights.

The second case, *PFL Life Insurance Co. v. Franklin*,[28] arose out of an employee's second workers' compensation claim. By the time of the second claim, the employer had a new insurer who argued that the prior insurer (who was not a party to the second proceeding) should be liable, because the second claim was attributable to the same injury for which the employee had received a prior award. The trial court awarded compensation to the claimant. On appeal, a three judge panel of the Oklahoma Court of Civil Appeals modified the award by adding a reservation of apportionable liability if the prior insurer was later joined.[29] The Oklahoma Supreme Court reversed, reasoning that the rights of the prior insurer could not be affected until it was named as a party to the instant proceeding. The panel's reservation of apportionable liability was merely an "impermissible forecast" and a "legal nullity."[30] The Oklahoma Supreme Court explained: "When only one of two successive employer's carriers stands before the court and the absent insurer lacks an opportunity to defend its interests, no legal effect may be ascribed to a tribunal's statement that 'reserves' the absent insurer's potential liability."[31] In other words, the requirements of due process do not allow a court to assert authority over an entity that is not before it. If the prior insurer were later to be joined as a party, the trial court would have authority to allocate liability between the two insurers.[32]

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24. *See* Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968).
25. *See* Nelson v. Nelson, 954 P.2d 1219 (Okla. 1998); PFL Life Ins. Co. v. Franklin, 58 P.2d 156 (Okla. 1998).
26. 954 P.2d 1219 (Okla. 1998).
27. *Id.* at 1227 (emphasis in original).
28. 958 P.2d 156 (Okla. 1998).
29. *See id.* at 158.
30. *Id.* at 161.
31. *Id.*
32. *See id.* at 165.

The Oklahoma Court of Civil Appeals handed down three decisions[33] involving jurisdiction of the small claims court. Title 12, section 1751(A) of the Oklahoma Statutes[34] provides for small claims court jurisdiction over actions based on contract or tort for the recovery of up to $4,500, exclusive of costs and attorney fees. In *Patterson v. Beall*,[35] the Oklahoma Court of Civil Appeals ruled that the small claims jurisdiction included violations of the Oklahoma Consumer Protection Act and in *Phillips v. Seffel*,[36] the Oklahoma Court of Civil Appeals decided that small claims jurisdiction covered a suit for the recovery of earnest money for breach of contract. Finally, in *Fowler Equipment Co. v. Harry Houston Oil Co.*,[37] the Oklahoma Court of Civil Appeals decided that the increase in 1995 in the jurisdictional amount for small claims court from $2,500 to $4,500 applied to pending cases.

III. STATUTES OF LIMITATIONS

A number of cases decided by the Oklahoma appellate courts involved statute of limitations issues. The most interesting and significant of these was *Bruner v. Sobel*,[38] which was concerned with the savings provision in section 100 of the Oklahoma Statutes.[39] Section 100 allows a plaintiff who has been dismissed from a previous action other than on its merits to commence a new action within one year of the dismissal.[40] The trial court in the *Bruner* case decided that the plaintiff's second action was barred by the statute of limitations even though it was filed within one year of the dismissal of the original action, since the original statute of limitations had not expired at the time of the dismissal of the original action. The trial court's decision was based on case law that required the original statute of limitation to have expired when the original action was dismissed.[41] The Oklahoma Supreme Court reversed, noting a 1975 amendment to Section 100 which had removed that limitation.[42] Thus, Oklahoma's one year savings statute applies even if there is still time remaining on the statute of limitations when the original action was dismissed.

The Oklahoma Court of Civil Appeals also decided a case involving section

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33. *See* Fowler Equip. Co. v. Harry Houston Oil Co., 945 P.2d 513 (Okla. Ct. App. 1997); Patterson v. Beall, 947 P.2d 617 (Okla. Ct. App. 1997); Phillips v. Seffel, 954 P.2d 1257 (Okla. Ct. App. 1998).

34. OKLA. STAT. tit. 12, § 1751 (1991).

35. 947 P.2d 617 (Okla. Ct. App. 1997).

36. 954 P.2d 1257 (Okla. Ct. App. 1998).

37. 945 P.2d 513 (Okla. Ct. App. 1997).

38. 961 P.2d 815 (Okla. 1998).

39. *See* OKLA. STAT. tit. 12, § 100 (1991).

40. *See id.*

> If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Id.

41. *See Bruner*, 961 P.2d at 817.

42. *See id.* at 817-18.

100. In *Pettyjohn v. Plaster*,[43] it held that the dismissal of the previous action for failure to state a claim was a judgment on the merits. The Court of Civil Appeals noted that the phrase "on the merits" has been generally understood to refer to the substance of a claim or defense, as opposed to purely procedural or technical grounds. Because a dismissal for failure to state a claim was a decision as to the law applicable to the case as disclosed in the plaintiff's petition, it constituted a judgment on the merits. Consequently, the plaintiff could not rely on section 100 to avoid the running of the statute of limitations.

In many cases, a dismissal or summary judgment may be appropriate because no factual issue exists concerning a statute of limitations defense. In others, issues of fact require a trial. For example, in *Cortright v. City of Oklahoma City*,[44] a fact at issue was whether the beginning of the 180 day limitation period for the filing of a tort claims suit was extended by the written agreement of the parties.[45] The Oklahoma Supreme Court, accordingly, reversed the trial court's dismissal of the case. Similarly, the Oklahoma Supreme Court reversed the trial court's dismissal on statute of limitations grounds in *Clements v. ONEOK Resources Co.*,[46] because an issue of fact concerning the statute of limitations was presented. Even though the statutory period had expired, the plaintiffs' allegation that the defendants had knowingly concealed their failure to pay oil and gas royalty payments had the effect of tolling the statute of limitation until the plaintiffs learned of the defendants' misconduct.[47] As a result, the plaintiffs raised an issue of fact upon which they should have been allowed to conduct discovery.[48]

Purcell v. Santa Fe Minerals, Inc.[49] concerned the classification of a claim for purposes of a statute of limitations. The plaintiff in *Purcell* was a lessor of mineral interests who brought an action against the lessee to recover underpaid royalties along with prejudgment interest. The lessee, arguing that the claim for prejudgment interest arose out of an oil and gas statute providing for prejudgment interest at twelve percent for unpaid royalties,[50] maintained that the suit was barred by one of two statutes. The statutes were: (1) the three year statute of limitations for an action upon a statutorily-created liability, in the second paragraph of title 12, section 95 of the Oklahoma Statutes,[51] or (2) the one year statute of limitations for an action upon a statute for a penalty codified in the fourth paragraph of the same section.[52] The trial court disagreed, however, and it applied the five year statute of limitations for breach of a written contract in the first paragraph of that same section.[53] The Oklahoma Supreme Court affirmed, reasoning that the basis of the lessee's claim was

43. 956 P.2d 948 (Okla. Ct. App. 1998).
44. 951 P.2d 93 (Okla. 1997).
45. *See id.* at 97.
46. 946 P.2d 1154, 1156 (Okla. 1997).
47. *See id.* at 1155-56.
48. *See id.* at 1156.
49. 961 P.2d 188 (Okla. 1998).
50. *See* OKLA. STAT. tit. 52, § 570.10 (1992).
51. OKLA. STAT. tit. 12, § 95 (1991).
52. *Id.*
53. *See Purcell*, 961 P.2d at 189.

the oil and gas lease, rather than the statute, which merely supplied a measure of damages for the lessee's breach of contract.[54]

Garrison v. Wood[55] also involved choosing a proper statute of limitations. The plaintiff in *Garrison*, within one year of his eighteenth birthday, brought an action against his father to establish paternity and to recover back child support. The father argued that the claim for child support was barred by the seventh paragraph of title 12, section 95 of the Oklahoma Statutes,[56] which requires an action to enforce a support obligation to be brought before the child reaches the age of eighteen. The plaintiff contended that the statute of limitations was tolled by section 96 of that title, which permits a child to bring an action within one year after reaching majority. Though the trial court ruled in the plaintiff's favor, the Oklahoma Court of Civil Appeals reversed, holding that the statute specifically concerning actions for child support controlled over the general tolling provision in section 96.[57]

The equitable defense of laches was examined in *Newton v. Newton*.[58] The *Newton* case arose out of an action to collect back child support. The plaintiff, filing the action after her new husband had formally adopted the child, sought child support for the period before the adoption. In response to the defendant's argument that the claim should have been barred by laches, the Oklahoma Court of Civil Appeals noted that laches requires an unreasonable delay in enforcing a claim resulting in material prejudice to the defendant.[59] Since there was no evidence of prejudice to the defendant, the appellate court rejected the defense of laches.

