

**UPDATE ON OKLAHOMA REAL PROPERTY TITLE RELATED CASES:
FOR 2011-2012**

(Covering July 1, 2011 to June 30, 2012)

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“Oklahoma Bar Association Real Property Law Section Annual Meeting”

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PANEL PRESENTATION:

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DALE L. ASTLE

Dale L. Astle is President of American Eagle Title and Abstract and General Counsel of American Eagle Title Insurance Company, Tulsa, Oklahoma. He received an Associate of Science degree from Northern Oklahoma College, a Bachelor of Science degree from Oklahoma State University and a Juris Doctor degree from University of Oklahoma College of Law.

He is past president of the Oklahoma Land Title Association and is a member of the Tulsa County and Oklahoma Bar Associations, the American College of Real Estate Lawyers and the Tulsa Title and Probate Lawyers Association. He is past chairman of the Real Property Law Section of the Oklahoma Bar Association and is a member of the Title Examination Standards Committee of the Oklahoma Bar.

Dale was selected for inclusion in the 2007 and 2009 issues of "Oklahoma Super Lawyers". He has also served as a member of the Executive Committee of the Abstractors and Title Insurance Agents Section of the American Land Title Association and as chairman of the ALTA Public Relations Committee.

He is a frequent presenter in seminars and educational conferences, has taught Real Estate Transactions as an adjunct professor at the University of Tulsa College of Law and has written several articles covering various topics related to real estate law and Oklahoma land titles.

He is the author of "***Equal Credit Opportunity Act – New Compliance Requirements***", Volume 48, Oklahoma Bar Journal, Number 3, "***An Analysis of the Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens***", Volume 32, Oklahoma Law Review, Number 4, "***Homestead Rights Relating To Purchase Money Mortgages***", Volume 63, Oklahoma Bar Journal, Number 37, "***Title Insurance***", Vernon's Oklahoma Forms 2d, Real Estate, "***Official Conveyances and Antecedent Records***," Patton and Palomar on Land Titles, Third Edition and "***Transfer-on-Death Deeds in Oklahoma***", Volume 82, Oklahoma Bar Journal, Number 651

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State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].
- PRACTICE:** Oil/Gas & Real Property Litigation (Arbitration, Shared Surface Use, Quiet Title,
Condemnation, & Restrictions);
Condo/Home Owners Association Creation & Representation; and
Commercial Real Estate Acquisition & Development.
- MEMBERSHIPS/POSITIONS:**
OBA Title Examination Standards Committee (Chairperson: 1992-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member); and
BSA: VC & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former
Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church
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- SPECIAL EXPERIENCE:**
Court-appointed Receiver for 5 Abstract Companies in Oklahoma
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles"
course (1982 - Present);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor
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Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing
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In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).
- SELECTED PUBLICATIONS:**
*"The Need for a Federal District Court Certificate in All Title Examinations: A
Reconsideration"*, 83 OBJ 2367 (November 3, 2012); and
*"The Real Estate Mortgage Follows the Promissory Note Automatically Without an
Assignment: The Lesson of BAC Home Loans"*, 82 OBJ 2938 (December 10,
2011); and
*"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of
Title to Severed Minerals after Rocket Oil and Gas Co. v. Donabar"*, 82 *The
Oklahoma Bar Journal* 622 (March 12, 2011).
- SPECIAL HONORS:** Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
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SCOTT WILLIAM McEACHIN

Scott McEachin is a sole practitioner in Tulsa, Oklahoma. His practice is limited, almost exclusively, to oil and gas title examination. He received a Bachelor of Arts degree in History and Political Science from the University of California at Santa Barbara and a Juris Doctor degree from the University of Oklahoma College of Law.

Mr. McEachin has been an attorney with Apco Oil Corporation in Oklahoma City and with Hondo Oil and Gas Company in Roswell, New Mexico. He was also affiliated with other law firms before beginning his private practice in Tulsa.

He is a member of the Real Property Section of the Oklahoma Bar Association, and he served as its Chair in 1989. He is a member of the Title Examination Standards Committee.

CASE LAW

LIST OF CASES

NO.	TOPIC	CASE	OKLAHOMA CITATION	DECIDED	MANDATE
A. OKLAHOMA COURT OF CIVIL APPEALS					
1	Attorney Fees	Goss v. Mitchell	2011 OK CIV APP 74	03/30/11	07/18/11
2	Attorney Fees	Maxxum Construction, Inc. v. First Commercial Bank	2011 OK CIV APP 84	04/29/11	07/18/11
3	Interpret Deed	Combs v. Sherman	2011 OK CIV APP 102	08/29/11	09/28/11
4	Insuring Remainder	Sorrels v. Tech	2011 OK CIV APP 107	06/03/11	09/28/11
5	Mortgage Priority	Countrywide Home Loans, Inc. v. BancFirst	2011 OK CIV APP 111	04/22/11	10/19/11
6	Guarantor's Liability	Borges v. Waller	2011 OK CIV APP 127	09/23/11	12/29/11
7	Adverse Possession	Flagg v. Faudree	2012 OK CIV APP 4	11/22/11	01/13/12
8	Merger Of Notes	Bank of Kremlin v. Davis	2012 OK CIV APP 7	12/22/11	01/31/12
9	MM Lien Pre-Lien Notice	Northwest Roofing Supply, Inc. v. Elegance in Wood, LLC	2012 OK CIV APP 13	08/04/11	02/23/12
10	Proper Venue	Beverly Enterprises-Texas, Inc. v. Devine Convalescent Care Center	2012 OK CIV APP 16	01/26/12	03/01/12
11	Inverse Condemnation	Material Service Corporation v. Rogers County Board of Commissioners	2012 OK CIV APP 17	08/18/11	03/01/12
12	Condemnation	State ex rel. Department of Transportation v. Wolfe	2012 OK CIV APP 20	11/21/11	03/01/12
13	Legal Description	Barrett v. Humphrey	2012 OK CIV APP 28	02/14/12	04/05/12
14	Real Estate Commission	Ferguson Advisors, LLC v. Malherbe	2012 OK CIV APP 33	11/16/11	04/05/12
15	MM Lien Priority	F & M Bank & Trust Co. v. Gardner Construction Company	2012 OK CIV APP 38	01/06/12	04/13/12
16	Condemnation Valuation	State ex rel. Dept. of Transportation v. Sherrill	2012 OK CIV APP 43	02/03/12	05/07/12
17	Title By Acquiescence	McGlothlin v. Livingston	2012 OK CIV APP 48	11/09/11	05/11/12

