UPDATE ON OKLAHOMA REAL PROPERTY TITLE RELATED CASES:
FOR 2012-2013

(Covering July 1, 2012 to June 30, 2013)

Presented For the:
"Oklahoma Bar Association Real Property Law Section Annual Meeting"

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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.

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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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OBA Title Examination Standards Committee (Chairperson: 1992-Present);
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Court-appointed Receiver for 5 Abstract Companies in Oklahoma
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Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
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SELECTED PUBLICATIONS:

"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10, 2011);
"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);
"Well Site Safety Zone Act: New Life for Act", 80 OBJ 1061 (May 9. 2009).

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
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John Frederick ("Fred") Kempf, Jr. has been a shareholder with Andrews Davis, P.C. in Oklahoma City, OK since July, 2008. His current fields of practice include real property law, real estate and oil and gas title work, title insurance defense, real property and title litigation, commercial transactions, oil and gas, basic estate planning, trusts and probate, business and commercial law, and sports and entertainment law. Earlier in his career, a significant portion of Mr. Kempf's practice included commercial litigation and collections, real property and oil and gas title examination, and real estate and oil and gas foreclosure litigation.

His representations have included: representation of local title companies and national title insurance underwriters in variety of title insurance claims, defense of title, and title curative matters; representation of a national company in commercial site acquisitions and closings for retail travel stop locations throughout the U.S.; service as local counsel for various site acquisitions, closings and development for a Real Estate Investment Trust which built and leased stores for a national chain of retail drug stores; representation of a publicly traded communications company on a variety of issues, acquisitions, negotiations, and granting of leases for wireless tower sites and retail store sites in locations throughout the U.S.; work for various banks on a variety of transactional, legal, and litigation matters relating to mortgage lending and loan workouts; general representation involving real property acquisition, mortgage, sale and development, oil and gas, basic estate planning, trusts and probate; and general business and commercial representation.

Mr. Kempf obtained a B.A. from Oklahoma State University in 1973, and his Juris Doctorate from the Oklahoma City University School of Law in 1976. He is a member of the Oklahoma County and Oklahoma Bar Associations. He is licensed in all Oklahoma State Courts, the federal district courts in Oklahoma, the United States Court of Appeals for the 10th Circuit, and the United States Supreme Court.

He is a member of the Oklahoma Bar Association's Real Property Law Section (Board of Directors; Chairman, 2000), the Oklahoma Title Examination Standards Committee of the OBA (since 1994), the Oklahoma City Real Property Lawyers Association (Board of Directors; President, 2006), and the Oklahoma City Mineral Lawyers Society (since 1986). He has been a frequent lecturer on real property law topics, and has authored "H.B. 2783 - Changes for the Title Examiner and Questions About Marketable Title," 66 Oklahoma Bar Journal 1751 (May 27, 1995), and "A New Approach to Affidavits of Death and Termination of Joint Tenancies," 75 Oklahoma Bar Journal 1377 (May 14, 2004).

CASE LAW

LIST OF CASES

NO.	TOPIC	CASE	OKLAHOMA CITATION	DECIDED	MANDATE
A. OKLAHOMA COURT OF CIVIL APPEALS					
1	Sovereign Immunity	JMA Energy Company, LLC v. State ex rel. Dept. of Transportation	2012 OK CIV APP 55	03/013/12	06/01/12
2	Guaranty of Mortgage	AVB Bank v. Hancock	2012 OK CIV APP 68	06/08/12	07/09/12
3	Condemnation	State ex rel. Dept. of Transportation v. K & L Leasing, Inc.	2012 OK CIV APP 71	06/28/12	07/31/12
4	Mechanic's Lien And Lis Pendens	Dee v. Horton	2012 OK CIV APP 80	05/03/12	08/17/12
5	Adverse Possession and Acquiescence	WRT Realty, Inc. v. Boston Investment Group II, L.L.C.	2012 OK CIV APP 82	07/31/12	08/30/12
6	Appointment of Receiver for Trust	Fansler v. Fansler	2012 OK CIV APP 95	06/29/12	10/19/12
7	Ad Valorem Taxes	Thornton Family, L.L.C. v. Yazel	2013 OK CIV APP 2	07/26/12	01/15/13
8	Mortgage Foreclosure Jury Instructions	Country Place Mortgage, Ltd. v. Brown	2013 OK CIV APP 3	11/30/13	01/15/13
9	Condemnation Award of Costs	State ex rel. Dept. of Transportation v. Sutherland Lumber and Home Center, Inc.	2013 OK CIV APP 9	01/04/13	02/07/13
10	Standing to Foreclose a Mortgage and Note	MidFirst Bank v. Wilson	2013 OK CIV APP 15	11/07/12	02/07/13
11	Economic Duress Through Demand Notes	Richards v. Banc-First Shawnee	2013 OK CIV APP 16	11/19/12	02/15/13
12	Application for Attorney Fees	Stillwater National Bank & Trust Co. v. Cook	2013 OK CIV APP 17	11/30/12	03/05/13
13	Special Assessment Districts Constitutionality	Bacon & Son, Inc. v. City of Tulsa	2013 OK CIV APP 20	01/18/13	03/12/13
14	Condemnation Procedures	State ex rel. Dept. of Transportation v. Metcalf	2013 OK CIV APP 28	02/13/13	03/14/13

15	Trust Assets Division and Distribution	In The Matter of the Estate of Rozell	2013 OK CIV APP 35	11/30/12	04/24/13
16	Attorneys Fees in Mortgage Foreclosure	HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC	2013 OK CIV APP 38	02/08/13	05/02/13
17	Mortgage Lien Priorities	HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC	2013 OK CIV APP 40	02/08/13	05/09/13
18	Partition Proceeding	Noble V. Noble	2013 OK CIV APP 41	01/31/13	05/09/13
19	Surety Bond Exoneration	City of Oklahoma City v. First American Title & Trust Company	2013 OK CIV APP 42	10/11/12	05/09/13
20	Misrepresentation of Square Footage of Residence	Lopez v. Rollins	2013 OK CIV APP 43	02/08/13	05/09/13
21	Special Assessment Districts	E & F Cox Family Trust v. City of Tulsa	2013 OK CIV APP 45	01/18/13	05/22/13
22	Special Assessment Districts	E & F Cox Family Trust v. City Of Tulsa	2013 OK CIV APP 47	01/18/13	05/22/13
B. OKLAHOMA SUPREME COURT					
23	Probate as to Pretermitted Heir and Proper Personal Representative	In The Matter of the Estate of Dicksion	2011 OK 96	11/15/11 & 06/25/12 & 07/09/12	10/02/12
24	Ad Valorem Tax Exemption of Charitable Use Property	AOF/Shadybrook Affordable Housing Corporation v. Yazel	2012 OK 59	06/19/12 & 07/16/12	08/10/12
25	Copying Land Records	County Records, Inc. v. Armstrong	2012 OK 60	06/19/12 & 04/08/13	05/02/13
26	Adverse Possession	Akin v. Castleberry	2012 OK 79	09/18/12	10/11/12
27	Separate Marital Estate	Smith v. Villareal	2012 OK 114	12/18/12	04/11/13
28	Service of Summons Deadline	Cornett v. Carr	2013 OK 30	04/23/13	06/11/13