In *Hodge v. Morris*,[60] the Oklahoma Court of Civil Appeals held that a plaintiff's claim against a third-party defendant must be filed within the normal limitations period. The plaintiff brought a slip and fall action against the property owner, who in turn asserted a third-party claim against a craftsman who had been laying carpet where the plaintiff was injured. After the trial court granted the defendant's motion for summary judgment, the third-party defendant moved for summary judgment on the ground that any claim that the plaintiff may have had against the third-party was barred by the statute of limitations. The trial court granted summary judgment to the third-party defendant, and the Oklahoma Court of Civil Appeals affirmed. The appellate court ruled that the plaintiff was required to assert a claim against the third-party defendant in order to proceed against it, and the plaintiff could not amend the original petition to add the claim against the third-party defendant after the statute of limitation had run unless the requirements in title 12, section 2015(C) of the Oklahoma Statutes[61] were satisfied.[62]

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54. *See id.* at 193-94.
55. 957 P.2d 129 (Okla. Ct. App.1998).
56. OKLA. STAT. tit. 12, § 95 (1991).
57. *See Garrison*, 957 P.2d at 130.
58. 956 P.2d 934 (Okla. Ct. App. 1998).
59. *See id.* at 936.
60. 945 P.2d 1047 (Okla. Ct. App. 1998).
61. OKLA. STAT. tit. 12, § 2015(C) (Supp. 1998).
62. *See Hodge*, 945 P.2d at 1050.

IV. ATTORNEY FEES AND INTEREST

Several cases[63] from the past year concerned Oklahoma's numerous attorney fee provisions. The decisions included discussions of entitlement to attorney fees under various statutes.[64] Also among the issues addressed were whether opposing parties may both be entitled to attorney fees as prevailing parties,[65] the equitable doctrine of marshaling,[66] the constitutionality of a one-way attorney fee provision,[67] and the authority of a court to order reimbursement of attorney fees that had been incorrectly awarded.[68] In addition, there was one case on the calculation of interest.[69] Finally, title 12, section 727 of the Oklahoma Statutes,[70] the statute that governs the award of interest on judgments in Oklahoma state courts, was significantly amended.

The Oklahoma Supreme Court, in *Oneok, Inc. v. Ming*,[71] analyzed title 12, section 936 of the Oklahoma Statutes, which provides for the award of attorney fees to the prevailing party in actions on contracts for labor or services.[72] After successfully defending a federal court action to recover a proportionate share of drilling costs in connection with a pooling order on a drilling and spacing unit, the defendant sought attorney fees under section 936. The trial court denied the defendant's motion for attorney fees. On appeal, the Tenth Circuit certified the question to the Oklahoma Supreme Court[73] pursuant to the Oklahoma certification statute.[74] The Supreme Court ruled that the defendant was entitled to attorney fees under section 936 because the underlying action had been brought to collect for labor or services under two contracts that the federal trial court had determined to be invalid.[75]

In *Midwest Livestock Sys., Inc. v. Lashley*,[76] the Oklahoma Supreme Court reaffirmed the principle that both parties may be entitled to an award of attorney fees. *Midwest Livestock* was a construction dispute, in which the property owner successfully sued the contractor for breach of contract, while the contractor, in turn, foreclosed its mechanic's lien. Finding that each party had prevailed on its respective claim, the Oklahoma Supreme Court ruled that each was entitled to an award of

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63. *See* Midwest Livestock Sys. v. Lashley, 967 P.2d 1197 (Okla. 1998); Oneok, Inc. v. Ming, 962 P.2d 1286 (Okla. 1998); Alford v. Garzone, 964 P.2d 944 (Okla. Ct. App. 1998); Ellison v. Florence, 954 P.2d 1255 (Okla. Ct. App. 1997); Fugate v. Mooney, 958 P.2d 818 (Okla. Ct. App. 1998); Musser v. Musser, 955 P.2d 744 (Okla. Ct. App. 1997).

64. *See* Oneok, Inc. v. Ming, 962 P.2d 1286 (Okla. 1998); Ellison v. Florence, 954 P.2d 1255 (Okla. Ct. App. 1997).

65. *See* Midwest Livestock Sys. v. Lashley, 967 P.2d 1197 (Okla. 1998).

66. *See* Fugate v. Mooney, 958 P.2d 818 (Okla. Ct. App. 1998).

67. *See* Alford v. Garzone, 964 P.2d 944 (Okla. Ct. App. 1998).

68. *See* Musser v. Musser, 955 P.2d 744 (Okla. Ct. App. 1997).

69. *See* Baker v. Barnes, 949 P.2d 695 (Okla. Ct. App. 1997).

70. OKLA. STAT. tit. 12, § 727 (Supp. 1998).

71. 962 P.2d 1286, 1288-89 (Okla. 1998).

72. OKLA. STAT. tit. 12, § 936 (1998).

73. *See Oneok, Inc.*, 962 P.2d at 1287.

74. *See* OKLA. STAT. tit. 20, § 1602 (1991).

75. *See Oneok, Inc.*, 962 P.2d at 1288.

76. 967 P.2d 1197 (Okla. 1998).

attorney fees from the other.[77]

The Oklahoma Court of Civil Appeals in *Fugate v. Mooney*[78] applied the equitable doctrine of marshaling with respect to satisfying attorney, physician and hospital liens. The plaintiffs recovered the policy limits of $25,000 from the defendant's liability insurance, and the policy limits of $35,000 from their uninsured/underinsured motorist ("UM") insurance. The plaintiffs' medical bills were in excess of these amounts, and their recovery was also subject to an attorney's lien of 35% of the recovery. Both the proceeds of the liability and the UM coverage were subject to the attorney's lien, but only the liability insurance proceeds were subject to the physician's and hospital's liens for the medical bills. In addition, the attorney's lien was senior to the physician's and hospital liens. The doctrine of marshaling applies to cases where a senior lienholder has liens on two funds, and it requires the senior lienholder to enforce its lien first against a fund in which a junior lienholder has no interest, before resorting to the fund in which they both have interests.[79] This enables the junior lienholder's interest to be maximized without affecting the senior lienholder's interest. In the *Fugate* case, the attorney's lien was fully satisfied out of the UM proceeds so that the entire amount of the liability proceeds could be applied to the physician's and hospital liens.