18	MM Lien Priority	Mill Creek Lumber & Supply Co. v. First United Bank and Trust Co.	2012 OK CIV APP 53	03/27/12	05/21/12
19	Statute Of Repose	Bankers Trust Co. of California N.A. v. Wallis	2012 OK CIV APP 56	02/24/12	06/01/12
B. OKLAHOMA SUPREME COURT: CASES OTHER THAN FORECLOSURE "STANDING" CASES					
20	Trying Title In F.E.D.	Rogers v. Bailey	2011 OK 69	07/06/11	10/19/11
21	Tax Sale Notice	Valdez v. Occupants of 3908 SW 24th Street	2011 OK 99	11/22/11	03/01/12
C. OKLAHOMA SUPREME COURT: FORECLOSURE "STANDING" CASES					
22	Foreclosure Standing	Deutsche Bank National Trust v. Brumbaugh	2012 OK 3	01/17/12	02/23/12
23	Foreclosure Standing	Deutsche Bank National Trust Company v. Byrams	2012 OK 4	01/17/12	04/23/12
24	Foreclosure Standing	HSBC Bank USA v. Lyon	2012 OK 10	02/14/12	05/07/12
25	Foreclosure Standing	Deutsche Bank National Trust Company v. Matthews	2012 OK 14	02/28/12	04/05/12
26	Foreclosure Standing	Deutsche Bank National Trust Company v. Richardson	2012 OK 15	02/28/12	04/05/12
27	Foreclosure Standing	CPT Asset Backed Certificates, Series 2004-EC1 v. Kham	2012 OK 22	03/06/12	05/21/12
28	Foreclosure Standing	Bank of America, NA v. Kabba	2012 OK 23	03/06/12	05/11/12
29	Foreclosure Standing	J.P. Morgan Chase Bank N.A. v. Eldridge	2012 OK 24	03/06/12	04/09/12
30	Foreclosure Standing	BAC Home Loan Servicing, L.P. v. Swanson	2012 OK 25	04/03/12	04/27/12
31	Foreclosure Standing	NTEX Realty, LP v. Tacker	2012 OK 26	04/03/12	04/27/12
32	Foreclosure Standing	U.S. Bank v. Moore	2012 OK 32	04/10/12	06/07/12
33	Foreclosure Standing	U.S. Bank, N.A. v. Alexander	2012 OK 43	05/01/12	07/20/12
34	Foreclosure Standing	Residential Funding Real Estate Holdings, LLC v. Adams	2012 OK 49	05/29/12	06/22/12
35	Foreclosure Standing	Wells Fargo Bank, N.A. v. Heath	2012 OK 54	06/12/12	07/09/12
36	Foreclosure Standing	U.S. Bank National Association v. Baber	2012 OK 55	06/12/12	07/09/12

1. **GOSS v. MITCHELL (2011 OK CIV APP 74)**

TOPIC: ATTORNEY FEES

RULING: Award of Attorney Fees is Justified When Enforcing or Defending Against Restrictions

FACTS: A property owner sought and received injunctive relief against another property owner in the subdivision enforcing certain restrictions. After winning, the plaintiff sought attorney fees relying on the Nonjudicial Marketable Title Procedures Act (NMTPA) (12 O.S. §1141.5).

TRIAL COURT RULING: Granted attorney fees and costs, based on the UMTPA, in a certain amount.

COURT OF CIVIL APPEALS RULING: Affirmed award of costs as unopposed. Appellant Court agreed this was not a quiet title action as required to justify award of attorney fees under the NMTPA, but then affirmed an award of fees based on The Real Estate Development Act (60 O.S. §§851-857, especially 856). Revised and remanded amount of fees for trial court to determine amount according Burke elements.

2. **MAXXUM CONSTRUCTION, INC. v. FIRST COMMERCIAL BANK (2011 OK CIV APP 84)**

TOPIC: ATTORNEY FEES

RULING: Award of Attorney Fees is Justified If Underlying Issue is “Labor or Services”

FACTS: Builder was not paid for construction “labor and services,” and sued both the landowner and the landowner’s bank (sued bank based on being a guarantor and for unjust enrichment).

TRIAL COURT RULING: After winning the lawsuit, the bank was awarded costs and attorney fees under 12 O.S. §936, which awards costs and attorney fees when the matter involves a dispute over “labor or services.”

COURT OF CIVIL APPEALS RULING: Affirmed award of costs and attorney fees because underlying issue was for “labor or services,” although the argument was based on guarantor and unjust enrichment.

3. **COMBS v. SHERMAN (2011 OK CIV APP 102)**

TOPIC: **INTERPRET DEED**

RULING: **Separate Conveyances From Joint Owners Conveyed Only Their Prorated Share**

FACTS: Two sisters owned surface and minerals as joint tenants. Without a contract, but with a joint letter from the sisters, saying they would sell “for \$175.00 per acre with one-quarter mineral rights going to the buyer,” and “Reference to the mineral rights—Agnes and I [Ethel Sherman] will retain 3/4 of the minerals and sell 1/4 with the 56 acres.” The separate deeds provided:

“LESS AND EXCEPT an undivided 3/4ths interest in and to the oil, gas and other minerals lying in and under the property, which are specifically reserved by Grantor herein, it being the intent of Grantor herein to convey to Grantee herein, an undivided 1/4th mineral interest.”

Buyer claimed he received 1/2 of the minerals, while the sellers said he received 1/4 of the minerals.

TRIAL COURT RULING: Trial court ruled for buyer giving him a 1/2 interest in the minerals.

COURT OF CIVIL APPEALS RULING: Reversed and remanded ruling the intent was clear

that the sisters sold 1/4 in the minerals and the buyer received 1/4 of the minerals, since you cannot keep 3/4 of the minerals, while giving 1/4, twice!

