UPDATE ON OKLAHOMA REAL PROPERTY TITLE RELATED CASES:

OKLAHOMA SUPREME COURT CASES
&
OKLAHOMA COURT OF CIVIL APPEALS CASES

FOR 2016-2017
(Covering July 1, 2016 to June 30, 2017)

Presented For the:
"Oklahoma Bar Association Real Property Law Section Annual Meeting"
At:
OKC, OK: November 2, 2017

COMMENTS BY SUPREME COURT JUSTICE NOMA D. GURICH

PANEL PRESENTATION BY:

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(C:\mydocuments\bar&papers\papers\304 Cases Update (16-17)(OBA-RPLS-Nov. 2017)

THE HONORABLE JUSTICE NOMA GURICH

Noma D. Gurich has served as a Justice on the Supreme Court of Oklahoma since February 15, 2011. She has been a member of the Oklahoma judiciary for 29 years. She is currently serving as Vice Chief Justice. Justice Gurich was born in South Bend, Indiana. She received a bachelor's degree Magna Cum Laude in political science in 1975 from Indiana State University. She earned her Juris Doctorate from the University Of Oklahoma College Of Law in 1978. She has been honored as distinguished alumnus by Indiana State, her high school and was inducted into the University of Oklahoma College of Law Order of the Owl Hall of Fame in 2016. After ten years as a litigator in the private practice of law in Oklahoma City, she was appointed to the Oklahoma Workers' Compensation Court where she served from 1988 to 1998, including 4 years as Presiding Judge. She was appointed and elected to serve as a District Judge in Oklahoma County from 1998 to 2011, where she also served as Presiding Administrative Judge for two years. She also served as the Presiding Judge of two Multi-County Grand Juries. She has the distinction of being appointed to judicial office by four governors. Justice Gurich was honored by the Oklahoma Bar Association Women in Law Section with a Mona Salyer Lambird Spotlight Award in 2003. She was named the 2011 Judge of the Year by the Oklahoma Chapter of the American Board of Trial Advocates. She has been honored by The Journal Record Woman of the Year program three times and inducted into the Journal Record Woman of the Year Circle of Excellence. She received a 2013 Byliner Award by the OKC Association of Women in Communications, and a 2013 Valuable Volunteer Award by the Foundation for Oklahoma City Public Schools. She is a graduate of the 2016 Salt & Light Leadership Training Class 8. Justice Gurich is a member of the OU College of Law Board of Visitors. Since 1998, she has been a member of the Kiwanis Club of Oklahoma. Justice Gurich is the Kiwanis Advisor for the Southeast High School (OKC) Key Club. Justice Gurich is an active member of St. Luke's United Methodist Church where she is a volunteer Mobile Meals driver and TV camera operator. She has also participated in mission trips to Russia and Alaska.

DALE L. ASTLE

Dale L. Astle is a commercial real estate attorney and serves as outside legal counsel for Bluestem Escrow and Title, LLC, 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 Bar Association, the Oklahoma Bar Association and the Tulsa Title and Probate Lawyers Association. He is a fellow in the American College of Real Estate Lawyers. He is past chairman of the Real Property Law Section of the Oklahoma Bar Association and has been a continuously active member of the Title Examination Standards Committee of the Oklahoma Bar for 37 years.

Dale was selected for inclusion in "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 numerous 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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COURTS: Okla. Sup. Ct. (May 1979); U.S. Dist. Ct., West. Dist of Okla. (Dec. 1984)

EDUCATION: University of Oklahoma [B.A. (PoliSci-Urban Admin.) 1971];
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 Title Litigation (Curative; Appeals, Expert Consultant/Witness)
Oil/Gas & Surface Title Opinions
Mediations and Arbitrations

MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Co- & Chairperson: 1988 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);
Kiwanis (Downtown OKC Club--member and former President); and
BSA: Vice Chair & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church

SPECIAL EXPERIENCE: Court-appointed Receiver for 5 Abstract Companies in Oklahoma;
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982 - Present), & "Oil & Gas Title Examination" (2015-Present)
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author: Pocket Part Update (1998 – 2000);
Contributing Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
"The Oklahoma Marketable Record Title Act ('aka' The 'Recording Act'): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies," 87 OBJ 27 (October 15, 2016)
"Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can Be A 'Root of Title'",85 OBJ 1104 (May 17, 2014)
"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (Dec.10, 2011)

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee*

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 affiliated with several law firms before beginning his private practice in 1992.

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.