The Oklahoma Court of Civil Appeals upheld a one-way attorney fees provision against a constitutional challenge in *Alford v. Garzone*.[80] *Alford* dealt with the Protection from Domestic Abuse Act,[81] which authorizes an award of attorney fees if a domestic protective order is granted.[82] After a protective order was denied, the trial court awarded the defendant attorney fees, but the Oklahoma Court of Civil Appeals reversed on the ground that the statute provided for an award of attorney fees only if a protective order was granted. The defendant argued that limiting an award of attorney fees to successful plaintiffs would violate the Equal Protection clause of the Fourteenth Amendment. Applying a strict scrutiny standard, the appellate court decided that the one-way attorney fee provision was rationally based because "[i]t encourages victims [of domestic abuse] to pursue their legal remedies in court without the threat of attorney fees being awarded should an order not be entered."[83]

An apparent conflict between two statutes was resolved by the Oklahoma Court of Appeals in *Ellison v. Florence*.[84] After obtaining a verdict for damages to timber under title 23, section 72 of the Oklahoma Statutes,[85] the plaintiffs sought attorney fees under title 12, section 940[86] which provides for an award of attorney fees in an

77. *See id.* at 1199.
78. 958 P.2d 818 (Okla. Ct. App. 1998).
79. *See id.* at 819.
80. 964 P.2d 944 (Okla. Ct. App. 1998).
81. OKLA. STAT. tit. 22, §§ 60.1-60.11 (Supp. 1998).
82. *See id.* § 60.4(D)(7).
83. *Alford*, 964 P.2d at 948.
84. 954 P.2d 1255 (Okla. Ct. App. 1997).
85. OKLA. STAT. tit. 23, § 72 (1991).
86. OKLA. STAT. tit. 12, § 940 (1991).

action to recover damages for negligent or willful injury to property.[87] The defendant argued that the specific statute on timber, which did not provide for an award of attorney fees, should prevail over the general attorney fees statute.[88] The appellate court ruled that the two statutes could be interpreted in harmony with each other by allowing attorney fees to be awarded under the general attorney fees statute because the specific statute on timber did not address the subject of attorney fees.[89] It therefore decided that the plaintiffs were entitled to an award of attorney fees.[90]

In *Musser v. Musser*,[91] the Oklahoma Court of Civil Appeals decided that a trial court had the authority to order reimbursement of attorney fees. After an award of attorney fees in connection with a divorce was reversed on appeal, the party who prevailed on the appeal filed an application for the return of fees that had previously been paid. The trial court denied the request on the grounds that it did not have jurisdiction over the attorney, because he was not a party. The Oklahoma Court of Civil Appeals reversed. It concluded that if a court had the power to order payment of attorney fees, it also had the power to order repayment of the attorney fees if the attorney fee award was reversed on appeal.[92]

The Oklahoma Court of Civil Appeals ruled in *Baker v. Barnes*,[93] that the defendant in a personal injury case was entitled to a credit for prior payments to the plaintiff before pre- and post-judgment interest on a judgment were calculated. After a jury returned a verdict for $200,000, the trial judge deducted payments of nearly $50,000 from the verdict before calculating pre- and post-judgment interest.[94] Following *Landrum v. National Union Ins. Co.*,[95] the Oklahoma Court of Appeals affirmed.[96] As the supreme court noted in *Landrum*, allowing the plaintiff to receive interest on money that the plaintiff had already received would give the plaintiff a windfall.[97]

The 1997 amendments to title 12, section 727 of the Oklahoma Statutes[98] resolved an issue concerning the calculation of interest on judgments on which the Oklahoma Court of Civil Appeals had been divided.[99] Since 1986, the interest rate on judgments has been tied to the interest paid on United States Treasury Bills, which has varied from year to year.[100] Before the 1997 amendments, the statute was unclear

87. *See Ellison*, 954 P.2d at 1256.
88. *See id.* at 1256.
89. *See id.* at 1256.
90. *See id.* at 1257.
91. 955 P.2d 744 (Okla. Ct. App. 1997).
92. *See id.* at 747.
93. 949 P.2d 695 (Okla. Ct. App. 1997).
94. *See id.* at 696.
95. 912 P.2d 324 (Okla. 1996).
96. *See Baker*, 949 P.2d at 697.
97. *See Landrum*, 912 P.2d at 329-30.
98. OKLA. STAT. tit. 12, § 727 (Supp. 1998).
99. *Compare* Bohnefeld v. Haney, 931 P.2d 90 (Okla. Ct. App. 1996) (different interest rates apply to each year from the date of the filing of the action to the verdict) and Burwell v. Oklahoma Farm Bureau Mut. Ins. Co., 896 P.2d 1195 (Okla. Ct. App.1995) (same) *with* McMullen v. Stevens, 895 P.2d 302 (Okla. Ct. App.1995) (interest rate in effect at the time of the verdict applies to all of the years from the filing of the action to the verdict).
100. *See* OKLA. STAT. tit. 12, § 727 (Supp. 1998) (Notice re: Interest on Judgments).

which interest rate should be used if interest accrued on a judgment in more than a single year.[101] The 1997 amendments clarify that interest is to be compounded each year so that the rate of interest on a judgment will vary from year to year as the applicable rate changes.[102]

The 1997 amendments also specify that post-judgment interest begins to accrue and prejudgment interest stops accruing when "the judgment is rendered."[103] Because there may be ambiguity associated with determining the date of rendition of a judgment, the Civil Procedure Committee of the Oklahoma Bar Association has proposed another amendment to title 12, section 727.[104] Under the Committee's proposal, the date when post-judgment interest begins to accrue and pre-judgment interest stops accruing would be the date of filing of the judgment, unless the judgment expressly states that the operative date is the date the judgment is rendered.[105]

V. PLEADING, DISCOVERY AND SUMMARY JUDGMENT

There were a variety of developments concerning the topics of pleading, discovery and summary judgment, which comprise the pretrial phase of the litigation process. The Oklahoma Supreme Court ruled in two cases[106] that the trial court abused its discretion by denying motions to dismiss for failure to state a claim upon which relief can be granted. The supreme court also found another trial court to have abused its discretion by denying any discovery to a plaintiff on the grounds that the case was frivolous.[107] The Oklahoma Court of Civil Appeals examined the payment of expert witness fees in connection with discovery in one case[108] and the standards for entering a default judgment as a discovery sanction in another case.[109] Lastly, the

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101. *See* cases cited *supra* note 99.

102. *See* OKLA. STAT. tit. 12, §727 (Supp. 1998).

103. *Id.*

> C. The postjudgment interest authorized by subsection A or subsection B of this section shall accrue from the date as of which the judgment is rendered, irrespective of the date as of which the judgment is filed with a court clerk or with a county clerk, and shall initially accrue at the rate in effect for the calendar year during which the judgment is rendered until the end of the calendar year in which the judgment was rendered, or until the judgment is paid, whichever first occurs.

Id.

104. *See OBA Resolutions for 1999 OBA Legislative Program*, 69 Okla. B.J. 3740, 3745-47 (1998).

105. *See id.* at 3747.

> C. The postjudgment interest authorized by subsection A or subsection B of this section shall accrue from the earlier of the date ~~as of which~~ the judgment is rendered; as expressly stated in the judgment or ~~irrespective of~~ the date ~~as of which~~ the judgment is filed with ~~a~~ the court clerk ~~or with a county clerk~~, and shall initially accrue at the rate in effect for the calendar year during which the judgment is rendered until the end of the calendar year in which the judgment was rendered, or until the judgment is paid, whichever first occurs.

Id.

106. *See* Brock v. Thompson, 948 P.2d 279 (Okla. 1997); Gaylord Entertainment Co. v. Thompson, 58 P.2d 128 (Okla. 1998).

107. *See* Floyd v. Ricks, 954 P.2d 131 (Okla. 1998).

108. *See* McCoy v. Black, 949 P.2d 689, 693-94 (Okla. Ct. App. 1997).

109. *See* Hotels, Inc. v. Kampar Corp., 964 P.2d 933, 935 (Okla. Ct. Civ. App. 1998).

Oklahoma Supreme Court issued three opinions affirming summary judgments,[110] in two of which[111] Justice Opala argued in dissent that the granting of summary judgment violated the right to jury trial under the Oklahoma Constitution.