4. **SORRELS v. TECH (2011 OK CIV APP 107)**

TOPIC: INSURING REMAINDER

RULING: Remainder Interest Owner Must Insure Own Interest

FACTS: Plaintiff held remainder interest due to a trust and resulting trustees deed to defendant, wherein plaintiff was required—in the deed—to insure her remainder interest. Plaintiff failed to insure her remainder interest. Defendant insured her life estate interest. A tornado destroyed the house. Plaintiff sued defendant to recover all of the insurance proceeds paid to defendant, plus the shortfall between the value of the house and the amount of the insurance proceeds.

TRIAL COURT RULING: Ruled for defendant on Summary Judgment. Plaintiff had an insurable interest and was responsible to insure it.

COURT OF CIVIL APPEALS RULING: Affirmed.

5. **COUNTRYWIDE HOME LOANS, INC. v. BANCFIRST (2011 OK CIV APP 111)**

TOPIC: MORTGAGE PRIORITY

RULING: Line of Credit Mortgage Continues Until Released

FACTS: Borrower took a first mortgage on their home and a second mortgage for a line of credit, giving a mortgage on their home. Borrower took a third mortgage on their home and used the proceeds to pay off the first and second mortgages. Release of first mortgage was filed, but not on the second mortgage (which was for a line of credit). Borrower continued to use the line of credit on the second mortgage. When the borrower defaulted on the third mortgage, a mortgage foreclosure was granted, and the holders of the second and third mortgages asked the

court to decide their priorities.

TRIAL COURT RULING: Granted second mortgage holder priority because no release was filed.

COURT OF CIVIL APPEALS RULING: Affirmed.

6. **BORGES v. WALLER (2011 OK CIV APP 127)**

TOPIC: **GUARANTOR'S LIABILITY**

RULING: **Reduction of Rent Reduces Guarantor's Obligation**

FACTS: A landlord granted a tenant's lease, with initially \$9,000/month for rent.

Landlord and tenant subsequently reduced the rent to \$6,000/month. The landlord then sought to recover the \$3,000/month difference from the guarantors of the lease. The tenant was not in default.

TRIAL COURT RULING: Granted summary judgment to guarantors. The obligation of the guarantor is measured by the default, and there is none. The \$3,000 reduction in rent is a mutual agreement and not a default.

COURT OF CIVIL APPEALS RULING: Affirmed.

7. **FLAGG v. FAUDREE (2012 OK CIV APP 4)**

TOPIC: **ADVERSE POSSESSION**

RULING: **Intent to Adversely Possess Another Land Is Not Necessary for Adverse Possession**

FACTS: A party occupied and used lands (29 acres) under fence with their own lands for 23 years, and sold such lands to another. Just before the sale, but after the 15 years adverse possession period had passed, the record owner sent a letter to the occupants/sellers asserting ownership, but took no further action to reoccupy the lands. The buyers sued to quiet title by

adverse possession, “tacking” their sellers’ possession with their own.

TRIAL COURT RULING: The sellers did occupy the lands, but “testified in her deposition that if she had known someone else owned the 29 acres, she would not have tried to take ownership of it.” The trial court ruled that, absent an intent to adversely possess another’s land, it is not adverse possession.

COURT OF CIVIL APPEALS RULING: Reversed. Intent is not a necessary element; only occupancy and use for the prescribed time.

8. **BANK OF KREMLIN v. DAVIS (2012 OK CIV APP 7)**

TOPIC: **MERGER OF NOTES**

RULING: **Admission that Notes Had Merged Bound Creditor**

FACTS: Parties Sue and Lance gave a note and mortgage (“small notes”) to CNB. Third party Davis paid off obligation owed by Sue and Lance to CNB on small note. Lance and Amanda gave a note and mortgage (“big note”) to Davis. A different lender (Kremlin) sought to foreclose a separate mortgage owed by Lance, and then Davis sought to foreclose the “small note” and joined Sue to do so.

TRIAL COURT RULING: The “small note” was extinguished and released by Davis’ payment (thereby releasing Sue from that obligation), and the “small note” was also merged (by Davis’ admission) into the “big note” (owed by Lance and Amanda). Hence, Sue did not owe anything. Each party was directed to pay their own attorney fees.

COURT OF CIVIL APPEALS RULING: Affirmed as to Sue owing nothing to Davis under the “small note.” Because

- (1) Davis admitted the “obligations merged,” and
- (2) the future advances clause in the “small note” cannot apply since Sue was not a party

to the later “big note.” Reversed to grant Sue her attorney fees, because 12 O.S. §936(A), which awards attorney fees to enforce a note, applies to either enforcing or defeating a note.

9. **NORTHWEST ROOFING SUPPLY, INC. v. ELEGANCE IN WOOD, LLC** (2012 OK CIV APP 13)

TOPIC: MM LIEN PRE-LIEN NOTICE

RULING: MM Lien Pre-Lien Notice is Essential Element to Lien Enforcement

FACTS: Homeowners employed general contractor and paid it for the work. General contractor failed to pay subcontractor. Subcontractor sued the homeowners to foreclose a materialman’s lien. After suing and no answer being filed, default judgment was taken. Homeowners promptly sued to vacate judgment.

TRIAL COURT RULING: Trial court denied request to vacate.

COURT OF CIVIL APPEALS RULING: Reversed. Neither general contractor nor materialman gave the statutorily-required pre-lien notice. Therefore, the lien was invalid. Under 12 O.S. §1031, a judgment acquired by misstatements to the court can be vacated in 2 years. The materialman’s assertion that the lien was properly “perfected” was false in light of the failure to give pre-lien notice.

10. **BEVERLY ENTERPRISES-TEXAS, INC. v. DEVINE CONVALESCENT CARE CENTER** (2012 OK CIV APP 16)

TOPIC: PROPER VENUE

RULING: Guarantor’s Venue can be Different from That of Lender’s

FACTS: Landlord in Oklahoma sued to enforce lease on a nursing facility located in Texas and to collect on a related guarantee. The tenant corporation had its headquarters in Texas and owned no property in Oklahoma. The president of the tenant, who signed the guarantee, lived in

Oklahoma.

TRIAL COURT RULING: Dismissed case for lack of jurisdiction.