A. OKLAHOMA COURT OF CIVIL APPEALS

1. **JMA ENERGY COMPANY, LLC v. STATE EX REL. DEPT. OF TRANSPORTATION (2012 OK CIV APP 55)**

TOPIC: SOVEREIGN IMMUNITY

HOLDING: STATE IS NOT IMMUNE AS A SURFACE OWNER TO PROCEEDINGS UNDER THE SUFACE DAMAGES ACT

FACTS: Drilling operator intended to commence operations on land owned by the State of Oklahoma (DOT). Negotiations with DOT failed and, when operator filed petition to appoint commissioners to determine the amount of damages under the Surface Damages Act, ODOT filed Motion to Dismiss based on sovereign immunity.

TRIAL COURT RULING: Trial Court held that the State is not immune from the Surface Damages Act.

COURT OF CIVIL APPEALS RULING: The Court of Appeal initially denied an Application and Petition, and, after the trial court denied several additional motions by ODOT (Motion to Dismiss for delay and exception to Report of Commissioners), Court of Appeals affirmed the trial court and held (1) sovereign immunity was totally abrogated as to all matters (both tort and contract) by Vanderpool v. State, 1983 OK 82, (2) limited sovereign immunity was reinstated in 1984 by adoption of the Governmental Torts Claims Act (51 O.S. §151 et seq.) and only provides the ability to sue the State as to all claims except "Tort" claims, (3) the damages to be determined and paid under the Surface Damages Act (52 O.S. §§318.2-318.9) ("SDA") are not related to a tort, and (4) there in no express exemption in the SDA for the State (although Indian lands are exempt).

[Author's Note: This is a good general discussion of the history and current status of "sovereign immunity."]

2. **AVB BANK v. HANCOCK (2012 OK CIV APP 68)**

TOPIC: GUARANTY OF MORTGAGE

HOLDING: A GUARANTY AGREEMENT, WAIVING THE ANTI-DEFICIENCY DEFENSE, IS NOT DEFEATED BY ASSERTION THAT GUARANTOR ENTITY IS ALTER EGO OF DEBTOR

FACTS: In a mortgage foreclosure action, debtor admitted all facts concerning execution of a Note and Mortgage, and guarantor admitted execution of guaranty as a LLC, both admitted default on note and mortgage. LLC as guarantor tried to deny liability under Guaranty claiming the agreement was unenforceable because the individual debtors who signed the note and mortgage were the "partners" of the LLC. The State of California courts have allowed a defense where the guaranty is not enforceable where the lender forces the debtor to create an entity to give a guaranty which waives the debtor's statutory anti-deficiency rights.

TRIAL COURT RULING: Guarantor was liable.

COURT OF CIVIL APPEALS RULING: Affirmed, stating:

> "¶10 Oklahoma has a well-developed line of authority affirming a guarantor's right to waive most statutory protections, pursuant to the parties' freedom to contract as they wish. See *Founders Bank, supra; JP Morgan Chase Bank v. Specialty Restaurants, Inc.*, 2010 OK 65, 243 P.3d 8. We are not prepared to adopt a rule from another state which would mark an abrupt departure from Oklahoma authority."

3. **STATE EX REL. DEPT. OF TRANSPORTATION v. K & L LEASING, INC. (2012 OK CIV APP 71)**

TOPIC: CONDEMNATION

HOLDING: LANDOWNER IS NOT LIABLE FOR ATTORNEY FEES IF WITHDREW DEMAND FOR JURY TRIAL

FACTS: ODOT and landowner both demanded jury trial over amount of damages to be awarded in a condemnation action. Landowner withdrew demand for jury trial shortly before trial (5 days), but ODOT proceeded to trial anyway. Jury award granted the landowner less than from the commissioners' award ($116,250 v. $196,733). ODOT requested attorney fees as the prevailing party.

TRIAL COURT RULING: Trial Court granted attorney fees to ODOT.

COURT OF CIVIL APPEALS RULING: Reversed; because landowner withdrew demand for jury trial before trial, such landowner is not liable for attorney fees even when the award was below the commissioners' award.

4. **DEE v. HORTON (2012 OK CIV APP 80)**

TOPIC: MECHANIC'S LIEN AND LIS PENDENS

HOLDING: ORDER RELEASING A MECHANIC'S AND MATERIAL LIEN, AND RELATED LIS PENDENS IS NOT "APPEALABLE BY RIGHT"

FACTS: Mechanic filed Mechanic's Lien and related lis pendens, but no foreclosure action. Landowner filed suit to quiet title, for breach of contract, negligence, and other claims. Mechanic filed answer, but no counterclaim to foreclose its Mechanic's Lien. Trial Court was requested to issue, at landowner's request, an emergency order to remove lien and lis pendens.

TRIAL COURT RULING: Trial Court granted landowner's motion and issued an emergency order removing the lien and lis pendens.

COURT OF CIVIL APPEALS RULING: When mechanic lien claimant filed an appeal of the trial court's emergency order, the Court of Civil Appeals dismissed the appeal and remanded it for further proceedings because (1) the emergency order was interlocutory (12 O.S. §952 (b)(3)), (2) was not certified for immediate appeal, and (3) was not appealable by right (12 O.S. §952 (b)(2)), as either (a) an "attachment" (12 O.S. §993(A)(1)), or (b) a provisional remedy (12 O.S. §993(A)(3)).