The Oklahoma Supreme Court made a dramatic point regarding motions to dismiss in two related decisions, *Brock v. Thompson*,[112] and *Gaylord Entertainment Co. v. Thompson*.[113] Motions to dismiss for failure to state a claim are generally disfavored under the liberal notice pleading standard in the Oklahoma Pleading Code.[114] Nevertheless, the Oklahoma Supreme Court decided that it was an abuse of discretion for the trial court in the two *Thompson* cases to deny the motions to dismiss. The *Thompson* cases arose out of lawsuits brought by the same two plaintiffs in Creek County that attempted to allege defamation claims against the defendants for letters and newspaper articles in which the defendants advocated the adoption of initiative measures concerning tort reform.[115] The Oklahoma Supreme Court granted writs of prohibition in the cases to arrest further proceedings in the trial court because of the failure to state a claim for various constitutional and other reasons. Noting that a writ of prohibition is not usually granted for denial of a motion to dismiss,[116] the supreme court decided that it was appropriate where an appeal would not be adequate to protect "against the chilling effect of a civil action on fundamental political freedom."[117]

The Oklahoma Court of Civil Appeals reversed an award of sanctions under title 12, section 2011[118] against the plaintiff in *Grazier v. First National Bank of Nowata*.[119] The appellate court decided that the trial court abused its discretion because the order imposing sanctions did not specify the conduct that warranted sanctions or explain how it determined the amount of the sanctions.[120]

In addition to several cases[121] dealing with discovery issues during the past year, an amendment was passed to the provision in title 12, section 2004.1[122] for the production of documents from third parties by subpoena duces tecum. Since 1993, section 2004.1 has authorized attorneys to obtain document production from third parties without having to go through the deposition of a custodian of records or other witnesses. Although the statute provided for notice of the subpoena to all parties, in some instances documents have been produced by third parties before opposing

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110. *See* Pickens v. Tulsa Metro. Ministry, 951 P.2d 1079 (Okla. 1997); Weldon v. Dunn, 962 P.2d 1273 (Okla. 1998); Williams v. Tulsa Motels, 958 P.2d 1282 (Okla. 1998).

111. *See* Weldon v. Dunn, 962 P.2d 1273, 1278 (Okla. 1998); Williams v. Tulsa Motels, 958 P.2d 1282, 1285-86 (Okla. 1998).

112. 948 P.2d 279 (Okla. 1997).

113. 958 P.2d 128 (Okla. 1998).

114. *See* Indiana Nat'l Bank v. State Dep't of Human Servs., 880 P.2d 371, 375-76 (Okla. 1994)("Motions to dismiss are generally viewed with disfavor under this liberal standard . . . .").

115. *See Brock*, 948 P.2d at 282-83; *Gaylord*, 958 P.2d at 135.

116. *See* 958 P.2d at 136.

117. *Id.* at 150.

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

119. 964 P.2d 950 (Okla. Ct. App. 1998).

120. *See id.* at 954.

121. *See* Floyd v. Ricks, 954 P.2d 131 (Okla. 1998); Hotels, Inc. v. Kampar Corp., 964 P.2d 933 (Okla. Ct. App. 1998); McCoy v. Black, 949 P.2d 689 (Okla. Ct. App. 1997).

122. OKLA. STAT. tit. 12, § 2004.1 (b)(1) (Supp. 1998).

parties had an opportunity to assert objections based on privilege, such as the physician-patient privilege. The 1998 amendment to section 2004.1 seeks to prevent this from occurring by requiring any subpoena for document production without a deposition to specify a date for production that is at least seven days after the date of service of copies of the subpoena on the witness and all parties.[123] In addition, the subpoena must include language advising the third party not to produce the documents before the specified date so that the opposing party can have an opportunity to object to the document production.

Concerning other discovery issues, the Oklahoma Supreme Court reversed the trial court for denying the plaintiff any discovery in *Floyd v. Ricks*.[124] The plaintiff filed an action for breach of contract and bad faith failure to pay a claim against her uninsured motorist insurer. The plaintiff served interrogatories and document requests on the insurer, and sought to depose the insurer's claims adjuster. The insurer objected to the written discovery requests, filing a motion to quash the deposition notice on the grounds that the lawsuit was frivolous because the plaintiff's alleged tortfeasor had liability insurance that was significantly greater than the plaintiff's injuries. Without allowing the plaintiff to conduct any discovery, the trial court granted summary judgment for the insurer. In ruling that the trial court abused its discretion in denying the plaintiff's discovery, the Oklahoma Supreme Court stated that the Oklahoma Discovery Code did not permit a defendant to refuse all discovery requests on the grounds that a lawsuit is frivolous, and it ruled that the trial court abused its discretion in denying the plaintiff's discovery.[125]

In *McCoy v. Black*,[126] the Oklahoma Court of Civil Appeals discussed several issues involving expert witnesses. The expert witness in *McCoy* was a clinical social worker, who had been designated by the plaintiff to testify at trial and had also provided some therapeutic treatment to the plaintiff. After the defendant took the social worker's deposition, the defendant refused to pay for her time spent in preparation for and the taking of her deposition on the ground that her opinions were not expert work product because they were not developed in preparation for trial. The appellate court acknowledged that an expert whose opinions are based on facts gathered in the course of treatment, rather than in preparation for trial, is not considered an expert under title 12, section 3226(B)(3).[127] It affirmed the trial court's finding, however, that the social worker in the case before it was a hybrid expert, whose opinions were based both on facts gathered in the course of treatment and information obtained in preparation for trial.[128] Because the social worker was a hybrid expert, it was appropriate for the trial court to order the defendant to pay her expert witness fees.

A default judgment that was entered as a discovery sanction against a *pro se*

123. *See id.*
124. 954 P.2d 131 (Okla. 1998).
125. *See id.* at 134.
126. 949 P.2d 689 (Okla. Ct. App. 1997).
127. OKLA. STAT. tit. 12, § 3226(B)(3).
128. *See McCoy*, 949 P.2d at 694.

defendant was reversed in *Hotels, Inc. v. Kampar Corporation.*[129] Stating that granting a default judgment should be a method of last resort, the Oklahoma Court of Civil Appeals listed the following five factors that a trial court should consider before imposing the ultimate sanction for a discovery violation: (1) whether the violation was due to bad faith; (2) prejudice to the opposing party; (3) whether the party was given a warning that a discovery violation could lead to a default judgment; (4) whether less drastic sanctions were considered or ordered before the default judgment; and (5) the amount of interference with the judicial process that the discovery violation caused.[130] The appellate court determined after weighing these factors that the trial court abused its discretion in ordering the default judgment.

The Oklahoma Supreme Court affirmed several summary judgments in slip and fall cases.[131] The basis for summary judgment in all three cases was that the dangerous conditions causing the plaintiffs' injuries were open and obvious as a matter of law. Justice Opala wrote lengthy dissents in *Weldon v. Dunn*[132] and *Williams v. Tulsa Motels,*[133] in which he argued that the summary judgments in those cases violated the right to jury trial under the Oklahoma Constitution.

Summary judgment was reversed in *Russell v. Board of County Commissioners,*[134] a breach of employment contract action brought by a number of deputy sheriffs to recover overtime and holiday pay. The Oklahoma Supreme Court ruled that whether the personnel policy handbook created an enforceable contract for overtime and holiday pay was an issue of fact that precluded summary judgment.

Summary judgment was also reversed in *Johnson v. The Black Chronicle, Inc.,*[135] a defamation case brought by a public figure against a newspaper. The Oklahoma Court of Civil Appeals emphasized that the party who moves for a summary judgment has the burden of proving that there are no issues of fact. The appellate court concluded: "Even where a trial judge believes a directed verdict is required, the judge should ordinarily hear the evidence and direct a verdict rather than attempt to try the case in advance on a motion for summary judgment."[136]

VI. JOINDER OF CLAIMS AND PARTIES

A number of cases presented procedural issues involving the joinder of claims and the proper parties to an action. These included cases on compulsory

129. 964 P.2d 933, 934 (Okla. Ct. App. 1998).
130. *See id.* at 935-36.
131. *See* Pickens v. Tulsa Metropolitan Ministry, 951 P.2d 1079 (Okla. 1997); Weldon v. Dunn, 962 P.2d 1273 (Okla. 1998); Williams v. Tulsa Motels, 958 P.2d 1282 (Okla. 1998).
132. 962 P.2d 1273, 1278-84 (Okla. 1998) (Opala, J., dissenting).
133. 958 P.2d 1282, 1285-93 (Okla. 1998) (Opala, J., dissenting).
134. 952 P.2d 492 (Okla. 1997).
135. 964 P.2d 924 (Okla. Ct. App. 1998).
136. *Id.* at 929.

counterclaims,[137] standing,[138] misjoinder of claims,[139] indispensable parties,[140] substitution of parties[141] and class actions.[142]