COURT OF CIVIL APPEALS RULING: Affirmed dismissal as to Texas corporation due to absence of minimum contacts with Oklahoma, but reversed as to guarantee suit on Oklahoma resident. Permissive forum selection clause in guarantee allowing suit in Texas does not deny jurisdiction to Oklahoma courts.

11. **MATERIAL SERVICE CORPORATION v. ROGERS COUNTY BOARD OF COMMISSIONERS (2012 OK CIV APP 17)**

TOPIC: **INVERSE CONDEMNATION**

RULING: **Void Annexation Gives Rise to Damages**

FACTS: Landowner sought permit to mine lands. County annexed lands and thereby prevented such mining due to prohibition on mining in the annexed lands, due to zoning restrictions against mining. Company sued to vacate annexation and for related damages.

TRIAL COURT RULING: Granted order that annexation was void for lack of notice, and granted substantial monetary damages, and pre- and post-judgment interest, relating to lost opportunity to mine and sell products on then-current adjacent road projects. Awarded contingent attorney fees (25%) only on damages, but not on interest. Granted some but not all expenses.

COURT OF CIVIL APPEALS RULING: Affirmed damages including interest. Remanded to increase attorney fees (25%) to apply to interest recovered, and to grant all expenses.

12. **STATE EX REL. DEPARTMENT OF TRANSPORTATION v. WOLFE (2012 OK CIV APP 20)**

TOPIC: **CONDEMNATION**

RULING: **Landowner Cannot Assert Neighbor’s Rights to Increase Own Damages**

FACTS: ODOT condemned part of a parcel of land and, because such taking made the remaining land landlocked, it condemned additional adjacent land to give a right-of-way to the initial condemnee. Initial condemnees objected to the commissioners’ report asserting:

- (1) ODOT cannot take adjacent land for the “private benefit” of the initial condemnee, and
- (2) therefore the commissioners’ award must be increased to treat the whole tract as being taken because the remainder became landlocked.

TRIAL COURT RULING: Denied landowners’ complaint.

COURT OF CIVIL APPEALS RULING: Affirmed. Initial landowners cannot “vicariously” assert neighbor’s rights to oppose condemnation of neighbor’s land.

13. **BARRETT v. HUMPHREY (2012 OK CIV APP 28)**

TOPIC: **LEGAL DESCRIPTION**

RULING: **Legal Description in a Journal Entry is Essential to Create an Easement**

FACTS: Person was granted a roadway easement in an earlier judgment. The holder of the roadway easement built a dirt bridge to use the roadway. A storm eroded the bridge and a dispute arose as to whether landowner’s storage of barrels and equipment caused the excessive erosion. Easement holder sued for damages to bridges.

TRIAL COURT RULING: Trial court accepted existence of the easement, and ruled the landowner’s barrel lids caused the bridge drain pipes to be clogged causing damage to the bridge.

COURT OF CIVIL APPEALS RULING: Reversed and remanded. The earlier court order recognizing an easement did not contain a legal description for the easement, so none was created. The landowner’s barrels and lids were downstream and, therefore, there was no

evidence they went upstream to block the bridge drainage pipes. The trial court must determine whether there was an easement and to create a legal description for it, and must reconsider the landowner's duty to the easement holder and whether it was violated.

14. **FERGUSON ADVISORS, LLC v. MALHERBE (2012 OK CIV APP 33)**

TOPIC: REAL ESTATE COMMISSION

RULING: Realtor Can Make Commission Contingent on Seller Recovering Post-Closing Payments

FACTS: Realtor was entitled, by contract, to a commission from the seller at the closing of the sale. At or before closing, the realtor signed an agreement deferring part of his commission until the balance of the purchase price was paid (post-closing). The balance of the price was never paid, and the lands were deeded back to the seller (who held a carry-back mortgage). Realtor requested the balance of his commission, and, when he was denied payment, he sued the seller.

TRIAL COURT RULING: Granted realtor's motion.

COURT OF CIVIL APPEALS RULING: Reversed. Realtor's agreement to delay the balance of the commission, until the balance of the purchase price was paid, was a condition precedent to his right to the commission.

15. **F & M BANK & TRUST CO. v. GARDNER CONSTRUCTION COMPANY (2012 OK CIV APP 38)**

TOPIC: MM LIEN PRIORITY

RULING: Vendor Contracting With Pre-Owner Takes Subject to Purchase Money Mortgage

FACTS: Vendor provided materials to the construction site before the contracting party

acquired title to the land involved. Lender advanced money to purchase the land and to pay vendors. When borrower failed to pay the mortgage, a foreclosure began. The lender and vendor fought over priorities of their liens.

TRIAL COURT RULING: Trial Court ruled for lender saying any vendor contracting with an owner prior to the owner's purchase of the land takes a junior position behind a purchase money lender (i.e., loan proceeds were used to purchase the land to which everyone's lien attaches).

COURT OF CIVIL APPEALS RULING: Affirmed.

16. **STATE EX REL. DEPT. OF TRANSPORTATION v. SHERRILL (2012 OK CIV APP 43)**

TOPIC: CONDEMNATION VALUATION

RULING: **Landowner Can Testify as to Value, and Jury Can Give "Per Acre"**

Valuation

FACTS: When lands were condemned by ODOT and there was a jury trial over valuation, three witnesses testified: landowner, landowner's appraiser, and ODOT's appraiser. Jury returned a per acre value, which the judge multiplied by the acreage to get a total value.

TRIAL COURT RULING: The court rejected ODOT's complaint that the landowner could not testify, even though he used "non-comparable" lands, because landowners can testify, and, because the jury's number was between the high and low valuations. The court rejected ODOT's complaint that the jury verdict was invalid because it was a per-acre value and not a total value.

COURT OF CIVIL APPEALS RULING: Affirmed.

17. **McGLOTHLIN v. LIVINGSTON (2012 OK CIV APP 48)**

TOPIC: TITLE BY ACQUIESCENCE

RULING: **A Fence Does Not Automatically Prove Acquiescence or Adverse Possession**

FACTS: A north/south fence lien angled so that it went at a diagonal so that each adjacent landowner had some land on the other side of the fence for about 70 years. There was a roadway, initially a dirt trail, running on the east side of the fence connecting the section line on the north to property owners on the south. The landowners to the south sued the eastern landowners to keep the north/south roadway open, and settled by taking an easement and in turn agreeing to pave the road. A dispute arose between the east and west landowners, with the east landowners suing to quiet title.