A. OKLAHOMA SUPREME COURT CASES

(JULY 1, 2016-JUNE 30, 2017)

LIST OF CASES

NO.	TOPIC		CASE	OLAHOMA CITATION	DECIDED / MANDATE
	GENERAL	SPECIFIC			
A. OKLAHOMA SUPREME COURT					
1	Mechanics & Materialmen's Liens	Does a subcontractor have to give pre-lien notice, and what happens if no notice is given and the claim exceeds $10,000?	Pizano v. Lacey & Associates, LLC	2016 OK 73	6/21/2016 10/20/2016
2	Enforceability of Deed	Was a person restored to competency when the statute presuming incompetence is repealed, and does a grand daughter's assistance to a grandmother constitute undue influence?	Blair v. Richardson	2016 OK 96	9/20/2016 10/20/2016
3	Abstractor's Negligence & Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 100	10/4/2016 11/2/2016
4	Attorney's Negligence & Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 104	10/11/2016 11/2/2016
5	Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 105	10/11/2016 11/2/2016
6	Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Scott v. Peters	2016 OK 108	10/25/2016 2/7/2017
7	Conditional Use permit For a Wind Farm	Can a county Board of Adjustment deny a conditional use permit for a wind farm without grounds other than its "vision" for the county?	Mustang Run Wind Project, LLC v. Osage County BD. of Adjustment	2016 OK 113	11/1/2016 12/1/2016

8	Private Nuisance	Is a neighbor allowed to rely on personal aesthetic objections to the image of a cell tower and the required blinking lights to justify finding it is a private nuisance?	Laubenstein and Wallace v. Bode Tower, L.L.C.	2016 OK 118	12/6/2016 4/17/2017
9	Condemnation	Under what circumstances are attorney's fees and other costs recoverable in a condemnation proceeding?	State ex rel. Dept. of Transportation v. Cedars Group, L.L.C.	2017 OK 12	2/22/2017 5/11/2017
10	Void Probate Decree	Is it constitutionally required that the Final Account be mailed to all heirs, or is Notice of the Hearing on such Final Account being mailed sufficient?	Bebout v. Ewell	2017 OK 22	3/21/2017 4/17/2017
11	Contract for Deed	Does a buyer's/grantee's interest under a Contract for Deed – in itself-- make him an insured party to a homeowner's policy?	Hensley v. State Farm Fire and Casualty Co.	2017 OK 57	6/20/17 7/19/17

A. OKLAHOMA SUPREME COURT

1. PIZANO v. LACEY & ASSOCIATES, LLC (2016 OK 73)

GENERAL TOPIC:

Mechanics and Materialmen's Liens

SPECIFIC TOPIC:

Does a sub-contractor have to give pre-lien notice, and what happens if no notice is given and the claim exceeds $10,000?

HOLDING:

ALL SUB-CONTRACTORS WHO DO NOT CONTRACT DIRECTLY WITH THE OWNER MUST GIVE PRE-LIEN NOTICE, AND FAILURE TO GIVE PRE-LIEN NOTICE REDUCES ANY RECOVERY TO LESS THAN $10,000 (I.E., $9,999.00).

FACTS:

Plaintiff, sub-sub-contractor (Pizano) contracted with a sub-contractor (Williams) to remove a roof, and did so. Sub-sub-contractor did not give owner (Lacey) a pre-lien notice before filing a lawsuit (42 O.S. §142.6). Sub-contractor failed to pay sub-sub-contractor, and sub-sub-contractor sued sub-contractor and after receiving a default judgement for more than $10,000, sought to foreclose the lien on the homeowner.

TRIAL COURT RULING:

Trial court held that the sub-sub-contractor met the definition of a "claimant" (42 O.S. §141) who did work under a contract which was not directly with the owner, and, therefore, the sub-sub-contractor must give pre-lien notice to the owner and original contractor, which it failed to do. However, the statute only required such pre-lien notice to be given if the debt was $10,000 or more. So the trial court sustained the lien as to $9,999.00, and allowed the foreclosure.

COURT OF CIVIL APPEALS RULING:

Both parties appealed. The COCA held that the sub-sub-contractor preserved her lien, but that there were disputed facts and the matter needed to be remanded to determine the amount and the enforceability of the lien.

SUPREME COURT RULING: Vacated COCA and affirmed trial court ruling.

2. BLAIR v. RICHARDSON (2016 OK 96)

GENERAL TOPIC:

Enforceability of deed.

SPECIFIC TOPIC:

Was a person restored to competency when the statute presuming incompetence is repealed, and does a grand daughter's assistance to a grandmother constitute undue influence?

HOLDING:

IT IS THE STATUTE IN FORCE AT THE TIME OF THE CONVEYANCE, PRESUMING COMPETANCE, THAT PREVAILS AND NOT A REPEALED STATUTE WHICH TREATED SOMEONE WHO WAS ADMITTED FOR TREATMENT AS BEING INCOMPETENT. NO UNDUE INFLUENCE WAS SHOWN.