5. **WRT REALTY, INC. v. BOSTON INVESTMENT GROUP II, L.L.C. (2012 OK CIV APP 82)**

TOPIC: ADVERSE POSSESSION AND ACQUIESCENCE

HOLDING: CITY VACATION OF STREET, BEFORE STATUTE WAS ENACTED ALLOWING REOPENING, VESTED TITLE IN ADJACENT OWNERS

FACTS: In 1902, City vacated 9 platted streets to provide a right of way easement to a railroad. The railroad abandoned the right of way in the late 1970s or early 1980s. Prior to 1984, the owner of one side of the abandoned ROW installed a six-foot tall metal chain link fence on the roadway 20 feet past the center line of the roadway, adding 20 feet to their one half of the ROW. Appellee occupied such disputed property over 15 years. In 2007, the City again vacated the streets. In 2008, the City's right to reopen the street was foreclosed in a court action. In 2008, the two owners of the lands on either side of the street sold the property, including the disputed property, to a third party, and it was agreed that a court proceeding would be instituted to determine who owned the disputed property and, therefore, was entitled to that portion of the sale proceeds.

TRIAL COURT RULING: On cross summary judgment motions, the Trial Court ruled Appellees proved they fenced and occupied the 20-foot strip for over 15 years and

thereby proved adverse possession.

COURT OF CIVIL APPEALS RULING: Because the street was vacated in 1902, before the statute was enacted to allow the City to reopen the street (after being initially closed by ordinance), and because the railroad right of way easement was abandoned, and then the fence was built and the fenced property was occupied for over 15 years, (1) all elements of adverse possession were proven, except for proof of "hostility," and (2) acquiescence was not proven because no evidence was presented of the parties' agreement in the construction of the fence. The trial court was accordingly partially affirmed, and partially remanded to establish either hostility in the occupancy, or mutual agreement in construction of the fence.

6. **FANSLER v. FANSLER (2012 OK CIV APP 95)**

TOPIC: APPOINTMENT OF RECEIVER FOR TRUST

HOLDING: WHERE TRUSTEES (DIVORCED PARTIES) ARE DEADLOCKED AND UNWILLING TO CARRY OUT PURPOSE OF TRUST WHICH WAS TO SELL DIVORCED PARTIES' HOUSE, APPOINTMENT OF RECEIVER IS PROPER

FACTS: Parties got divorced and, under a settlement agreement, placed residence in trust, with former husband and wife as trustees. Wife was given possession of the house. The express purpose of the trust was to sell the house and split the proceeds. 10 years went by and no sale occurred, but wife collected rent on the house in the interim. Husband filed suit to remove wife as trustee or appoint receiver. Wife asserted that trial court lacked jurisdiction over the trustees because the suit was styled and the parties were served as individuals and not as trustees.

TRIAL COURT RULING: Court assumed control of trust and directed parties to

cooperate and sell the residence. 10 months later, with no sale occurring, the court appointed a receiver to control and sell the house. Wife appealed.

COURT OF CIVIL APPEALS RULING: Affirmed Trial Court, and held that parties were properly joined as trustees although only named as individuals.

7. **THORNTON FAMILY, L.L.C. v. YAZEL (2013 OK CIV APP 2)**

TOPIC: AD VALOREM TAXES

HOLDING: THERE IS NO AD VALOREM TAX DUE ON INCOMPLETE STRUCTURES

FACTS: Landowner bought land in 2003 and removed structures from it. During 2008, landowner began construction of a car dealership service and sales building. It was assessed on January 1, 2009 at $3 million as raw land.

In 2010, before construction was complete, the County Assessor gave notice of an Assessed value of $14 million. Land owner informally protested and the amount was lowered to $8 million. The landowner formally protested and the County Board of Equalization sustained the County Assessor's valuation of $8 million. Landowner filed suit in the District Court.

TRIAL COURT RULING: On cross motions for summary judgment, the trial court ruled the value of the raw land was $2.7 million, and an existing warehouse was worth $400,000, for a total value of $3.1 million.

COURT OF CIVIL APPEALS RULING: Affirmed, saying the statute implied taxes were only due on completed structures, agreeing with the result (but not the precise holding) of an Attorney General Opinion which said "A plain reading of" this statute shows only a completed building adds value for tax purposes.

8. **COUNTRY PLACE MORTGAGE, LTD. v. BROWN (2013 OK CIV APP 3)**

TOPIC: MORTGAGE FORECLOSURE JURY INSTRUCTIONS

RULING: JURY INSTRUCTIONS WHICH FAIL TO INCLUDE "BALANCE DUE" ON THE NOTE IN THE MEASURE OF DAMAGES ARE IN ERROR

FACTS: At trial on an action to enforce a note and to foreclose on a mortgage, with a counterclaim by the debtors for fraud, the initial proposed jury instructions submitted by the lender provided that "the amount of the damages should be determined as the balance due under the note." The lender sought to amend its own instructions to add "taxes, insurance and other expenses" to the instructions. The instruction that the court finally gave the jury provided "you must then fix the amount of its damages, the taxes, insurance and expenses." Thus, the court dropped the language about "the balance due under the note".

TRIAL COURT RULING: The trial court received a verdict from the jury for $18,000, which only covered the $18,171.18 for taxes, insurance, and attorney fees, but not the balance due under the note, which balance was $153,044.61. The verdict gave nothing for the debtors' fraud claim. The lender sought a new trial or a judgment notwithstanding the verdict, and lost. The lender appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded "for new trial solely on the issue of [lender's] damages" to include the balance due on the note. The jury sent questions to the judge asking "What amount is the Plaintiff asking for and how is that broken down? Is there an Exhibit that shows this?" and "If we find for the Plaintiff, does that allow their foreclosure? Then we will put sum of ___ for anything in addition to the foreclosure?" There is no transcript or record showing the court's responses to the jury's

questions. The appellate court found that the instruction was contrary to law, and "probably resulted in a miscarriage of justice."

9. **STATE EX REL. DEPT. OF TRANSPORTATION v. SUTHERLAND LUMBER AND HOME CENTER, INC. (2013 OK CIV APP 9)**

TOPIC: CONDEMNATION AWARD OF COSTS

RULING: AWARD OF COSTS IN A CONDEMNATION PROCEEDING, INCLUDING ATTORNEY FEES, IS NOT JUSTIFIED IF THE LOSING PARTY DID NOT DEMAND A JURY TRIAL

FACTS: Only ODOT, as the condemning party, demanded a jury trial and the jury awarded a lesser amount than the commissioners' report ($427,280 v. $180,802). ODOT sought recovery (a) for "deposition preparation and deposition testimony of the Department's witnesses" and (b) for "expenses for the service of subpoenas, costs for copying papers necessarily used at trial, and reasonable expense for taking and transcribing deposition testimony."