TRIAL COURT RULING: This matter was considered in the trial court twice with an intervening appeal. In both instances, the trial court quieted title in each owner as to the lands on their side of the fence, relying on both title by acquiescence and adverse possession.

COURT OF CIVIL APPEALS RULING: Reversed. Neither theories were proven. A fence does not constitute a boundary line by acquiescence absent:

- (1) uncertainty of boundary, and
- (2) agreement to use the fence as the boundary.

Therefore, here there is not evidence of title by acquiescence. The roadway was used by multiple persons, so east landowner cannot claim such land by adverse possession. Roadway easement was granted to the east and west landowners, and to the landowners to south.

18. **MILL CREEK LUMBER & SUPPLY CO. v. FIRST UNITED BANK AND TRUST CO. (2012 OK CIV APP 53)**

TOPIC: **MM LIEN PRIORITY**

RULING: **Replaced Construction Mortgage is Junior to Intervening MM Lien**

FACTS: A construction mortgage was filed on a residence. Thereafter, materials were provided. The construction mortgage was released and a new construction mortgage was filed,

including language saying there were no liens, other than those “of record.” When the vendor was not paid, it filed an MM lien and sued to foreclose such lien. The lender joined the suit, claiming its mortgage was senior to the vendor’s lien due to UCC language and equitable subrogation.

TRIAL COURT RULING: The trial court granted summary judgment to vendor.

COURT OF CIVIL APPEALS RULING: Affirmed. The UCC argument fails due to its express limitation to fixtures, and not to building materials. The equitable argument fails because the “pre-materials-delivery” construction mortgage was released, and because, while the new replacement construction mortgage was filed after the materials were delivered but before the vendor’s lien was filed, the filing of the vendor’s lien “related back” to the date the first materials were provided. So, the vendor wins.

19. **BANKERS TRUST CO. OF CALIFORNIA N.A. v. WALLIS (2012 OK CIV APP 56)**

TOPIC: **STATUTE OF REPOSE**

RULING: **Repose Relates to Initiating Action and Not Completing It**

FACTS: A foreclosure of a note and mortgage was timely commenced, and, after being dismissed, was again timely commenced. After numerous motions and an intervening appeal, the debtor sought to have the action dismissed with prejudice under 12 O.S. §301, because the case continued beyond the 7-year note and 10-year mortgage statute of repose.

TRIAL COURT RULING: Trial court dismissed the foreclosure with prejudice.

COURT OF CIVIL APPEALS RULING: Reversed, because such interpretation of the statute was absurd and would encourage and reward litigation-delaying tactics.

20. **ROGERS v. BAILEY (2011 OK 69)**

TOPIC: TRYING TITLE IN F.E.D.

RULING: Vague Allegations of Ownership Justifies Transferring from FED to District Court

FACTS: Mother sued daughter in forcible entry and detainer action. Daughter asserted title to subject premises, and requested removal to District Court to try title.

TRIAL COURT RULING and COURT OF CIVIL APPEALS RULING: Trial Court and Court of Civil Appeals determined:

(1) defendant/tenant's request to transfer to District was untimely as being less than 72 hours before hearing, and

(2) allegations of ownership lacked sufficient detail.

Court of Appeals Affirmed.

SUPREME COURT RULING: Vacated and reversed. Assertions of ownership can be made in FED at time of hearing, and even scant allegations of equitable ownership are enough to support a transfer to District Court.

21. **VALDEZ v. OCCUPANTS OF 3908 SW 24TH STREET (2011 OK 99)**

TOPIC: TAX SALE NOTICE

RULING: Notice of the Tax Sale to only One of the Multiple Owners Makes Sale Void

FACTS: Real Property was held in joint tenancy by two persons. When they failed to pay ad valorem taxes, a third party bought a tax certificate and later acquired a tax deed. The notice supporting the tax deed only went to one of the two owners. The two prior owners sued to redeem the property from the taxes and to quiet title.

TRIAL COURT RULING and COURT OF CIVIL APPEALS RULING: Ruled for buyer but only as to a 1/2 interest.

SUPREME COURT RULING: Vacated Court Civil Appeals ruling and reversed Trial Court. Invalidity of notice to one owner made the entire sale invalid.

OKLAHOMA SUPREME COURT “STANDING” CASES (2012)

(last revised 07-13-12)

(prepared by Monica Wittrock)

Case #	Date	Plaintiff	Defendant	P-Atty	D-Atty	County/Judge	Lower Court	Supreme Court / Justice Opinion	Comments
2012 OK 3	01/17/12	Deutsche Bank	Brumbaugh	Phillips Murrah	Phillip Taylor	Tulsa County Morrissey	Summary Judgment	Reversed & Remanded (Combs) Published	Endorsement in Blank No evidence in record that P was holder or had rights of holder prior to filing No standing = Reversed and Remanded to determine when P acquired interest in note CASES CITED: Doan, Hendrick, Fent. Lujan, Gill
2012 OK 4	01/17/12	Deutsche Bank	Byrams	Kivell Rayment	Phillip Taylor	Tulsa County Sellers	Summary Judgment	Reversed & Remanded (Combs)	No Endorsement. Assignment of Mortgage filed 1 month after filing Assignment of Mortgage is of no consequence; mortgage follows note No standing = Remanded to determine if P has “rights of a holder” CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC
2012 OK 10	02/14/12	HSBC Bank	Lyon	Kivell Rayment	Phillip Taylor	Rogers County Post	Summary Judgment	Affirmed (Combs)	Endorsement in Blank (filed with 2 nd Amended Petition) Standing established because P provided evidence with 2 nd Amended Petition Affirmed = No contest to validity of note or default was raised CASES CITED: Doan, Hendrick, Fent. Lujan, Gill