FACTS:

Mother who was a grandmother's only child died, leaving two adult children. One grandchild moved away to another state, while one grandchild remained near the grandmother and helped the grandmother in minor ways. The grandmother expressed an intent to convey her home to the local granddaughter, and the granddaughter took the grandmother to an abstract company where the grandmother put the title in joint tenancy between herself and the local granddaughter. After the grandmother died, the local granddaughter had the court determine that she, the local granddaughter, was the surviving owner. The local granddaughter rented out the land and split the proceeds with her distant sister and her father. A dispute arose, and the distant daughter sued to set aside the joint tenancy deed.

TRIAL COURT RULING:

The distant granddaughter argued that (1) the admission of the grandmother for treatment made her statutorily incompetent until she was restored, which did not occur, and (2) the local granddaughter was a fiduciary who used undue influence to secure the joint tenancy deed. The trail court denied both theories. The earlier statute (43A O.S. §55) presumed that if someone was admitted for treatment, they were incompetent. The grandmother was admitted for treatment for about 3 months in 1966 and then released. Such statute was repealed in 1986 and replaced with a statute expressly providing that such placement, without a separate finding of incompetence, did not create a presumption of incompetence. Therefore, when the grandmother executed the joint tenancy deed in 1987 she was -- under the then current statute -- presumed competent. Also, the local granddaughter's minor unofficial assistance to her grandmother, driving her to do local errands, did not create a

fiduciary relationship, and the actions by the local granddaughter to help the grandmother find a form joint tenancy deed and drive her to the local abstract company to complete the form did not constitute undue influence.

COURT OF CIVIL APPEALS RULING:

The distant granddaughter appealed. The COCA reversed the trial court, and held that the grandmother was never restored to competency and, therefore, she lacked the capacity to execute the deed. The undue influence issue was not addressed.

SUPREME COURT RULING:

The Supreme Court vacated the COCA decision and affirmed the trial court.

3. CALVERT v. SWINFORD (2016 OK 100) [see 2016 OK 104 and 2016 OK 105, below]

GENERAL TOPIC:

Abstractor's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ABSTRACTOR CONDUCTING A CLOSING AND IN PREPARATION OF A DEED (FAILING TO EXCLUDE MINERALS) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION.

FACTS:

Two sisters had a sales contract to sell real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE -- the Supreme Court retained the case]

SUPREME COURT RULING:

The trial court was affirmed.

4. CALVERT v. SWINFORD (2016 OK 104) [see 2016 OK 100 above, and 2016 OK 105 below]

GENERAL TOPIC:

Attorney's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ATTORNEY IN PREPARATION OF A DEED (FAILING TO EXCLUDE MINERALS) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION.

FACTS:

Two sisters had a sales contract to sell real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

5. CALVERT v. SWINFORD (2016 OK 105)) [see 2016 OK 100 and 2016 OK 104 above]

GENERAL TOPIC:

Deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for reformation of an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR REFORMATION OF A DEED (FAILING TO EXCLUDE MINERALS) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION.

FACTS:

Two sisters had a sales contract to sell real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

6. SCOTT v. PETERS (2016 OK 108)

GENERAL TOPIC:

Deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for reformation of an error in a deed (failing to exclude minerals) begin to run?

FACTS:

Grantor/plaintiff had a sales contract for real property providing that the minerals were to be reserved to the grantors. The deed did not reserve the minerals. Later, the grantor/plaintiff again deeded the same land to a third party, without reserving the minerals. The third party conveyed such lands again to a "fourth" party, who then conveyed to the original grantee, when such original grantee demanded such deed. Such grantee signed a mineral lease. All of these deeds were promptly filed in the land records. The original grantor, more than 5 years after he (the original grantor) conveyed the same land to the third party, sued his original grantee, to quiet the title to the minerals.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years -- 12 O.S. § 95(A)(12)) because the grantor had notice upon the filing of the deed. The argument that the statute of limitations should be tolled until the injured party realized the error was rejected. The grantor included an argument claiming that the 15 year adverse possession statute should apply, but that argument was rejected. Summary judgment was granted to the original grantee.

COURT OF CIVIL APPEALS RULING:

[NONE -- the Supreme Court retained the case]

SUPREME COURT RULING:

The trial court was affirmed (unanimously), relying on the three Calvert cases.

[Author's Comment: It is heartening that the Supreme Court stated in the concluding paragraph 19:

> *"If this were not the case, real property transactions across the state could be set aside at almost any time which could leave all real property transactions unsettled indefinitely. Accordingly, we had that, notice imposed on the grantor by the filing of the deed with the county clerk precludes this action as untimely."*]

7. MUSTANG RUN WIND PROJECT, LLC v. OSAGE COUNTY BD. OF ADJUSTMENT (2016 OK 113)

GENERAL TOPIC:

Conditional use permit for a wind farm.