TRIAL COURT RULING: ODOT requested and was awarded an amount for each of the two sets of expenses. The landowner had stipulated and agreed to pay the first category of expenses, but not the second. The landowner appealed saying neither amount was justified by law, because, according to statute, such costs are awarded only if the losing party demanded the jury trial. In this case, it was ODOT who demanded the jury trial, and was the winner, not the loser.

COURT OF CIVIL APPEALS RULING: The appellate court affirmed the granting of the costs which the landowner had agreed to pay, and reversed as the other costs, because, by statute, no costs are to be awarded unless the party requesting the jury trial

loses at trial.

10. **MIDFIRST BANK v. WILSON (2013 OK CIV APP 15)**

TOPIC: STANDING TO FORECLOSE A MORTGAGE AND NOTE

RULING: FAILURE TO ATTACH AN AUTHENTICATED AND PROPERLY ENDORSED NOTE TO A MORTGAGE FORECLOSURE PLEADING IS FATAL

FACTS: MidFirst sued to foreclose a note and mortgage which was initially issued to Harry Mortgage and endorsed to Washington Mutual Bank. No endorsement to MidFirst was ever shown. In response to a Motion to Dismiss, MidFirst claimed the note contained an endorsement "in blank" (i.e., to bearer), but the note attached to such response failed to show such endorsement. The response also included an affidavit asserting that MidFirst was the holder of the note, but no note was attached to the affidavit. The Motion to Dismiss was not decided. MidFirst filed a Motion for Summary Judgment and the debtors failed to respond.

TRIAL COURT RULING: MidFirst's Motion for Summary Judgment for foreclosure was granted. The debtors sought to vacate such judgment, but such motion was denied. The debtors appealed.

COURT OF CIVIL APPEALS RULING: The order denying the debtors' motion to vacate is reversed; the judgment in favor of MidFirst is vacated; and the case is remanded for further proceedings to determine who held the note.

[AUTHOR'S NOTE: This case continues to remind foreclosing attorneys to properly document IN THE RECORD their claim to "Standing" by showing they held the note when the foreclosure petition was filed.]

11. **RICHARDS v. BANC-FIRST SHAWNEE (2013 OK CIV APP 16)**

TOPIC: ECONOMIC DURESS THROUGH DEMAND NOTES

RULING: A THREAT TO CALL DUE A DEMAND LOAN IS NOT SUFFICIENT EVIDENCE OF ECONOMIC DURESS, TO TOLL A STATUTE OF LIMITATION TO SUE FOR BREACH OF CONTRACT BY BANK

FACTS: A demand note and construction mortgage were converted to a permanent loan, but only after borrower was allegedly denied certain credits towards the construction loan, and was allegedly threatened with the note being called due if he protested the lack of such credit. Ten years later the loans were paid off and the debtor then sued for breach of contract, breach of fiduciary duty, and duress. Lender asserted statute of limitations.

TRIAL COURT RULING: At trial, after the debtors presented their evidence, the lender moved for a directed verdict which was granted. Debtors appealed.

COURT OF CIVIL APPEALS RULING: Affirmed. Because the threat to call the note due was reasonable, since the note was a demand note, there was insufficient evidence to establish economic duress.

12. **STILLWATER NATIONAL BANK & TRUST CO. v. COOK (2013 OK CIV APP 17)**

TOPIC: APPLICATION FOR ATTORNEY FEES

RULING: THE FILING OF AN APPLICATION FOR ATTORNEY FEES IN AN ACTION ON A MECHANICS AND MATERIALMAN'S LIEN PRIOR TO THE DECISION DENYING THE ARCHITECT'S MOTION TO RECONSIDER JUDGMENT IN FAVOR OF THE LENDER IS NOT PREMATURE

FACTS: Lender made a construction loan, and, in anticipation of construction, an

architect prepared plans, and, upon the developer's failure to pay for such plans, the architect filed a mechanics and materialman's lien. Before any construction began, the developer defaulted on the loan and gave the lender a deed in lieu of foreclosure. The lender sued to quiet title against the architect.

TRIAL COURT RULING: The title was quieted in favor of the lender, who filed an application for attorney fees. Such application was filed between the date the architect filed its motion for reconsideration and the date the court denied such motion for reconsideration. The denial of the motion for consideration denied attorneys fees, but stated they would be reconsidered "upon application." Without re-application for attorney fees, the matter was set for hearing on such fees and the original application granted. Architect appeals the adverse rulings concerning the lien and the attorney fees.

COURT OF CIVIL APPEALS RULING: Court of Civil Appeals affirmed the order denying the existence and priority of the architect's lien, and the Supreme Court denied Cert. Architect again disputed the grant of attorney fees, due to allegedly being applied for prematurely and then not reapplied for. Court of Civil Appeals affirmed saying statute does not prevent early application for attorney fees, just late (over 30 days) application, and, therefore, the initial "early" application (i.e., prior to the judgment on the motion to reconsider the lien matter) was timely and proper, and must be granted to lender as the prevailing party.

13. **BACON & SON, INC. v. CITY OF TULSA (2013 OK CIV APP 20)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS CONSTITUTIONALITY

RULING: SPECIAL ASSESSMENT NOTICE PROCEDURES AND ALLOCATION OF BENEFITS AND SHARE OF COSTS ARE CONSTITUTIONAL

FACTS: Landowner challenged constitutionality of the special assessment statutes due to alleged lack of due process in the assessment district creation process, and the allocation of estimated benefits and allocation of share of costs. Two hearings were held and landowner waited until later than 30 days after the first hearing to file this action.

TRIAL COURT RULING: Trial Court granted summary judgment to City and held that the statutory due process which was provided was constitutionally adequate in that affected parties received notice including two hearings (for creation of a district and then separately for approval of assessments) and a notice that they could review the allocation information at the City offices, concerning estimated benefits and costs. Also it was held that the landowner failed to protest within 30 days of the first hearing, and is therefore, by statute, barred from such protest.

COURT OF CIVIL APPEALS RULING: Affirmed.

14. **STATE ex rel. DEPT. OF TRANSPORTATION v. METCALF (2013 OK CIV APP 28)**

TOPIC: CONDEMNATION PROCEDURES

RULING: STATUTORY PROCEDURES CALLING FOR AN APPRAISAL BEFORE MAKING AN OFFER TO PURCHASE ARE NOT MANDATORY BEFORE COMMENCING CONDEMNATION PROCEEDING

FACTS: ODOT made a offer to purchase land based on an appraisal, and then, at the request of the landowner reduced its taking from a full taking of the parcel (2 acres; $130,650) to a partial taking (0.28 acres; $11,000). The first offer for a full taking was based on an appraisal but the second offer concerning a partial taking just relied on the original appraisal to compute a new offer. The offers were not accepted, and no

counteroffer was made. The proceeding was commenced.