2012 OK 14	02/28/12	Deutsche Bank	Matthews	Baer Timberlake	Pro Se	Creek County Parish	Summary Judgment	Reversed & Remanded (Combs)	Endorsement to P occurred 6 months after Petition, but attached to MSJ No standing = P did not establish holder statue prior to filing Petition Remanded with instructions to dismiss without prejudice Note: Gurich & Winchester dissent – issue is not standing but real party in interest CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal
2012 OK 15	02/28/12	Deutsche Bank	Richardson	Baer Timberlake	Delluomo Crow	Oklahoma County Dan Owens	Summary Judgment	Reversed & Remanded (Combs)	Endorsement in Blank attached to MSJ P must show “entitled to enforce” prior to filing action No standing = Reversed and Remanded to determine when P acquired interest in note Note: Gurich & Winchester dissent – standing may be established after filing of petition CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal
2012 OK 22	03/06/12	CPT	Kham	Baer Timberlake	Phillip Taylor	Tulsa County Cantrell	Default Judgment	Reversed & Remanded (Combs)	MERS Discussion Endorsement in Blank Standing challenged on Motion to Vacate Judgment (after Sheriff’s Sale) No standing = Plaintiff failed to present evidence that it was the holder (attorney had note on his person on Motion to Vacate, but did not present for record); Reversed and Remanded to determine whether P had rights of a holder prior to the filing of the petition Note: Gurich and Winchester dissent – standing must be challenged during proceedings;

									D waived standing since it was not questioned until after Sheriff's Sale; issue is real party in interest CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal MERS CASES CITED: Landmark, Ward
2012 OK 23	03/06/12	Bank of America	Kabba	Kivell Rayment Baer Timberlake	J.R. Matthews	Cleveland County Lucas	Summary Judgment	Reversed & Remanded (Combs)	Endorsement in Blank – filed with MSJ P must show “entitled to enforce” prior to filing action No standing = Reversed and Remanded to determine when P acquired interest in note; if after petition filed, action should be dismissed without prejudice Note: Gurich & Winchester dissent – standing may be established after filing of petition; P should be allowed to amend CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal
2012 OK 24	03/06/12	JP Morgan Chase	Eldridge	Baer Timberlake Phillips Murrah	Marygaye LeBoeuf [David Eldridge – pro se]	Canadian County Miller	Summary Judgment	Reversed & Remanded (Combs)	Note (not Endorsed) and Assignment of Mortgage presented to court at pre-trial hearing Question as to merger of P entities Standing not raised until one year after judgment P must show “entitled to enforce” prior to filing action No standing = Reversed and Remanded to determine when P acquired interest in note; if after petition filed, action should be dismissed without prejudice Note: Gurich & Winchester dissent (in part) – standing may be established after filing of petition; P should be allowed to

									amend CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal
2012 OK 25	04/03/12	BAC Home Loan Servicing, LP	Swanson	Baer Timberlake	Pro Se	Cert from CCA which affirmed trial court	Summary Judgment	Reversed & Remanded (Combs)	Endorsement in Blank – filed with Petition P must show “entitled to enforce” prior to filing action No standing = Reversed and Remanded to determine when P acquired interest in note; if after petition filed, action should be dismissed without prejudice Note: Gurich & Winchester dissent – standing may be established after filing of petition; P should be allowed to amend CASES CITED: Brumbaugh
2012 OK 26	04/03/12	NTEX Realty	Tacker	Charles Ward	Phillip Taylor	Rogers County Condren	Summary Judgment	Reversed & Remanded (Combs)	Endorsement in Blank undated – filed with MSJ P must show “entitled to enforce” prior to filing action No standing = Reversed and Remanded to determine when P acquired interest in note; if after petition filed, action should be dismissed without prejudice Note: Gurich & Winchester dissent – standing may be established after filing of petition; P should be allowed to amend CASES CITED: Brumbaugh, Gill
2012 OK 32	04/10/12	U.S. Bank	Moore	Kivell Rayment	Gary Blevins	Oklahoma County Dixon	Summary Judgment	Reversed & Remanded (Combs)	MERS – Assignment to P was executed AFTER suit, but effective BEFORE TC entered JE for P; D filed Chapter 7 and filed Petition to Vacate P must show “entitled to enforce” prior to filing action No standing = Reversed and

									Remanded Note: Gurich & Winchester dissent – standing may be established after filing of petition; P should be allowed to amend CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal, Brumbaugh
2012 OK 43	05/01/12	U.S. Bank	Alexander	Baer Timberlake	Michael Warkentin	Cleveland County Lucas	Summary Judgment	Reversed & Remanded (Combs)	MERS – Assignment to P was executed AFTER suit, but effective 70 days BEFORE TC entered JE for P; D filed Chapter 7 and filed Petition to Vacate P must show “entitled to enforce” prior to filing action; MERS did not show it had authority to assigned No standing = Reversed and Remanded Note: Gurich & Winchester dissent – standing may be established after filing of petition; P should be allowed to amend CASES CITED: Doan, Hendrick, Fent. Lujan, Gill + Engle, BAC + Veal, Brumbaugh
2012 OK 49	05/29/2012	Residential Funding	Adams	Baer Timberlake	Phillip Taylor		Summary Judgment	Reversed & Remanded (Combs)	Same standing and proof issues as above except Court finds that the “note” is not an instrument affecting real estate under 16 O.S. Sec . 93 (and does not require indorsement to be executed Pres or VP).
2012 OK 54	06/12/2012	Wells Fargo Bank	Heath	Kivell Rayment	Phillip Taylor	Tulsa County Cantrell	Summary Judgment	Reversed and Remanded (Combs)	Same standing and proof issues as above Alexander case. D filed Chapter 7 and filed Petition to Vacate. Court stated in its Conclusion “If a plaintiff claims it is the holder of the note and obtains an indorsement after the suit is filed, then it

									should initiate the procedure for curing this defect,” footnoting the Lyan case where the court allowed the evidence to be attached to the second amended petition which “effectively cured any lack of standing in the initial filing.”
2012 OK 55	06/12/2012	U.S. Bank	Baber	Phillips Murrah	MaryGaye LeBoeuf	Oklahoma County Parrish	Summary Judgment	Reversed & Remanded (Combs)	P filed a non-indorsed copy of the note at every step of the proceeding. Court found there was a question of fact as to when P acquired note and remanded back for determination as to if and when P became a “person entitled to enforce the note.”
OTHER CASES:									
OK Ct App 107,258	CERT DENIED 02/16/2012	MERS	Wilson	Kivell Rayment	Derryberry & Neifeh	Oklahoma County Gurich	Summary Judgment	Affirmed by CCS Division 1 CERT DENIED	Appeal is from confirmation of sale and denial of motion to vacate, not from judgment of foreclosure; argument by D was that MERS lacked standing; Judgment in favor of MERS was procured by fraud (because MERS misrepresented its interest) Issue is “real party in interest” and can be waived; challenge was not raised timely and deemed waived; Issue of fraud by MERS was also not raised timely and deemed waived [Failure to raise the issue prior to judgment = admission of fact that MERS was holder of the note] 11/28/2011 SCt granted Writ of Cert 02/16/2012 SCt withdraws Order Granting Cert
2012 OK 34	04/16/12	Whitehall Homeowners	Appletree Enterprise,				Order Denying	Petition for rehearing	Failure to file Certificate of Service of Final Order - time to