SPECIFIC TOPIC:

Can a county Board of Adjustment deny a conditional use permit for a wind farm without grounds other than its "vision" for the county?

HOLDING:

A COUNTY BOARD OF ADJUSTMENT CANNOT DENY A CONDITIONAL USE PERMIT FOR A WIND FARM WITHOUT SPECIFIC GROUNDS SUPPORTED BY EVIDENCE.

FACTS:

A company applied to the Osage County Board of Adjustment for a conditional use permit to install a 68-unit wind farm on a 15 acre tract. The applicant met all requirements for the granting of the permit. The Board of Adjustment denied the application with the primary stated reason being that "we're really here to look at our vision, is this appropriate for adjacent landowners and is it appropriate for the county." The applicant appealed to the District Court.

TRIAL COURT RULING:

The Osage Nation (as amicus) protested the proposal, raising various arguments ranging from the county not having statutory authority to issue any conditional use permits, to concerns about a negative impact on the environment (such as prairie chickens and eagles) and visual pollution and decrease in land values on adjacent property. The trial court reviewed the entire record from the Board of Adjustment hearings and heard all the various arguments. It rejected them all, based on the evidence or the lack of evidence. It ordered the Board of Adjustment to issue the permit. The trial court stated: "It appears that some members of the Board were more concerned with adjoining landowners that with the rights of the surface owners to use their property in a lawful manner and receive compensation therefore."

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING:

The Supreme Court affirmed the trial court, stating: "Property rights and the use of property are fundamental rights on which this country was established, and it is a board of adjustment's duty to determine the reasonableness of a property owner's request based on the evidence before the board."

8. LAUBSTEIN v. BODE TOWER, L.L.C. (2016 OK 118)

GENERAL TOPIC:

Private Nuisance.

SPECIFIC TOPIC:

Is a neighbor allowed to rely on personal aesthetic objections to the image of a cell tower and the required blinking lights to justify finding it is a private nuisance?

HOLDING:

"OUR CASE LAW PROHIBITS NUISANCE CLAIMS BASED ENTIRELY ON AESTHETIC CONCERNS. IT WOULD BE WHOLLY UNREASONABLE TO ALLOW ONE INDIVIDUAL'S VISUAL SENSIBILITIES TO IMPEDE DEVELOPMENT OF CELLULAR PHONE SERVICE FOR THE RESIDENTS OF MUSKOGEE."

FACTS:

BoDe Tower, LLC owned land and secured state and federal authorization to construct a cell tower in an effort to fill a gap in cellular coverage. No zoning or restrictive covenants prohibit construction of the tower. Neighbors filed a lawsuit to enjoin the existence of the tower, although they did not enjoin its construction during the pendency of the lawsuit.

TRIAL COURT RULING:

The tower was deemed a private nuisance and it was ordered that it must be torn down. Such destruction was stayed during the appeal.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed the trial court.

SUPREME COURT RULING:

The Supreme Court accepted Cert, and vacated the COCA opinion and reversed the trial court, with instructions to enter judgment for the defendant, the tower builder. The Oklahoma Supreme Court held: "We have said that a nuisance 'arises from an unreasonable, unwarranted, or unlawful use' of property." Also, "An alleged nuisance must 'substantially interfere with the ordinary comforts of human existence.'" "The evidence in this case unequivocally established that the tower was lawfully constructed, and the nuisance claim was predicated entirely on Laubenstein's distinctive aesthetic preferences."

9. STATE ex rel. DEPT. OF TRANSPORTATION v. CEDARS GROUP, L.L.C. (2017 OK 12)

GENERAL TOPIC:

Condemnation.

SPECIFIC TOPIC:

Under what circumstances are attorney's fees and other costs recoverable in a condemnation proceeding?

HOLDING:

WHERE THE CONDEMNEE AND ATTORNEY HAVE AN AGREEMENT WHEREBY NO ATTORNEY FEES ARE DUE UNLESS THE RECOVERY EXCEEDS THE COMMISSIONERS' AWARD BY 10%, SUCH AGREEMENT SUPPORTS AN AWARD OF ATTORNEY FEES, AND COSTS.

FACTS:

When the condemnee rejected the Commissioners' award, and a jury trial was held, the jury award exceeded the Commissioners' award by 10%, thus triggering the award of attorney fees to the condemnee. There was conflicting evidence offered first of a specific written contingency fee contract for attorney fees and then a substituted oral contract which removed the formula for the amount of attorney fees and allowed the court to set the amount.

[Author's Comment: It should be noted that ODOT made a good faith offer before the condemnation action was filed of $562,500, the Commissioners awarded $462,500, and the jury award was $525,000; meaning the condemnee received $37,500 LESS after the trial than he would have received if he had accepted ODOT's original offer.]