TRIAL COURT RULING: Trial court dismissed the proceeding due to ODOT's failure to procure an appraisal for the smaller tract, thereby making the offer invalid, because it was not based on an appraisal. Such appraisal is called for in 27 O.S. Section 13.

COURT OF CIVIL APPEALS RULING: Reversed and remanded for determination of appropriate amount of compensation. The steps provided in 27 O.S. Section 13 are relegated by Section 15 to being nothing more than "policies", and are not mandatory. "Based on the above [statutes and cases], the condemnor is required to make a bona fide offer to purchase the land before bringing its condemnation action. This is the only jurisdictional prerequisite. Although such offers may customarily be based on an appraisal, the statute does not require it."

[*It will be interesting to see if the recent legislative enactment (described below) affects this issue:*

HB1562 Landowners Bill of Rights Act
Sponsors: Representatives Jordan and Kay of the House, and Senators Treat, Marlatt, Shortey, and Brecheen of the Senate

Status: Signed into Law on April 30, 2012

The measure directs the Attorney General to "prepare a written statement that includes a 'Landowner's Bill of Rights' for a property owner whose real property may be acquired…through the use of…eminent domain authority…".]

15. **IN THE MATTER OF THE ESTATE OF ROZELL (2013 OK CIV APP 35)**

TOPIC: TRUST ASSETS DIVISION AND DISTRIBUTION

RULING: TRUST DIVIDING ASSETS BETWEEN BENEFICIARIES AT TRUSTOR'S DEATH VESTS IN BENEFICIARY AND IF NOT DISTRIBUTED BY

THE BENEFICIARY DEATH, THEN GOES TO BENEFICIARY'S ESTATE, RATHER THAN LAPSING

FACTS: Trust provided for Trustor/Mother's Trust assets to be divided between 7 children's sub-trusts on her death, and to be distributed within 3 years thereafter. Such distribution goes to living children of deceased beneficiary, if beneficiary is not alive on division date (i.e., on death of trustor). No other provision is provided in case beneficiary dies before distribution date and has no living children, as happened here. A suit ensued between the estate of the deceased (childless) beneficiary and the trustee of the trust.

TRIAL COURT RULING: The trial court ruled the beneficiary was not alive when distribution was made, and because he had no children, the bequest to him lapsed. Beneficiary's personal representative appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded. The trust "provides for a beneficiary's share to be divested upon the conditions subsequent that the beneficiary is deceased and has living children. With respect to [this beneficiary's] share, both conditions were not met. [This beneficiary] was deceased but he had no children. Therefore, his interest, which vested upon [his mother's] death, was never divested. It passed to his estate upon his death."

16. **HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC (2013 OK CIV APP 38)**

TOPIC: ATTORNEYS FEES IN MORTGAGE FORECLOSURE

RULING: JUNIOR LIENHOLDER CAN UNSUCCESSFULLY CONTEST THE PRIORITY OF THE LIEN OF THE PRIMARY MORTGAGE HOLDER AND STILL NOT OWE ATTORNEYS FEES

FACTS: First lender sought to foreclose using the non-judicial foreclosure procedure, and, even though it achieved a settlement with the debtor, it was forced into a regular court foreclosure action where it incurred attorney fees, due to the assertion by the second lender that its lien was ahead of the first lender.

TRIAL COURT RULING: Trial court determined that first lender had the first and prior mortgage lien ahead of second lender. First lender elected not to pursue an award of attorney fees against the mortgagor, but, instead, sought to recover attorney fees from second lender for asserting and losing on the lien priority issue.

COURT OF CIVIL APPEALS RULING: Affirmed. The American Rule dictates that in the absence of contractual right to attorney fees or specific statutory language allowing attorney fees, no fees are allowed to the prevailing party. In addition, the case-law rule is that junior lienholders and other incidental foreclosure parties, who resist in good faith, are not subject to attorney fees because it is the mortgagor who really caused the parties to incur legal fees, and consequently it is the mortgagor and the res which must bear that burden. This is true even if the mortgagor defaults.

17. **HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC (2013 OK CIV APP 40)**

TOPIC: MORTGAGE LIEN PRIORITIES

RULING: ACCEPTANCE OF A DEED IN LIEU OF FORCLOSURE WITH FORGIVENESS OF ONLY IN PERSONAM LIABILITY WITH THE INTENT TO FORECLOSURE JUNIOR LIENHOLDERS DOES NOT MERGE LIEN WITH TITLE

FACTS: First lender accepted a deed in lieu of foreclosure (a special warranty deed "subject to" specified liens and interests), and forgave the debtor's in personam liability,

but retained in rem liability (anticipating a future foreclosure action), while acknowledging that its mortgage was "subject to" specified other mortgages and claims. Second lender filed a foreclosure action seeking foreclosure of its mortgage against the mortgagors, and also asking that the court determine that the first lender's mortgage lien had merged into its fee title.

TRIAL COURT RULING: "The trial court determined it was not the intent of the parties to the settlement agreement to subordinate [first lender's] first mortgage to [second lender's] second mortgage. The trial court granted summary judgment in favor of [firs lender]. [Second lender] appeals.

COURT OF CIVIL APPEALS RULING: Affirmed. The appellate court considered (a) the language of the special warranty deed making it "subject to" the listed interests, (b) the retention of in rem liability by the first lender, and (c) the Restatement (Third) of Property comment that "The doctrine of merger does not apply to mortgages or affect the enforceability of a mortgage obligation." It concluded the first lender's mortgage lien was still senior.

18. **NOBLE v. NOBLE (2013 OK CIV APP 41)**

TOPIC: PARTITION PROCEEDING

RULING: PARTY TO A PARTITION ACTION DOES NOT HAVE A RIGHT OF REDEMPTION THAT LASTS UNTIL CONFIRMATION OF SHERIFF'S SALE

FACTS: Two siblings received 80 acres by inheritance from their grandfather. They could not agree to a partition in kind. One sibling filed for a partition. After the commissioners' appraisal/report was given ($528,000), and neither sibling elected to buy at that price, a sheriff's sale was held and one of the siblings purchased the land for less

than the commissioner's award ($378,400). Before the hearing on the confirmation of sale, the other non-buying sibling sought to "redeem" the property at the commissioners' value.