		Association	Inc.				Appellee's Motion to Dismiss Appeal	granted	commence appeal starting when party received actual notice.
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22. **DEUTSCHE BANK NATIONAL TRUST v. BRUMBAUGH*** (2012 OK 3)

TOPIC: FORECLOSURE STANDING

RULING: **Proof of Lender’s Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Long Beach Mortgage Company. Thereafter, Borrowers entered into loan modification agreement with U.S. Bank, N.A.(successor trustee to Wachovia Bank, N.A., formerly known as First Union National Bank), as trustee for Long Beach Mortgage loan 2002-1. The borrower defaulted and foreclosure was filed by Deutsche Bank National Trust, as Trustee for Long Beach Mortgage Loan 2002-1. The petition asserted it was the current holder of the note and mortgage, but failed to attach any mortgage assignments or notes or documents. Lender filed motion for summary judgment, with affidavit saying it holds note and mortgage, but not attaching any new documents and not saying when it acquired the note and mortgage. At the hearing on the motion for summary judgment, the note was presented showing

- (1) it had possession, and
- (2) it was endorsed “in blank” (i.e., to bearer).

Borrower said lender did not prove it holds note and mortgage.

TRIAL COURT RULING: Trial court granted summary judgment to lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt.

23. **DEUTSCHE BANK NATIONAL TRUST COMPANY v. BYRAMS*** (2012 OK 4)

* 1 of 15 2012 Oklahoma Supreme Court cases on Foreclosing lender’s standing

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Argent Mortgage Company, LLC. Foreclosure was filed by Deutsche Bank. Lender filed a motion for summary judgment and attached an assignment of mortgage dated after the petition was filed, going from Argent to Deutsche Bank, signed by Citi Residential Lending, Inc. Borrower said lender did not prove it holds the note.

TRIAL COURT RULING: Grated summary judgment to lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

24. **HSBC BANK USA v. LYON*** (2012 OK 10)

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Wells Fargo Bank, N.A. Foreclosure was filed by HSBC Bank, USA. Lender filed for summary judgment, asserting it held an assignment of mortgage dated and filed after the petition was filed. The note attached to the petition was unendorsed.

TRIAL COURT RULING: The first motion for summary judgment was denied and the case dismissed, with 20 days to amend. 2nd Amended Petition was filed attaching note showing

blank endorsement signed by original lender. Second motion was granted.

SUPREME COURT RULING: Affirmed.

25. **DEUTSCHE BANK NATIONAL TRUST COMPANY v. MATTHEWS*** (2012 OK 14)

TOPIC: FORECLOSURE STANDING

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Chase Bank USA. Foreclosure was filed by Deutsche Bank, with an unendorsed note attached to petition. The lender filed a motion for summary judgment with an assignment of mortgage attached signed 6 months after the petition was filed. This motion included allonges of the note showing it was transferred after the petition was filed. At the hearing on the motion for summary judgment, the note was presented showing

- (1) it had possession, and
- (2) it was endorsed "in blank" (i.e., to bearer).

TRIAL COURT RULING: Trial court granted summary judgment to lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

(1) it was wrong that proof of ownership of the note must be held when petition is filed, and

(2) standing is not jurisdictional and can, therefore, be waived.]

26. **DEUTSCHE BANK NATIONAL TRUST COMPANY v. RICHARDSON*** (2012

OK 15)

TOPIC: FORECLOSURE STANDING

RULING: Proof of Lender's Ownership of Note Before Petition is Essential for Standing

FACTS: Note and mortgage were given to WMC Mortgage Corporation. Foreclosure was filed by Deutsche Bank. The lender filed a motion for summary judgment, with a note attached with an undated blank endorsement. There was also an assignment of mortgage from MERS as nominee for WMC, dated and filed after the petition was filed.

TRIAL COURT RULING: Trial Court granted summary judgment to lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

(1) holds note, and

(2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

(1) it was wrong that proof of ownership of the note must be held when petition is filed, and

(2) standing is not jurisdictional and can, therefore, be waived.]

27. **CPT ASSET BACKED CERTIFICATES, SERIES 2004-EC1 v. KHAM*** (2012 OK

22)

TOPIC: FORECLOSURE STANDING

RULING: Proof of Lender's Ownership of Note Before Petition is Essential for Standing

FACTS: Note and mortgage were given to Encore Credit Corporation, although the mortgage names MERS as mortgagee. An unendorsed note was attached to the petition. An assignment of note and mortgage to Deutsche Bank was signed and filed by MERS. Default judgment was taken. On the date for the hearing to confirm the foreclosure sale, the borrowers sought to vacate and then to appeal the initial default judgment, due to lack of standing.

TRIAL COURT RULING: Default judgment confirmed and motion to vacate denied.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt.

Assignment of a mortgage alone does not transfer a note, and MERS has no claim of interest in this note (or any note as nominee).

[NOTE: There was a dissent saying,

(1) it was wrong that proof of ownership of the note must be held when petition is filed, and

- (2) standing is not jurisdictional and can, therefore, be waived.]

28. **BANK OF AMERICA, NA v. KABBA* (2012 OK 23)**

TOPIC: FORECLOSURE STANDING

RULING: Proof of Lender's Ownership of Note Before Petition is Essential for Standing

FACTS: Note and mortgage were given to BNC Mortgage, Inc. Foreclosure was filed by

Bank of America, and did not attach a note or endorsements. Bank of American filed an assignment of mortgage (signed by MERS) 9 months after the petition. The lender filed a motion for summary judgment attaching for the first time a note with an undated endorsement in blank.