TRIAL COURT RULING:

The trial court granted an assessor's bill, but denied all attorney fees, including a Burke incentive, (because the fees were contingent and not "actually incurred"), and all engineering, expert witness and costs.

COURT OF CIVIL APPEALS RULING:

Trial court was affirmed.

SUPREME COURT RULING:

Supreme Court granted Cert. Supreme Court (1) allowed reasonable attorney fees because "actually incurred" language included contingent fees, (2) allowed engineering costs to determine location of underground storage tanks, which had to be relocated, as part of the taking of the land, (3) allowed expert witness fees per statute, (4) allowed some litigation (non-overhead) costs and denied others (overhead), with the trial court to decide which costs belong in which category. No Burke incentive was allowed (1) because such incentives only apply in a civil action and not in a special proceeding such as condemnation, (2) Burke incentive could have been "actually incurred", and (3) in order to balance granting just compensation while protecting the public treasury.

10. BEBOUT v. EWELL (2017 OK 22)

GENERAL TOPIC:

Void probate decree.

SPECIFIC TOPIC:

Is it constitutionally required that the Final Account be mailed to all heirs, or is Notice of the Hearing on such Final Account being mailed sufficient?

HOLDING:

WHERE PRETERMITTED MINOR HEIRS RECEIVE NOTICE OF THE FILING OF A FINAL ACCOUNT AND A HEARING THEREON, AND THEY FAIL TO LOCATE AND REVIEW SUCH FINAL ACCOUNT, AND THEY WAIT MORE THAN ONE YEAR AFTER REACHING MAJORITY TO FILE A CHALLENGE, SUCH CHALLENGE IS TOO LATE, EVEN IF THE DECREE CONTAINED AN ERROR OF LAW (FAILING TO APPPOINT AN ATTORNEY FOR MINORS AND FAILING TO PROVIDE FOR OMITTED PRETERMITTED HEIRS).

FACTS:

The probate court distributed the estate's assets according to the terms of the will, to the daughter and granddaughter, with no mention in the will or in the decree about two omitted grandsons (pretermitted heirs). The two grandsons received a copy of the Notice for Hearing of Final Account, but did not receive a copy of such Final Account. Such Final Account was available in the court file. The two grandsons were minors, although one reached majority just before the final decree was filed. The two grandsons filed an action 32 years later [probably a quiet title action] to have the probate decree deemed void for lack of due process notice and to have their interests confirmed. They also argued that the probate court errored by not appointing attorneys for them as minors.

TRIAL COURT RULING:

The trial court agreed that the probate decree was void on its face for lack of evidence that the final account was sent to the two grandsons.

COURT OF CIVIL APPEALS RULING:

The court of civil appeals affirmed the trial court.

SUPREME COURT RULING:
The Supreme Court vacated the COCA and reversed the trial court, and remanded it to the trial court to issue a decision against the two grandsons. The Supreme Court said the Notice of the Hearing on the Final Account should have prompted them (inquiry notice)

to review the Final Account which was on file, and which gave them constructive notice. The two grandsons countered with the holding in the Booth case, which ruled that an old probate decree was void on its face when the pretermitted heirs did not receive a copy of the Final Account. However, in this pending case, Booth was distinguished on its facts by saying that if the heirs in Booth (two brothers) had made the effort to review the Final Account such knowledge would still not have advised them that they were being omitted from the distribution because the Final Account showed them -- pursuant to the will -- each receiving their 1/3 share, along with the sister/personal representative getting 1/3. However, at the hearing to confirm the Final Account the Booth court directed that such distribution to the three heirs would occur but only after the fees of the attorneys and personal representative and the costs of administration had been paid. Such costs would have exhausted the estate, so the court conveyed the land (the only asset) to the sister as her personal representative fees. In addition, the Supreme Court rejected the two minor grandsons' argument that the probate judge's failure to appoint an attorney for them rendered the decree void.

Also, the Supreme Court concluded the Bebout opinion by saying:

> "*Because the final distribution of an estate could deprive interested persons of certain protected property interests, it is of the utmost importance that constitutionally sufficient notice be provided to such persons. Of no less importance, however, is the stability of the law in connection with real property and titles to lands in this state.*"

11. HENSLEY v. STATE FIRE AND CASUALTY CO. (2017 OK 57)

GENERAL TOPIC:

Contract for Deed

SPECIFIC TOPIC:

Does a buyer's/grantee's interest under a Contract for Deed -- in itself -- make him an insured party to a homeowner's policy?

HOLDING:

WHERE A BUYER/GRANTEE UNDER A CONTRACT FOR DEED IS NOT A NAMED PARTY UNDER A HOMEOWNERS INSURANCE POLICY BUT THE SELLER/GRANTOR IS A NAMED PARTY, THE BUYER/GRANTEE IS NOT AN INSURED –SOLELY DUE TO CONTRACT FOR DEED. FACTS ABOUT WHETHER THE INSURER TREATED THE BUYER/GRANTEE AS AN INSURED PARTY CAN BE OFFERED TO ESTABLISH A GOOD FAITH DUTY ON THE INSURER.