TRIAL COURT RULING: Trial court denied the attempted "redemption", and a sheriff's deed was issued. The losing sibling filed an appeal

COURT OF CIVIL APPEALS RULING: Affirmed. There is no statutory right of redemption, and there is not an analogy to a mortgage foreclosure or tax sale redemption setting where the party stands to lose the entire interest. In a partition, neither party has a senior right, and each party will receive a proportional payment.

[AUTHOR'S COMMENT: There is, in effect, a statutory right of "redemption" provided in the partition statute, which arises at the time of the commissioners' report/appraisal when either owner can elect to purchase and thereby "redeem" the property from the forced sale. Such right expires when the election period passes.]

19. **CITY OF OKLAHOMA CITY v. FIRST AMERICAN TITLE & TRUST COMPANY (2013 OK CIV APP 42)**

TOPIC: SURETY BOND EXONERATION

RULING: CHANGES IN AN AGREEMENT BETWEEN THE PRINCIPAL AND THE SUBCONTRACTOR DOES NOT EXONERATE THE SURETY, SINCE THE CHANGES WERE NOT TO THE AGREEMENT BETWEEN THE PRINCIPAL AND THE OBLIGEE

FACTS: Principal/developer gave a surety bond from the obligee (First American) to the City insuring that it would complete its efforts to construct a subdivision, including paving the streets. Principal became insolvent and stopped its development, including

halting payments to the subcontractor which was paving the streets. City sued surety to pay to complete the development, principally the streets. Principal and subcontractor were also joined. Surety argued that it was exonerated because the principal and subcontractor modified their subcontract.

TRIAL COURT RULING: Trial court granted summary judgment to surety declaring that the bond was exonerated by the contract modifications. Obligee/City appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded. Exoneration only occurs when the contract between the principal and the obligee is altered without the surety's consent, which is not present here. The matter was reversed and remanded to determine all the parties' respective obligations and breaches.

20. **LOPEZ v. ROLLINS (2013 OK CIV APP 43)**

TOPIC: MISREPRESENTATION OF SQUARE FOOTAGE OF RESIDENCE

RULING: REPRESENTATION OF SQUARE FOOTGAGE OF RESIDENCE BY SELLER AND REALTORS SUBJECT THEM TO TRIAL, INSPITE OF RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (RPCDA), AS TO WHETHER SUCH REPRESENTATIONS WERE MADE REASONABLY, RECKLESSLY, OR WITH INTENTIONAL DISHONESTY.

FACTS: County assessor showed the square footage of the residence to be 4,614 of livable space. An appraiser for the seller found the house to contain 5,053 square feet. The sellers claimed they had added an addition and that the real square footage was 5,053. The realtors (a) listed the house as having 5,053 square feet "per court house", and (b) prepared marketing materials showing 5,053 sf "per appraisal" and "per court houses". The listing and marketing information contained disclaimers as to accuracy of

the information. The buyers' appraiser relied on the earlier appraiser's sf when preparing an appraisal for the lender. After buying the house, the buyers learned when the county assessor reassessed the house that it contained 4,130 sf, not 5,053 sf. The buyer had its own appraisal done and was told there was 4,383 sf. The buyers sued the sellers and realtors for fraud and negligent misrepresentation, sued sellers for breach of contract, sued the realtors for violations of the Real Estate License Code, and sued the lender's appraiser for negligence.

TRIAL COURT RULING: Trail court granted summary judgment to the sellers, realtors and lenders appraiser, because the buyers failed to sue under the RPCDA, which was "the exclusive vehicle for recovery where misinformation is communicated in the sale residential property." In addition, the trial court gave summary judgment to the lender's appraiser, "because there was no evidence that Buyers relied on the square footage reported in [lender's appraiser's] appraisal before purchasing the house." Buyers appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded, as to the sellers and realtors, for the trier of fact to determine whether the misrepresentation of square footage was "reasonable, reckless, or intentionally dishonest." The appellate court found (a) the RPCDA does not require the disclosure of square footage, and, therefore, is not the sole remedy for related misrepresentations, and (b) the waivers and disclaimers did not protect the realtors. The appellate court quoted the earlier Oklahoma Supreme Court opinion (Bowman v. Presley, 2009 OK 48): "Representations of the size of real property are statements of material fact, not expressions of opinion, and a buyer need not conduct a separate investigation to ascertain their truth." The Appellate affirmed the summary

judgment in favor of the lender's appraiser because the buyers did not know of or rely on such appraisal.

21. **E&F COX FAMILY TRUST v. CITY OF TULSA (2013 OK CIV APP 45)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS

RULING: FAILURE TO FILE WRITTEN OBJECTION TO PROPOSED SPECIAL DISTRICT DURING PUBLIC HEARING ENDS ABILITY TO CHALLENGE CREATION OF DISTRICT

FACTS: When City of Tulsa proposed a special assessment district to build the multi-purpose facility in downtown Tulsa, now known as ONEOK Field, there was a public hearing before the City Council to consider the $60 million assessment. None of the parties who subsequently filed this lawsuit appeared and filed a written protest, although they variously filed pre-hearing written protests, and email protests during the hearing, and an individual, as an individual, (rather than for a related trust, which trust later sued) appeared and protested verbally but failed to file a written protest. When the district was approved, the various protestants filed a declaratory action to halt the creation of the assessment district.

TRIAL COURT RULING: Trial court dismissed all but one of the protestants because they failed to file a written objection during the public hearing, as required by the statute. Strict enforcement of the statute was justified because its language is clear. Trial court allowed one protestant to proceed. Motions for summary judgment were denied and at trial the protestant lost. Both the dismissed protestants and the continuing protestant all appealed.

COURT OF CIVIL APPEALS RULING: Affirmed. Strict compliance with the protest

process is required and the protestants failed to comply. The continuing protestant objected in the appeal to various discovery disputes and to lack of adequate time to conduct discovery and to prepare for a non-jury trial. Such continuing protestant failed to identify any facts or authority regarding the core issue: "whether City Council had a rational basis upon which to determine property in District was reasonably expected to increase in value as a result of the creation of District..."?

22. **E & F COX FAMILY TRUST v. CITY OF TULSA (2013 OK CIV APP 47)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS

RULING: FAILURE TO FILE SUIT TIMELY TO OBJECT TO CREATION OF SPECIAL ASSESSMENT DISTRICT AND TO BENEFITS TO ONE'S TRACT BARS SUIT

FACTS: Creation of special assessment district entails two steps/hearings, including (a) a first stage hearing to consider "the advisability of construction of an improvement and the amount to be assessed against the tract of land to pay for it", and (b) the second stage hearing to approve the "determination of the actual assessments levied on properties...". The protestants failed to file a legal action within the 30 day period after the first stage hearing, and instead waited until after the second stage hearing and filed a suit within the 15 day period after the second stage hearing. However, their challenge only related to the subject matter of the first stage hearing: "attacking the amount of benefit, or lack of it to their tracts...".