In *Metroplex Properties, L.L.C. v. Oral Roberts University*,[143] the Oklahoma Court of Civil Appeals affirmed a trial court ruling that a number of tort claims against one defendant were barred, because they should have been asserted as compulsory counterclaims against that defendant in an earlier action in federal court. The defendant had previously brought a declaratory relief action against the plaintiff in which the defendant had obtained a declaration that the plaintiff had failed to exercise an option to purchase certain real estate owned by the defendant.[144] The plaintiff then filed its state court action alleging that the defendant failed to provide various documents to the plaintiff during the option period. Finding that the claims in the second action arose out of the same transaction that was the subject of the prior federal court action, the Court of Civil Appeals held that they were compulsory counterclaims which were barred under Rule 13 of the Federal Rules of Civil Procedure.[145]

The Oklahoma Supreme Court examined the issue of taxpayer standing in *Brandon v. Ashworth*.[146] When their school district voted to rehire its school superintendent and entered into a contract with him, a group of taxpayers challenged the contract as void under the Oklahoma Constitution.[147] The first issue that was addressed was the standing of the taxpayers to bring the action. Following a long line of precedents,[148] the Oklahoma Supreme Court held in *Brandon v. Ashworth* that a taxpayer had standing to bring a declaratory relief action concerning the validity of a superintendent's contract with a school district.[149] After deciding that the taxpayers had standing, the supreme court then went on to rule against them on the merits by holding that the contract with the school superintendent was not in violation of the Oklahoma Constitution.[150]

The Oklahoma Court of Civil Appeals addressed the appropriate remedy for misjoinder of parties in *Watson v. Batton*.[151] The plaintiff asserted claims against two defendants that arose out of two unrelated auto accidents which occurred six months apart. The trial court found misjoinder of parties and dismissed the action.

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137. *See* Metroplex Properties, L.L.C. v. Oral Roberts Univ., 956 P.2d 926 (Okla. Ct. App. 1998).
138. *See* Brandon v. Ashworth, 955 P.2d 233 (Okla. 1998).
139. *See* Watson v. Batton, 958 P.2d 812 (Okla. 1998).
140. *See* Liberty Bank & Trust Co. v. Perimeter Ctr. Ltd. Partnership, 958 P.2d 814 (Okla. Ct. App. 1998).
141. *See In re* Estate of King v. Gilbert, 955 P.2d 756 (Okla. Ct. App. 1998).
142. *See* Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998); Greghol Ltd. Partnership v. Oryx Energy Co., 959 P.2d 596 (Okla. Ct. App. 1998); Mayo v. Kaiser-Francis Oil Co., 962 P.2d 657 (Okla. Ct. App. 1998).
143. 956 P.2d 926 (Okla. Ct. App. 1998).
144. *See id.* at 928.
145. *See id.* at 930.
146. 955 P.2d 233 (Okla. 1998).
147. *See id.* at 235.
148. *See,e.g.*, Coleman v. Miller, 307 U.S. 433, 445 (1939); Frothingham v. Mellon, 262 U.S. 447, 480 (1923).
149. *See* Brandon, 955 P.2d at 235.
150. *See id.* at 238.
151. 958 P.2d 812 (Okla. Ct. App. 1998).

The appellate court agreed that the parties were improperly joined in one action, because the claims against them arose out of two separate accidents. The Oklahoma Court of Civil Appeals, reversing the dismissal, ruled that the proper remedy was severance and directed the trial court to proceed separately with two actions.

An indispensable party issue arose in *Liberty Bank & Trust Co. of Oklahoma City, N.A. v. Perimeter Center Ltd. Partnership.*[152] Applying the criteria for an indispensable party under title 12, section 2019,[153] the Oklahoma Court of Civil Appeals held that Oklahoma City was an indispensable party in a declaratory relief action which involved the interpretation of a planned unit development that had been approved by the city council.

The case of *In re Estate of King v. Gilbert*[154] highlighted an important distinction between a conservator and a guardian. While a guardian may sue in his own name without joining the ward under title 12, section 2017(A) of the Oklahoma Statutes,[155] a conservator may not be substituted for a ward who is not incompetent and is the real party in interest.

Three cases[156] involved the Oklahoma class action statute, title 12, section 2023[157] which is modeled after Federal Rule of Civil Procedure 23. In two of the cases,[158] the trial courts certified class actions under subparagraph (B)(3) of section 2023. In the third case,[159] the trial court denied certification. In all three cases, the appellate courts found no abuse of discretion.

Black Hawk Oil Co. v. Exxon Corporation,[160] was brought on behalf of a class of natural gas producers against a plant that purchased natural gas from them and extracted various by-products from the natural gas. The plaintiffs alleged that the operator of the plant violated its contracts with the class members by collecting and selling scrubber oil from the natural gas without accounting for it to them. The Oklahoma Supreme Court analyzed each of the requirements of paragraph A and subparagraph (B)(3) and found that they were satisfied.[161] In particular, the supreme court decided that the common issues predominated over individual issues because the provisions in the contracts with the class members that dealt with accounting for payments to producers used virtually identical language.[162]

The class in *Greghol Limited Partnership v. Oryx Energy Co.*[163] consisted of the royalty and overriding royalty interest owners with respect to an oil and gas unit. The plaintiffs alleged that the unit operator improperly charged them various costs

152. 958 P.2d 814 (Okla. Ct. App. 1998).
153. OKLA. STAT. tit. 12, § 2019(b) (Supp. 1998).
154. 955 P.2d 756 (Okla. Ct. App. 1998).
155. OKLA. STAT. tit. 12, § 2017(A) (Supp. 1998).
156. Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998); Greghol Ltd. Partnership v. Oryx Energy Co., 959 P.2d 596 (Okla. Ct. App. 1998); Mayo v. Kaiser-Francis Oil Co., 962 P.2d 657 (Okla. Ct. App. 1998).
157. OKLA. STAT. tit. 12, § 2023 (Supp. 1998).
158. Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998); Greghol Ltd. Partnership v. Oryx Energy Co., 959 P.2d 596 (Okla. Ct. App. 1998).
159. Mayo v. Kaiser-Francis Oil Co., 962 P.2d 657 (Okla. Ct. App. 1998).
160. 969 P.2d 337 (Okla. 1998).
161. *See id.* at 343-44.
162. *See id.* at 344.
163. 959 P.2d 596 (Okla. Ct. App. 1998).

in connection with the gathering, treating and processing of the gas produced from the unit. In affirming the trial court order granting class certification, the Oklahoma Court of Civil Appeals noted that the standard of appellate review for an order granting class certification is abuse of discretion. The appellate court also stated that in close cases, the trial court should grant, rather than deny certification, because the order may be modified later.[164]

The trial court's denial of class certification was affirmed in *Mayo v. Kaiser-Francis Oil Co.*[165] The class in the *Mayo* case consisted of oil and gas interest owners, who claimed that the defendants conspired to underpay royalties to them pursuant to a scheme in which the well operator sold its gas production at a contract rate to a purchaser, who then resold it at a higher rate. The trial court refused to certify the class, because most of its members were oil and gas interest owners who did not have any lease agreements with the defendants.[166] Since the requirement of commonality was lacking, the Oklahoma Court of Civil Appeals ruled that the trial court did not err in denying class certification.

VII. TRIAL

The Oklahoma Supreme Court resolved an important medical malpractice issue, regarding the cross-examination of expert witnesses, in *Mills v. Grotheer.*[167] In nearly all medical malpractice cases, both the defendant physician and some of the defendant's expert witnesses will be members of PLICO, the Physicians Liability Insurance Company of Oklahoma, which provides medical malpractice insurance to Oklahoma physicians. The plaintiff in *Mills* sought to impeach the defendant's expert witness by showing the common PLICO membership of the defendant and the expert witness. While Federal Rule of Evidence 411 prohibits proof of liability insurance to show negligence, it allows use of liability insurance to show prejudice of a witness. Following the majority rule among other jurisdictions, the Oklahoma Supreme Court adopted a "connectedness" test under which a plaintiff would need to establish more of a connection between the defendant's expert witness and the defendant's liability insurer than merely being a policyholder or member of the same mutual insurance company.[168] The supreme court indicated that impeachment should be allowed, however, if the expert witness was an employee of the liability insurer, a member of the insurer's board of directors, or on its claims review committee.