FACTS:

Buyer/grantee was buying a house and the insurance premium on the homeowner's insurance was included in the monthly payment to the seller/grantor. When a hail storm damaged the mobile home on the land both the seller and buyer submitted separate claims. The insurance company paid the seller but refused to pay the buyer; the buyer said the amount paid to the seller was too low and should have been paid to him. The buyer filed a lawsuit to establish that he was an insured and that the insurer acted in bad faith in handling the claim.

TRIAL COURT RULING:

The trial court granted summary judgment to the insurer holding that the buyer was a stranger to the insurance policy.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed, and the buyer sought Cert, which was granted.

SUPREME COURT RULING:

The Supreme Court agreed that the status of holding equitable title under a contract for deed does not -- in itself -- make the buyer an insured or a third party beneficiary under a hazard insurance policy. However, because there were facts in dispute about the

insurer's treatment of the buyer as an insured, the matter had to be remanded for determination of the facts concerning the bad faith claim.

B. OKLAHOMA COURT OF CIVIL APPEALS CASES

(JULY 1, 2015-JUNE 30, 2016)

LIST OF CASES

NO.	TOPIC		CASE	OKLAHOMA CITATION	DECIDED / MANDATE
	GENERAL	SPECIFIC			
B. OKLAHOMA COURT OF CIVIL APPEALS					
1	Mortgage Foreclosure	Can the liability for failure to give a required notice arising under a high risk mortgage and the failure to charge the correct interest rate -- if the loan is a consumer loan -- be extinguished by an amendment of the note interest?	First National Bank in Marlow v. Bicking	2016 OK CIV APP 22	12/30/2015 4/14/2016
2	Attorney Fees	Can the prevailing defendant seek to recover attorney fees and costs from the members of a class or the insurers of a class regarding fire damage to real property?	Avens v. Cotton Electric Cooperative, Inc.	2016 CIV APP 39	12/18/2015 6/27/2016
3	Probate	Must the plaintiff file a proof of claim of pending lawsuit against deceased?	Guerra v. Starnes	2016 OK CIV APP 42	5/24/2016 6/27/2016
4	Deficiency Judgment	Can notice of a deficiency judgment be corrected by nunc pro tunc, and is the 30-day period to appeal measured from the original or the correction judgment?	Charles Sanders Homes, Inc. v. Cook and Assoc. Engineering, Inc.	2016 OK CIV APP 45	12/23/2015 7/18/2016
5	Guaranty Exoneration	Does the dismissal of a motion for deficiency judgment against the debtor exonerate the guarantor?	The People's National Bank v. Allison	2016 OK CIV APP 51	11/24/2015 7/26/2016
6	Local Rules			2016 OK CIV APP 54	8/3/2016

		Does failure to file the resulting judgment (or a motion to settle JE) within the 30 days required by local court rules make the judgment void?	Deutsche Bank National Trust Co. v. Myers		8/30/2016
7	Homeowner's Association	Does an HOA have responsibility to protect lots adjacent to streams (in common areas) from damage from erosion and floods?	Grindstaff v. The Oaks Owners' Association, Inc.	2016 OK CIV APP 73	4/25/2016 12/1/2016
8	Residential Condition Disclosure Act	If a seller and his realtor knew or might have known of prior residential defects, is a summary judgment for the seller and a dismissal of the realtor appropriate?	Stauff v. Bartnick	2016 OK CIV APP 76	9/2/2016 12/14/2016
9	Smoking Prohibition	Are there any grounds in law or in Condo regulations prohibiting a person from smoking in a private residence?	Nuncio v. Rock Knoll Townhome Village, Inc.	2016 OK CIV APP 83	5/13/2016 12/30/2016
10	Spousal Forced Share	Can a second surviving wife defeat a conveyance of the homestead by the husband as an individual (from his own revocable trust -- set up and "funded" between marriages) made during his second marriage to a daughter of the first wife, where the children of the first marriage are the contingent beneficiaries, and claim a probate homestead, and claim a spousal forced share, and claim a surviving spousal allowance from such asset?	In the Matter of the Estate of Eagleton	2017 OK CIV APP 2	12/9/2016 1/12/2017