TRIAL COURT RULING: Trial court granted summary judgment to City of Tulsa declaring the suit was untimely.

COURT OF CIVIL APPEALS RULING: Affirmed. "Plaintiffs had the opportunity

within 30 days after City created District to file an action attacking the amount of benefit, or lack of it to their tracts. [11 O.S.] §39-108(D) Failing to avail themselves of such a remedy bars them from a right of action thereafter."

B. OKLAHOMA SUPREME COURT

23. **IN THE MATTER OF THE ESTATE OF DICKSION (2011 OK 96)**

TOPIC: PROBATE AS TO PRETERMITTED HEIR AND PROPER PERSONAL REPRESENTATIVE

RULING: PATERNITY OF ILLEGITIMATE SON, AS PRETERMITTED HEIR, CAN BE DETERMINED DURING PROBATE, AND PERSONAL REPRESENTATIVE CANNOT BE BUSINESS PARTNER OF DECEDENT IN INTESTATE PROCEEDING

FACTS: Probate was filed by son of decedent and he was appointed as personal representative. Illegitimate son sued to be determined to have paternity confirmed and to receive a share of the estate. Illegitimate son sought to challenge the holographic will, and, once the personal representative of the estate revealed that he was a business partner of the decedent, the illegitimate son sought the personal representative's removal.

TRIAL COURT RULING: Trial court held: Powell was an unintentionally omitted (illegitimate) child from the will being probated, and was entitled to his statutory share of the estate; and the holographic will was admitted over Powell's objections and the personal representative was allowed to serve even though he was the business partner of the decedent, based on the objections being untimely.

COURT OF CIVIL APPEALS RULING: Reversed and remanded on all issues, determining that the trial court erred when it allowed post-death determination of paternity. Powell sought certiorari.

SUPREME COURT RULING: Affirmed in part, and reversed and remanded in part.

Reversed the trial court decision that his contest of the admission of the holographic will was not timely filed. The form of the objection was improperly titled "Objection to Application for Sale of Real Estate", but the substance was adequate and was timely. Affirmed that paternity can be determined in the probate of the deceased parent, rather having to be done before death. Cases to the contrary are overruled.
Reversed as to the trial court allowing the decedent's business partner as the personal representative. Such prohibition applies in intestate proceedings or when the business partner is not named as personal representative in a will. Also, there was no delay in objecting to such appointment.

24. **AOF/SHADYBROOK AFFORDABLE HOUSING CORPORATION v. YAZEL (2012 OK 59)**

TOPIC: AD VALOREM TAX EXEMPTION OF CHARITABLE USE PROPERTY

RULING: APARTMENT COMPLEX FUNDED WITH PROCEEDS FROM SALE OF FEDERALLY TAX EXEMPT BONDS IS EXEMPT FROM AD VALOREM TAXATION (PRIOR CASE OVERRULED)

FACTS: An apartment complex was funded with proceeds from sale of federally tax exempt bonds, and provided low cost units "almost exclusively to persons of little financial means who were either disabled or over the age of sixty-two (62)." The complex was treated as being exempt from ad valorem taxation from 1998 to 2003, and then started taxing them. The complex paid taxes under protest from 2004 to 2006, when it was sold. The reason for the exemption was due to the Oklahoma Constitutional exemption for charitable purposes (Art. 10, Section 6). However, in 2004 the legislature

removed the exemption from properties purchased with federally tax exempt bonds. The complex sued to recover the taxes paid under protest.

TRIAL COURT RULING: Trial court ruled for the apartment complex, initially and on remand, holding that it "was 'physically dedicated to a charitable purpose' under Article 10, §6 of the Oklahoma Constitution and that Shadybrook's use of the property during 2004, 2005, and 2006 did not fall under the rule announced by this Court in London Square Village."

COURT OF CIVIL APPEALS RULING: The Court of Civil Appeals reversed and remanded the case to the "trial court to determine the factual issue of whether Shadybrook's use of the property was for charitable purposes under Article 10, §6, 'so as to overcome the Supreme Court's ruling in London Square...".

SUPREME COURT RULING: Affirmed. "We find that Shadybrook has overcome its burden of providing the existence of an exemption and has demonstrated that its operation of the low-income housing complex was a charitable use entitling it to the ad valorem tax exemption in §6. London Square Village is overruled. The statutory language in 68 O.S. 2887(8)(a)(2)(b) excluding property funded with proceeds from the sale of federally tax-exempt bonds from ad valorem exemption is unconstitutional. We affirm the trial court's order in all respects."

25. **COUNTY RECORDS, INC. v. ARMSTRONG (2012 OK 60)**

TOPIC: COPYING LAND RECORDS

RULING: THIRD PARTY CANNOT HAVE COPY OF TRACT INDEX FOR PURPOSES OF SALE FOR PROFIT

FACTS: "Company, in business of operating a website that provides land records to

on-line subscribers, requested electronic copies of the official tract index and land documents from the Rogers County [sic] Court Clerk. The requests were denied and the company brought an action for declaratory judgment asserting a right to the documents under the Open Records Act and a determination of the appropriate fee."

TRIAL COURT RULING: Summary judgment was granted for the company.

SUPREME COURT RULING: The Supreme Court "retained the appeal on its own motion, and reverses and remands with instructions to enter judgment for the Rogers County Clerk." The Open Records Act and the Oklahoma Abstractor's Act prohibit the county clerk from providing copies of the land documents or index (either paper or electronic) to anyone who seeks to resell such information. However, "Rogers County contracts with KellPro, Inc. to create and maintain a website for the purpose of publishing text information entered by the County Clerk's Office into the KellPro software along with images of documents stored electronically at the clerk's office. Rogers County pay KellPro a fee based on the volume of data stored and KellPro makes copies of the images of land documents accessible for a fee payable to the County Clerk. ... The contract between Rogers County Clerk and KellPro specifically provides that the electronic data remain the property of the County while KellPro retains its intellectual property rights to its software." The difference between KellPro and the plaintiff's operations is that KellPro maintains the website for the County for a charge to the county, but all proceeds from sale of the information goes to the Count, but the plaintiff seeks access to the information solely for its own profit.