The *Mills* case was followed in *Holm-Waddle v. William D. Hawley, M.D., Inc.*,[169] another medical malpractice case in which the plaintiff unsuccessfully sought to impeach the defendant's expert witness with membership in PLICO. The *Holm-Waddle* case also had a destruction of evidence issue. While the case was pending,

164. *See id.* at 598.
165. 962 P.2d 657 (Okla. Ct. App. 1998).
166. *See id.* at 659.
167. 957 P.2d 540 (Okla. 1998).
168. *See id.* at 543.
169. 967 P.2d 1180 (Okla. 1998).

the plaintiff died. An expert, hired by the plaintiff's counsel, performed an autopsy. Before notice of the autopsy was given to the defendant, the plaintiff's body was cremated. Because the defendant received no notice, the Oklahoma Supreme Court affirmed the trial court's order prohibiting any use at trial of evidence from the autopsy.[170]

The Oklahoma Court of Civil Appeals examined the right to jury trial provision in the Oklahoma Constitution[171] in *State ex rel. Zimmerman v. One Black with Purple Trim Ford Flareside Truck.*[172] The *Zimmerman* case was a civil forfeiture action brought against a garage under the Oklahoma Motor Vehicle Chop Shop Act.[173] The trial court ordered the property forfeited.[174] The property owners appealed on the ground that the Vehicle Chop Shop Act was unconstitutional because it did not provide for a jury trial. The Oklahoma Court of Civil Appeals ruled that the Oklahoma Constitution required a jury trial in forfeiture actions, but the Vehicle Chop Shop Act was constitutional even though it did not expressly provide for a jury trial.[175] The appellate court, therefore, reversed and remanded for a new trial by jury.

The restrictions on peremptory challenges required by *Batson v. Kentucky*[176] were the subject of *Rucker v. Mid Century Insurance Co.*[177] The United States Supreme Court held in the *Batson* case that a state prosecutor's use of a peremptory challenge against a juror because of the juror's race violated the Equal Protection clause of the United States Constitution. *Batson* has since been extended to civil actions,[178] and to peremptory challenges on the basis of gender.[179] While the *Batson* line of cases prohibits peremptory challenges on these bases, the burden of showing discrimination is on the party objecting to the challenge. In the *Rucker* case, the Oklahoma Court of Civil Appeals found no violation of *Batson* in the peremptory challenge of two black jurors, because the defendant offered race-neutral reasons for striking the two jurors.

Under title 12, section 578[180] a party with an objection to a jury instruction is required to raise it with the trial court promptly after the instructions are given to the jury in order to preserve the error for appellate review. There is an exception, though, for plain or fundamental error, which in the context of jury instructions means that the jury instructions contain an erroneous statement of law that appears on the face of the jury instructions. *Sullivan v. Forty-Second West Corporation*[181] was concerned with the omission of a jury instruction. Although there was no record that a particular jury instruction had been requested at the trial court, the Oklahoma

170. *See id.* at 1182-83.
171. OKLA. CONST. art. 2 § 19.
172. 960 P.2d 844 (Okla. Ct. App. 1997).
173. OKLA. STAT. tit. 47, § 1505 (1991).
174. *See Zimmerman*, 960 P.2d at 845.
175. *See id.* at 847.
176. 476 U.S. 79 (1986).
177. 945 P.2d 507 (Okla. Ct. App. 1997).
178. *See* Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).
179. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).
180. OKLA. STAT. tit. 12, § 578 (1991).
181. 961 P.2d 801 (Okla. 1998).

Court of Civil Appeals found fundamental error because the jury instruction had not been given. The Oklahoma Supreme Court reversed and affirmed the trial court, largely as a result of the inadequacy of the record and the lack of any clear indication of the significance of the issue that the missing jury instruction would have addressed.[182]

The Oklahoma Supreme Court ordered a new trial in *McMinn v. City of Oklahoma City*[183] as a result of the trial court's refusal to allow cross-examination of a party regarding damages. It held that the trial court's denial of cross-examination was an abuse of discretion.[184] The supreme court also discussed the law of the case doctrine, which makes a decision in an appeal binding on all subsequent stages of the case.[185]

VIII. CLAIM AND ISSUE PRECLUSION

The Oklahoma Supreme Court decided a record number of cases involving claim and issue preclusion during the past year. Claim preclusion, formerly known as *res judicata*, bars a second action on a claim previously the subject of an earlier action. The scope of a claim extends to all legal theories and remedies arising out of an event or transaction that the plaintiff asserted or could have asserted in the earlier action. Issue preclusion, formerly called collateral estoppel, bars relitigation of an issue that was actually litigated and determined in an earlier action between the same parties, whether on the same or a different claim.

The Oklahoma Supreme Court emphasized a basic requirement of either claim or issue preclusion, that of a final judgment, in In re *Estate of Sneed v. Hall*.[186] During the course of a probate proceeding, the trial court issued an interlocutory order severing an exhibit to a will from consideration until after it was determined whether the exhibit created an *inter vivos* trust. The Oklahoma Supreme Court held that until there was a final judgment, claim preclusion did not apply; therefore, the trial court was free to decide later to incorporate the exhibit into the will.[187]

Another basic requirement for claim preclusion is identity of parties between the second and earlier actions. This requirement was emphasized in *Deloney* ex. rel. *Deloney*.[188] The second action in *Deloney* was a paternity action brought by a child by and through her mother to establish paternity and collect child support. The earlier action was the prior divorce decree between the mother and her former husband which referred to the child as born of the marriage. The Oklahoma Supreme Court held that neither claim nor issue preclusion applied because the child was not

182. *See id.* at 802-03.
183. 952 P.2d 517 (Okla. 1997).
184. *See id.* at 523.
185. *See id.* at 523-24. "Decisions made in an earlier appeal are the law of the case as to the issues resolved therein .... Once an appellate court decision is final, it is binding in all subsequent stages of the case." *Id.*
186. 953 P.2d 1111 (Okla. 1998).
187. *See id.* at 1116.
188. 944 P.2d 312 (Okla. 1997).

a party to the divorce proceeding and therefore could not have been bound by any determination that was made in that proceeding.[189]

An additional limitation on claim preclusion is that the court in the earlier action must have had jurisdiction to adjudicate the claims presented in the second action. This limitation is illustrated by *Hefley v. Neely Insurance Agency, Inc.*[190] After the plaintiff's claim for Workers' Compensation was denied for lack of coverage, the plaintiff filed a tort action against the Workers' Compensation insurer, claiming the insurer was negligent for failure to inform him of the need for a special endorsement in order to obtain coverage. The Oklahoma Supreme Court ruled that neither claim nor issue preclusion applied, because the parties were different, the issues were different, and most importantly, the Workers' Compensation Court lacked authority to try tort and general contract claims.[191]

An obvious, but essential, requirement for claim preclusion is that the two actions must both involve the same claim. This requirement was one of the issues in *Miller v. Miller*.[192] The plaintiff in the *Miller* case brought a tort action alleging various theories against his former wife and her parents in which he claimed that they falsely represented that he was the father of the former wife's child. The trial court found that the action was precluded by the divorce decree, but the Oklahoma Supreme Court reversed. Although the plaintiff was a party to the divorce decree, the supreme court decided that claim preclusion did not apply because the divorce and the plaintiff's tort action did not involve the same claim. They reasoned that divorce proceedings and tort actions were fundamentally different, since divorce proceedings seek to end a marriage while tort actions seek damages.[193] The supreme court also held that issue preclusion did not apply for two reasons. First, the issues in the divorce and tort actions were different, because of the different relief sought.[194] In addition, the plaintiff was not given a full and fair opportunity to litigate the issue of paternity because of the alleged fraud by the defendants.[195]