11	Prenuptial Agreement, and Power of Appointment	Can a spouse grant by conveyance or will greater rights than specified in a prenuptial agreement, and does the failure to meet the formal requirements for exercising a power of appointment, which exceed the statutory requirements, make such appointment, which invalid?	In the Matter of the Estate of Pierce	2017 OK CIV APP 25	12/13/2016 5/11/2017
12	Attorney Fees	If an offer of judgment is made with a specific reference to 12 O.S. §1101 (and not to §1101.1), and, if it is accepted, is the recipient of such judgment entitled to attorney fees, when the offer is silent?	Winn-Tech, Inc. v. Nubuko Lawson	2017 OK CIV APP 28	4/23/2017 5/18/2017
13	Water Rights, and Injunctive vs. Declaratory Relief	If a request for a temporary injunction is denied, does that mean a request for a declaratory ruling is futile, and does a delay of 5 months between denial of the request for a temporary injunction and the request for leave to amend to ask for a declaratory ruling constitute undue and prejudicial delay, and does the absence of a current shortage of water preclude consideration of a declaratory request?	City of Blackwell v. Bruce Wooderson, et al	2017 OK CIV APP 33	5/12/2017 6/6/2017

B. OKLAHOMA COURT OF CIVIL APPEALS:

1. FIRST NATIONAL BANK IN MARLOW v. BICKING (2016 OK CIV APP 22)

GENERAL TOPIC:

Mortgage Foreclosure

SPECIFIC TOPIC:

Can the liability for failure to give a required notice arising under a high risk mortgage and the failure to charge the correct interest rate -- if the loan is a consumer loan -- be extinguished by an amendment of the note interest?

HOLDING:

AN AMBIGUITY ON THE PURPOSE OF A LOAN (BUSINESS VS. CONSUMER) CANNOT BE RESOLVED IN A SUMMARY JUDGMENT, AND VIOLATIONS OF VARIOUS RATE LIMITS AND NOTICES REQUIRED UNDER A CONSUMER LOAN CANNOT BE CURED BY AMENDING THE NOTE.

FACTS:

Lender made a note where the proceeds were used to buy or refinance several consumer and business purchases, and the rate of interest was too high for a consumer loan, and several consumer loan related notices were not given. The note went into default and the lender sought foreclosure of the mortgage.

TRIAL COURT RULING:

Summary judgment was given to lender concluding that the loan was for business purposes, so the interest rate limitation and notices were not required, and any violations of the requirements were cured by the refinancing of the note at a lower interest rate.

COURT OF CIVIL APPEALS RULING:

Trial court was reversed and remanded. The facts concerning whether the loan was for a business or consumer purpose needed to be decided by the trier of fact and not in a summary judgment. Also, any initial violations were not cured by the refinancing of the note.

2. AVENS v. COTTON ELECTRIC COOPERATIVE, INC. (2016 OK CIV APP 39)

GENERAL TOPIC:

Attorney Fees

SPECIFIC TOPIC:

Can the prevailing defendant seek to recover attorney fees and costs from the members of a class or the insurers of a class regarding fire damage to real property?

HOLDING:

WHERE A MEMBER OF A CLASS (NOT THE PLAINTIFF REPRESENTATIVE) AND AN INSURER OF A MEMBER OF A CLASS WERE NOT ACTIVE IN THE CASE, WHERE THE DEFENDANT WINS, AND WHERE THE DEFENDANT AGREES NOT TO PURSUE AN AWARD OF ATTORNEY FEES AGAINST THE REPRESENTATIVE OF THE CLASS, NO ATTORNEY FEES CAN BE AWARDED AGAINST THE MEMBER OR INSURER.

FACTS:

There was wild fire that caused damages to a large number of structures. There was a class action lawsuit filed against Cotton Electric Cooperative, Inc. claiming that the Coop's negligence caused the fire. There were many non-participating members and in addition several insurance companies interested in the outcome because they paid for such damages. These non-participating members and the insurers did not participate in the lawsuit.

TRIAL COURT RULING:

There was a jury trial which ruled against the class and for the Coop. The Coop and the participating members reached a settlement agreement wherein the Coop would not seek attorney fees against the participating members if they refrained from seeking an appeal. Then the Coop sought recovery of attorney fees and expenses against the non-participating members and the insurers under the statute (12 O.S. §940) allowing attorney fees and expenses in a lawsuit involving injury to real property. The trial court denied such fees and expenses. The Coop appealed.

COURT OF CIVIL APPEALS RULING

The COCA affirmed the trial court because the non-participating members and the insurers were not directly involved in the litigation.

3. GUERRA v. STARNES (2016 OK CIV APP 42)

GENERAL TOPIC:

Probate

SPECIFIC TOPIC:

Must the plaintiff file a proof of claim of pending lawsuit against deceased?