TRIAL COURT RULING: Summary judgment was granted to lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]

29. **J.P. MORGAN CHASE BANK N.A. v. ELDRIDGE*** (2012 OK 24)

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to J.P. Morgan. Foreclosure was filed by Chase/Milwaukee, with nothing attached. The mortgage was assigned 6 months after the petition was filed. At a pre-trial hearing, the unendorsed note was produced.

TRIAL COURT RULING: The motion for summary judgment was granted to the lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]

30. **BAC HOME LOAN SERVICING, L.P. v. SWANSON*** (2012 OK 25)

TOPIC: FORECLOSURE STANDING

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given. There was an allonge on the petition transferring in the note to Countrywide Bank. Foreclosure was filed by BAC Home Servicing, LP. When BAC filed its motion for summary judgment, it included an undated blank endorsement on the note.

TRIAL COURT RULING and COURT OF CIVIL APPEALS RULING: Summary judgment to the lender was granted, and affirmed.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt.

[NOTE: There was a dissent saying,

(1) it was wrong that proof of ownership of the note must be held when petition is filed, and

(2) standing is not jurisdictional and can, therefore, be waived.]

31. **NTEX REALTY, LP v. TACKER* (2012 OK 26)**

TOPIC: FORECLOSURE STANDING

RULING: Proof of Lender's Ownership of Note Before Petition is Essential for Standing

FACTS: Note and mortgage were given to Home Funds Direct, Inc. Foreclosure was filed by NTEX Realty, LP, with an unendorsed note attached. Lender filed a motion for summary judgment, including an undated allonge with the note transferring it to the foreclosing lender.

TRIAL COURT RULING: The trial court granted a summary judgment to the lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

(1) holds note, and

(2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt.

[NOTE: There was a dissent saying,

(1) it was wrong that proof of ownership of the note must be held when petition is filed, and

(2) standing is not jurisdictional and can, therefore, be waived.]

32. **U.S. BANK v. MOORE* (2012 OK 32)**

TOPIC: FORECLOSURE STANDING

RULING: Proof of Lender's Ownership of Note Before Petition is Essential for Standing

FACTS: Note and mortgage were given to Colonial Bank, with MERS as nominee on the mortgage. Foreclosure was filed by US Bank, with no note or mortgage attached. When the motion for summary judgment was filed, it included the note, mortgage, assignment of mortgage, and an affidavit in support. The assignment of mortgage by MERS was to Chase Home Finance, and was executed after the petition was filed.

TRIAL COURT RULING: The trial court granted summary judgment to the lender.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]

33. **U.S. BANK, N.A. v. ALEXANDER* (2012 OK 43)**

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to MILA, Inc. Foreclosure was filed by Wells Fargo, with an unendorsed note and a mortgage attached. US Bank was substituted for Wells Fargo. A default judgment was given, but was vacated a day later. A motion for summary judgment was filed with an affidavit regarding facts, and an assignment of mortgage by MERS.

The assignment of mortgage was executed after the petition was filed and was to be effective before the mortgage was signed. After the motion for summary judgment was denied, a second motion was filed with the note including an undated allonge in blank.

TRIAL COURT RULING: The trial court granted the motion for summary judgment.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]

34. **RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC v. ADAMS*** (2012 OK 49)

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Gateway Mortgage Group. Foreclosure was filed by Residential Funding, including the note and mortgage, with an endorsement on the note from Gateway to "Option One Mortgage," and a blank additional endorsement by "Option One Endorsement Corporation." A motion to substitute RAHI Real Estate as lender was granted.

When the lender filed a motion for summary judgment, it included an assignment of mortgage to

RAHI. The assignment of mortgage is executed after the petition was filed, but does not attempt to assign the note. The assignment is executed by Sand Canyon Corp. fka Option One Mortgage Corporation.

TRIAL COURT RULING and COURT OF CIVIL APPEALS RULING: The trial court granted the motion for summary judgment to Residential Funding, and it was affirmed.

SUPREME COURT RULING: Supreme Court rejected borrower’s argument that a note cannot be endorsed by anyone except the same officer who can assign a mortgage (e.g., president or vice-president), and instead allowed a signature by a “shipping specialist.” This holding establishes that a note is not an instrument affecting real estate.

Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[The dissent says the borrower failed to challenge the name discrepancy (“Corporate”) and so there are no facts in dispute.]

35. **WELLS FARGO BANK, N.A. v. HEATH* (2012 OK 54)**

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender’s Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Option One Mortgage Corporation. Foreclosure was filed by Wells Fargo Bank, N.A., with the note, mortgage, and assignment of mortgage attached to the petition. Note contained neither an endorsement nor an allonge. Assignment of

mortgage did not assign the note. Motion for summary judgment was granted, and a sale was conducted.

TRIAL COURT RULING: A hearing to confirm the sale was set, but postponed until after the debtor's bankruptcy was completed. Debtor then sought to vacate initial judgment, but such motion was denied and the sale confirmed. At the hearing to vacate, the lender presented an undated allonge in blank.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt. Ownership of mortgage does not prove ownership of note, since mortgage follows the note.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]

36. **U.S. BANK NATIONAL ASSOCIATION v. BABER* (2012 OK 55)**

TOPIC: **FORECLOSURE STANDING**

RULING: **Proof of Lender's Ownership of Note Before Petition is Essential for Standing**

FACTS: Note and mortgage were given to Ameriquest Mortgage Corporation, Inc. (with mortgage given to MERS as nominee). Foreclosure was filed by US Bank, N.A., with an unendorsed note and mortgage attached.

TRIAL COURT RULING: Motion for summary judgment by lender was granted, with

unendorsed note and mortgage attached to such motion. Trail court denied motion to vacate.

SUPREME COURT RULING: Reversed and remanded to elicit proof lender

- (1) holds note, and
- (2) acquired note before petition was filed.

If not proven, case to be dismissed without prejudice. Debtor is not released of debt.

[NOTE: There was a dissent saying,

- (1) it was wrong that proof of ownership of the note must be held when petition is filed, and
- (2) standing is not jurisdictional and can, therefore, be waived.]