The Oklahoma Supreme Court addressed issue preclusion in three recent cases. In *Hesser v. Central National Bank & Trust Co. of Enid*,[196] the supreme court held that issue preclusion did not apply in a legal malpractice action arising out of a probate proceeding because the issues in the two cases were different. In the prior probate proceeding, a will drafted by the attorney was challenged for failure to comply with the applicable statutes. After the will contest was settled, the beneficiary of the will brought a legal malpractice action against the attorney. The supreme court ruled that the issue of legal malpractice was not and could not have been decided in the probate proceeding,[197] because it was outside the scope of the court's probate

189. *See id.* at 318-19.
190. 954 P.2d 135 (Okla. 1998).
191. *See id.* at 138.
192. 956 P.2d 887 (Okla. 1998).
193. *See id.* at 897.
194. *See id.* at 898.
195. *See id.*
196. 956 P.2d 864 (Okla. 1998).
197. *See id.* at 869.

jurisdiction under title 58, section 1 of the Oklahoma Statutes.[198] In addition, because of the settlement, there was no adjudication of the validity of the will in the probate action.[199]

To preclude a party from relitigating an issue, the party must have been given a full and fair opportunity to litigate the issue in an earlier proceeding. The Oklahoma Supreme Court decided that this requirement was not satisfied in *Danner v. Dillard Department Stores, Inc.*[200] After the plaintiffs were acquitted on larceny charges, they sued for malicious prosecution and recovered substantial damages.[201] The Oklahoma Court of Civil Appeals ruled that the plaintiffs' action was barred by issue preclusion, because the issue of probable cause had been determined against them at the preliminary hearing in the prior criminal action. The Oklahoma Supreme Court reversed the Oklahoma Court of Civil Appeals and affirmed the trial court by holding that issue preclusion was not applicable because the plaintiffs were not given a full and fair opportunity to litigate at the preliminary hearing.[202] The Oklahoma Supreme Court found that the determination of probable cause at the preliminary hearing was based on false testimony, and key facts were not and could not have been discovered before the preliminary hearing.[203] Similarly, the supreme court held in *Miller v. Miller*[204] that issue preclusion did not apply because of the absence of a full and fair opportunity to litigate the particular issue.[205]

The Oklahoma Supreme Court held that issue preclusion did apply, though, in *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*[206] After its first lawsuit for breach of contract was dismissed for lack of personal jurisdiction because of a forum selection clause, the plaintiff filed a second action against the defendant for violation of an Oklahoma statute. Although the second action was ostensibly based on a different legal theory, the second action arose out of the same contract that contained the forum selection clause.[207] Since the issue of lack of jurisdiction had been decided in the first lawsuit, the Oklahoma Supreme Court decided that the second action was barred by issue preclusion.[208]

The Oklahoma Supreme Court also decided a case that involved the effect of a judgment against two defendants. In *Cox v. Kansas City Life Insurance Co.*,[209] the trial court signed a journal entry of judgment for $11 million against an insurer and $21 million against the insurer's agent. The insurer's liability was based on *respondeat superior*, resulting from the actions of its agent. The insurer appealed, but the agent did not. The Court of Civil Appeals reduced the judgment against the

198. OKLA. STAT. tit. 58, § 1 (1991).
199. *See Hesser*, 956 P.2d at 868.
200. 949 P.2d 680 (Okla. 1997).
201. *See Danner*, 949 P.2d at 682.
202. *See id.* at 682.
203. *See id.* at 683.
204. *See Miller*, 956 P.2d 887 (Okla. 1998).
205. *See id.* at 898.
206. 946 P.2d 662 (Okla. 1997).
207. *See Nat'l Diversified*, 946 P.2d at 668.
208. *See id.* at 668.
209. 957 P.2d 1181 (Okla. 1997).

insurer from $11 million to $1.5 million. The plaintiff then attempted to hold the insurer liable for the $21 million judgment against the agent. The Oklahoma Supreme Court held that the judgments against the insurer and agent were separate, even though the insurer's liability was based on *respondeat superior*, because the jury's verdict was for separate amounts against the two defendants.[210] Thus, the $21 million judgment against the agent imposed liability on the agent alone.

IX. POST-TRIAL MOTIONS

Several cases were concerned with post-trial matters. In *Wofford v. Mental Health Services, Inc.*,[211] the Oklahoma Supreme Court reversed an order granting a new trial on the ground that the order was an abuse of discretion. The supreme court found no error in the record, and that the trial court had substituted its subjective views for the jury verdict by ordering the new trial.[212] In reaching this conclusion, the Oklahoma Supreme Court relied on the remarks the trial judge made after the jury was discharged.

Two cases dealt with motions to vacate judgments. The Oklahoma Supreme Court held in *Stepp v. Stepp*,[213] that the trial court could modify a consent divorce decree pursuant to title 12, section 1031.1,[214] because the motion to vacate the decree was filed within thirty days of the entry of the divorce decree.[215] Had the motion to vacate not been filed within thirty days of the entry of the divorce decree, the decree could have been modified only on the grounds specified in section 1031. In contrast, *Board of Trustees of Town of Davenport v. Wilson*[216] was concerned with a motion to vacate a default judgment under section 1031. The Oklahoma Court of Civil

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210. *See id.* at 1186.
211. 946 P.2d 1149 (Okla. 1997).
212. *See Wofford*, 946 P.2d at 1154.
213. 955 P.2d 722 (Okla. 1998).
214. OKLA. STAT. tit. 12, § 1031.1(Supp. 1998) provides:

> A. A court may correct, open, modify or vacate a judgment, decree or appealable order on its own initiative not later than thirty (30) days after the judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed with the court clerk. Notice of the court's action shall be given as directed by the court to all affected parties.
>
> B. On motion of a party made not later than thirty (30) days after a judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed with the court clerk, the court may correct, open, modify or vacate the judgment, decree or appealable order. If the moving party did not prepare the judgment, decree, or appealable order, and Section 696.2 of this title required a copy of the judgment, decree, or appealable order to be mailed to the moving party, and the court records do not reflect the mailing of a copy of the judgment, decree, or appealable order to the moving party within three (3) days, exclusive of weekends and holidays, after the filing of the judgment, decree, or appealable order, the motion to correct, open, modify, or vacate the judgment, decree or appealable order may be filed no later than thirty (30) days after the earliest date on which the court records show that a copy of the judgment, decree, or appealable order was mailed to the moving party. The moving party shall give notice to all affected parties. A motion to correct, open, modify or vacate a judgment or decree filed after the announcement of the decision on all issues in the case but before the filing of the judgment or decree shall be deemed filed immediately after the filing of the judgment or decree.

215. *See Stepp*, 955 P.2d at 725.
216. 953 P.2d 764 (Okla. Ct. App. 1997).

Appeals held that an attorney's negligence in failing to respond to a lawsuit after the party was properly served was neither "an irregularity in obtaining a judgment" under the third paragraph of section 1031 nor an "unavoidable casualty or misfortune, preventing the party from prosecuting or defending" under the seventh paragraph of section 1031.[217] The appellate court therefore affirmed the trial court's denial of the motion to vacate the default judgment.[218]

Two cases involved the enforcement of judgments. *Drllevich Construction, Inc. v. Stock*[219] was concerned with Oklahoma's dormancy of judgments statute[220] which renders unenforceable a judgment on which no execution or garnishment has been issued for five years after the date of the judgment. The judgment in the *Drllevich* case had been rendered in the State of Washington nearly ten years before it was filed in Oklahoma under the Uniform Enforcement of Foreign Judgments Act.[221] The Oklahoma Supreme Court had previously held in *First of Denver Mortgage Investors v. Riggs*[222] that the five year dormancy period for a judgment from another state began to run when the judgment was rendered in the other state, rather than from when it was filed in Oklahoma. Noting that this represented a minority position, the Oklahoma Supreme Court decided to overrule the *Riggs* decision in order to promote the uniformity of laws with respect to other states. Thus, the five year dormancy period for a judgment from another state runs from the date the judgment is filed in Oklahoma, rather than when it was originally rendered.