26. **AKIN v. CASTLEBERRY (2012 OK 79)**

TOPIC: ADVERSE POSSESSION

HOLDING: MIXED OR DUAL POSSESSION IS ALWAYS FATAL TO A CLAIM OF ADVERSE POSSESSION

FACTS: Mr. and Mrs. McKinney owned title to a landlocked set of three parcels (Government Lots 1, 2 & 3) They sold, at auction, and deeds were give to the Akins (father and son) covering only Lot 1. The widowed McKinney gave a deed to a third party Castleberry covering Lots 2 & 3. The Castleberry's paid taxes on the two lots thereafter. The three lots are landlocked with Akin owning land on two sides, a third person owning the land on a third side, with a river on the fourth side. The land was only good for cattle grazing, and recreational uses, such as hunting. The Akins had fenced the perimeter of the 3 lots and had a locked gate controlling access to it. Castleberry's claimed to have a key to such gate. The Castleberry's did not live in that county. Akins and Castleberry's both claimed they used the property for recreational purposes. Akins gave a right of way easement for an oil and gas pipeline. The Castleberry's had an agreement drawn up for the Akins to sign, giving the Castleberry's access to the three lots for cattle grazing, hunting and access to the river. The Akins did not sign the agreement. The Akins filed suit to confirm their ownership of the disputed two lots relying on the deed from the auction only giving them one of the three lots, plus allegations of adverse possession.

TRIAL COURT RULING: Initially, after trial, the trial court granted title to the Akins based on adverse possession, and after the Court of Civil Appeals reversed and remanded it for the trial court to hear certain excluded evidence from the Castleberry's, the trial court granted title to the Akins based on adverse possession.

COURT OF CIVIL APPEALS RULING: On the second appeal, the Court of Civil

Appeal reversed and remanded it.

SUPREME COURT RULING: The Supreme Court granted cert. and vacated the Court of Civil Appeals latest decision, and affirmed the Trial Court's decision in favor of the Castleberry's, confirming title to the two lots in the Castleberry's. The appellate court discussed the law concerning the requirements to prove adverse possession, emphasizing that adverse possession is not favored, and that all presumptions favor the record owner. The court focused on the "mixed or dual possession (shared use)", holding that such shared "possession can never ripen into exclusive dominion".

27. **SMITH v. VILLAREAL (2012 OK 114)**

TOPIC: SEPARATE MARITAL ESTATE

HOLDING: PRESUMPTION THAT PROPERTY TITLED TO BOTH SPOUSES AS JOINT TENANTS MUST BE TREATED AS PROPERTY OF THE MARITAL ESTATE IN A DIVORCE CAN BE REBUTTED BY CLEAR AND CONVINCING EVIDENCE, SUCH AS THE AFFIDAVIT OF THE LENDER THAT THE INCLUSION OF THE OTHER SPOUSE'S NAME WAS ERROR, AND THE PURCHASE WAS MADE WITH ONLY ONE SPOUSE'S FUNDS

FACTS: Husband remarried, and, during a divorce of the second wife, he purchased two rental properties for his two daughters from his first marriage. The two purchases were made before the divorce was final, and were made with his own separate funds, although the deeds showed the husband and wife as joint tenants. The presumption is that property placed in joint tenancy showing husband and wife as joint tenants is presumed to be a gift to the marital estate, even if the land are purchased with the separate funds of one spouse. The lender on each of the two loans used to purchase

the two properties provided affidavits that their verbal instructions and notes showed that the deeds were to have the husband as the sole grantee. An officer of one of the lenders testified that the placement of the wife's name on the deed was an error, contrary to the husband's verbal instructions.

TRIAL COURT RULING: Trial court ruled for the wife, finding that the placement of both the wife's and the husband's names on the deeds as joint tenants created a rebuttable presumption that the conveyance was a gift to the marital estate. The trial court determined that the presumption was not rebutted. The husband appealed.

COURT OF CIVIL APPEALS RULING: The court of civil appeals affirmed.

SUPREME COURT RULING: The supreme court reversed the trial court and the court of civil appeals, and held that the rebuttable presumption that the deed was a gift to the marital estate was overcome by clear and convincing evidence supported by not only the testimony of the husband, but by testimony of the lenders' staff that the instructions to the closer and lender from the husband were to place the title in his sole name.

28. **CORNETT v. CARR (2013 OK 30)**

TOPIC: SERVICE OF SUMMONS DEADLINE

HOLDING: RULE 9(A) OF THE RULES FOR DISTRICT COURTS' (MUST ISSUE SUMMONS IN 90 DAYS) IS STRICKEN AS BEING IN CONFLICT WITH 12 O.S.§2004(1) (MUST SERVE SUMMONS IN 180 DAYS)

FACTS: Husband sued to challenge a fraudulent sale of the divorced parties' property due to a side agreement to pay the wife additional funds ($8,000) outside closing. The divorce court ordered the wife to sell the property for the highest possible price and to split the proceeds. The case was initially dismissed without prejudice, and

the husband refiled the lawsuit. The husband's lawyer failed to reissue summons within the 90 days required by Rule 9(a)

TRIAL COURT RULING: The trial court, on its own motion, dismissed the case a second time, again without prejudice to refiling.

COURT OF CIVIL APPEALS RULING: Court of Civil Appeals affirmed. Supreme Court granted Cert.

SUPREME COURT RULING: Supreme court vacated Court of Civil Appeals decision, and reversed Trial Court, and remanded to the Trial Court. Rule 9(a) requires that the Summons be issued within 90 days of the case being commenced, or the trial court may dismiss it without notice to the plaintiff. 12 O.S.§2004(1) provides that if Service is not made within 180 days of the commencement of the case, the trial court may dismiss the case without prejudice. The Supreme noted that the Rule 9(a) was adopted 20 years before the Pleading Code was adopted, including 12 O.S. §2004(1). It also noted that the public policy being implemented by Rule 9(a) was superseded by the adoption of 12 O.S.§2004(1). Therefore, after considering similar federal rules and related federal cases on service, the Supreme Court ruled "To the extent the two conflict, the statute must prevail." (¶6) It further concluded: "Today's decision renders Rule 9 unnecessary, and it is hereby stricken from the Rules for the District Courts of Oklahoma."

There was a dissent, joined in by 4 of the 5 justices. The dissent argued that the Rule 9 pertained to the issuance of Summons and not the Service of Summons. The dissent further argued that the purpose of Rule 9 was to allow the trial court to control its docket by forcing plaintiffs to promptly issue Summons or face a dismissal. Therefore,

they argued, the public policy, of allowing the trial to control its docket, was still useful in promoting a positive goal.