Gibbs v. Easa,[223] dealt with the imposition of sanctions against a judgment debtor during post-judgment collection proceedings. The case arose out of a lawyer's *pro se* small claims action to collect a fee for legal services. The lawyer claimed that the judgment debtor violated court orders, altered assets and made false and misleading statements to the court to avoid collection of the judgment, and the trial court imposed sanctions more than twice as large as the original judgment. In reversing, the Oklahoma Supreme Court found no basis for an award of sanctions; neither under title 12, section 2011[224] which establishes the implications of an attorney's signature on pleadings, nor for contempt of court under title 21, section 565.1(E),[225] nor yet under the inherent authority of the court. Title 12, section 2011 did not authorize sanctions in this case, because there was no paper that the defendant filed in bad faith.[226] The contempt statute, title 21, section 565.1(E), lacked any provision for sanctions in the form of an award of attorney fees, and the record in the case was not sufficient to support an award of attorney fees for bad faith under the

217. *Davenport*, 953 P.2d at 765.
218. *See id.*
219. 958 P.2d 1277 (Okla. 1998).
220. OKLA. STAT. tit. 12, § 735 (1991).
221. *See Drllevich*, 958 P.2d at 1278.
222. 692 P.2d 1358 (Okla. 1984).
223. 1998 WL 297671 (Okla. 1998).
224. OKLA. STAT. tit. 12, § 2011 (1991).
225. OKLA. STAT. tit. 21, § 565.1(E) (Supp. 1998).
226. *See* 1998 WL 297671 (Okla. 1998).

trial court's equitable powers.[227]

X. APPEALS

The timing of appeals was the subject of *Whitehead v. Tulsa Public Schools*.[228] The Oklahoma Supreme Court held that a petition in error may be filed by regular mail within the appropriate time, instead of by certified mail. Although title 12, section 990A[229] provides for the filing of an appeal by certified mail with return receipt requested, the supreme court decided that this requirement was not jurisdictional. With four Justices dissenting, the Oklahoma Supreme Court overruled its decision in *Rusk v. Independent School District No. 1 of Tulsa*.[230] The majority emphasized, though, that the mailing must utilize the United States Postal Service, and not a private delivery service.[231]

In *Tidemark Exploration, Inc. v. Good*,[232] the Oklahoma Supreme Court examined the effect of the 1997 amendments to section 990A,[233] which were intended to assure the giving of notice of the filing of a judgment to all parties. Under these amendments, a copy of a judgment, decree or appealable order must be mailed to all parties promptly after its filing, and if the court records do not reflect a mailing to the appellant within three days after the filing of the judgment, the time for filing an appeal is extended until thirty days after the court records show that a copy of the judgment was mailed to the appellant. In the *Tidemark* case, the appealable order was filed on October 31, 1997, and notice of the filing was mailed to the appellants, but the appellees neglected to file a certificate of mailing.[234] The supreme court ruled that the time for appeal was not extended on account of the lack of a certificate of mailing, because the appellants received actual and timely notice of the filing of the judgment.[235]

In *Southland Associates v. Clay*,[236] the Oklahoma Court of Civil Appeals held that in the event of a conflict between a journal entry signed by the judge and a minute drafted by the court clerk, the journal entry controls. Accordingly, in the absence of a showing that the journal entry was clearly erroneous, the judgment as set forth in the journal entry was affirmed.

An appeal was dismissed in *LaRue v. Noble Independent School District No. 40*.[237] The Oklahoma Court of Civil Appeals ruled that the appealing parties lacked standing to appeal, because they were not adversely affected by the trial court's

227. *See id.* at 5.
228. 968 P.2d 1211 (Okla. 1998).
229. Okla. Stat. tit. 12, § 990A (Supp. 1998).
230. 885 P.2d 1365 (Okla. 1994).
231. *See Whitehead*, 968 P.2d at 1213.
232. 967 P.2d 1194 (Okla. 1998).
233. OKLA. STAT. tit. 12, § 990A (Supp. 1998).
234. *See Tidemark*, 967 P.2d at 1196.
235. *See id.* at 1196.
236. 956 P.2d 169 (Okla. Ct. App. 1998).
237. 946 P.2d 277 (Okla. Ct. App. 1997).

decision. Another appeal was dismissed in *Clark v. State*,[238] but for a different reason. The Oklahoma Court of Civil Appeals decided that the appeal was premature, because the summary judgment did not resolve all the legal theories in the case, as is required by title 12, section 994 of the Oklahoma Statutes.[239]

The Oklahoma Supreme Court relied upon the settled law of the case doctrine in *Lockhart v. Loosen*,[240] and *Shoemaker v. Estate of Freeman*.[241] This doctrine bears some similarity to claim preclusion, and it bars relitigation of issues that either have been resolved in an earlier appeal or were not timely raised by the aggrieved party in an earlier appeal.

XI. CONCLUSION

During the past year, the Oklahoma appellate courts decided numerous procedural issues, ranging from the application of statutes of limitations, to pleading, discovery, and trial and appellate procedure. Among the significant decisions was *Bruner v. Sobel*,[242] in which the Oklahoma Supreme Court held that the Oklahoma savings statute applied even though the original statute of limitation had not expired when the first action was dismissed. *Hodge v. Morris*[243] was another significant decision where the Oklahoma Court of Civil Appeals held that a plaintiff's claim against a third-party defendant could not be added by amendment after the statute of limitations had expired.

The allocation of expert witness fees for time spent in discovery is an issue that arises frequently in litigation, and the analysis of this by the Court of Civil Appeals in *McCoy v. Black*[244] will be of great use. Also of great practical importance was the supreme court's adoption of the "connectedness test" with respect to the impeachment of medical expert witnesses in *Mills v. Grotheer*.[245]

The large number of cases[246] that involved claim and issue preclusion were particularly noteworthy. These cases demonstrated a number of prerequisites for these doctrines to come into play, such as: the requirements of finality;[247] identity of parties;[248] jurisdiction over the claims presented in the second action (for claim

238. 957 P.2d 140 (Okla. Ct. App. 1998).
239. OKLA. STAT. tit. 12, § 994 (1991).
240. 943 P.2d 1074, 1077 n.1 (Okla. 1997).
241. 967 P.2d 871 (Okla. 1998).
242. 961 P.2d 815 (Okla. 1998).
243. 945 P.2d 1047 (Okla. Ct. Civ. App. 1998).
244. 949 P.2d 689 (Okla. Ct. Civ. App. 1997).
245. 957 P.2d 540 (Okla. 1998).
246. *See, e.g.*, Danner v. Dillard Dep't Stores, 949 P.2d 680 (Okla. 1997); Deloney *ex rel.* Deloney v. Downey, 944 P.2d 312 (Okla. 1997); Hefley v. Neely Ins. Agency, 954 P.2d 135 (Okla. 1998); Hesser v. Cent. Nat'l Bank & Trust Co. of Enid, 956 P.2d 864 (Okla. 1998); *In re* Estate of Sneed, 953 P.2d 1111 (Okla. 1998); Miller v. Miller, 956 P.2d 887 (Okla. 1998); National Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc., 946 P.2d 662 (Okla. 1997).
247. *See In re* Estate of Sneed, 953 P.2d 1111 (Okla. 1998).
248. *See* Deloney *ex rel.* Deloney v. Downey, 944 P.2d 312 (Okla. 1997).

preclusion);[249] identity of claims (for claim preclusion);[250] identity of issues (for issue preclusion);[251] and having a full and fair opportunity to litigate in the first action (for issue preclusion).[252]

Important legislative developments occurred, as well. These involved the calculation of interest on judgments[253] and the subpoenaing of documents from third parties.[254]

249. *See* Hefley v. Neely Ins. Agency, 954 P.2d 135 (Okla. 1998).
250. *See* Miller v. Miller, 956 P.2d 887 (Okla. 1998).
251. *See* Hesser v. Cent. Nat'l Bank & Trust Co. of Enid, 956 P.2d 864 (Okla. 1998).
252. See Danner v. Dillard Dep't Stores, 949 P.2d 680 (Okla. 1997).
253. *See* OKLA. STAT. tit. 12, § 727 (Supp. 1998).
254. *See id.* § 2004.1 (Supp. 1998).