HOLDING:

IF A TIMELY SUBSTITUTION OF THE DEFENDANT'S PERSONAL REPRESENTATIVE IS MADE IN A CASE PENDING AT THE DEATH OF THE DEFENDANT -- MEANING WITHIN 90 DAYS OF A SUGGESTION OF DEATH FILED IN THE PENDING CASE -- THEN UNDER CURRENT STATUTORY LAW (12 O.S. §2015), THERE IS NO REQUIREMENT FOR THE PLAINTIFF TO FILE A NOTICE OF CLAIM (58 O.S.§331) IN THE PROBATE.

FACTS:

A defendant was sued for a range of claims, including elements of contract, negligence, breach of statutory duty, and fraud, relating to breach of duty and breach of disclosure requirements in a real estate transaction involving the defendant as a real estate agent. The defendant died and a probate was filed, and the personal representative was substituted for the deceased defendant in the damages case within 90 days of the filing of a corrected suggestion of death in the case. However, the plaintiff in the damages case failed to file a proof of claim in the probate within the two-month deadline.

TRIAL COURT RULING:

Trial court held: the plaintiff "failed to make a claim with the [defendant's] Estate regarding the [plaintiff's] pending lawsuit, and hence the lawsuit was barred by operation of the 'non-claim' provisions of 58 O.S.2011 §§331-334 of Oklahoma's probate procedure statutes." The plaintiff appealed.

COURT OF CIVIL APPEALS RULING:

The COCA opinion went through a lengthy discussion of the history of the interactive civil procedure and probate statutes. 58 O.S. §331 required the personal representative to send notice to the known creditors with 2 months of appointment. The use of publication notice to give creditors notice was found to constitutionally deficient and the statute had been amended to require written notice. Then the next question was whether the plaintiff filed a timely proof of claim. However, due to significant repeals and amendments of these statutes in 1972, especially the repeal of the statute requiring the plaintiff to present a claim (58 O.S. §343), the COCA held (¶17) "Given the

conflict/ambiguity between §331 and §1080…The legislature chose to alter the probate code by repealing the §343 requirement that the plaintiff in a lawsuit existing before the defendant's death must present a claim to the executor or administrator."… And (¶10): "However, after examining the relevant statutes, we find that a plaintiff with a lawsuit pending at the time of the defendant's death is no longer required to file a creditor's claim with the estate, but establishes the claim by substituting an estate representative as defendant within 90 days of a suggestion of death on the record."

4. **CHARLES SANDERS HOMES, INC. v. COOK AND ASSOC. ENGINEERING, INC. (2016 OK CIV APP 45)**

GENERAL TOPIC:

Deficiency Judgment.

SPECIFIC TOPIC:

Can notice of a deficiency judgment be corrected by nunc pro tunc, and is the 30-day period to appeal measured from the original or the correction judgment?

HOLDING:

A NUNC PRO TUNC ORDER IS RETROACTIVE, AND CONSEQUENTLY ANY APPEAL MUST BE INITIATED WITHIN 30 DAYS OF THE ORIGINAL ORDER AND NOT THE CORRECTION ORDER; AN APPEAL CANNOT BE MADE FROM A "MINUTE ORDER".

FACTS:

A note and mortgage was given by two persons, including the buyer of the land ("Cook and Associates", and a related person ("Justin Cook" an additional party on the note). The note went into default and a foreclosure was filed.

TRIAL COURT RULING:

Judgment was given and a sheriff's sale held. No appeal from the foreclosure judgment was filed. The appraisal for the property, in advance of the sale, was for $278,769.78, but the amount of the judgment is not disclosed in the appellate opinion. The property sold for $186,000 which was less than the appraised value and less than the amount of the judgment [whatever that amount was], and a deficiency judgment for $93,769.78 was granted by default separately against each promisor. [see comment below*] No appeal from the determination of deficiency was filed. However, after the appeal time had lapsed, each of the defendants filed a motion to vacate the deficiency judgments for lack of sufficient information in the notice of hearing to determine the deficiency. The alleged defect ("irregularity") asserted by the buyer ("Cook and Associates") was because the only evidence of the value of the land being sold was the pre-sale appraisal valuation of $278,769.78, and that figure was [apparently] not used to compute the deficiency. The motion to vacate filed by Cook and Associates was denied on the merits. Another motion to vacate filed by both defendants was asserted because -- allegedly -- the notice of the deficiency hearing incorrectly stated that the pre-sale appraisal valuation would be used to compute the deficiency. This motion was denied on its merits. Both issues were appealed.

COURT OF CIVIL APPEALS RULING:

The first motion to vacate was determined to be challenging a "Minute Order" which is not an appealable order; and was therefore premature and was dismissed.

The second motion to vacate was considered, and the actual language of the notice of the hearing on the deficiency was determined to be correct because it correctly advised the defendants that there would be a "judicial determination of the difference between the amount of the judgment entered in the lawsuit and the fair market value of the mortgaged premises on or near the date of the sale." Denial of motion to vacate was affirmed.

Another complaint was whether the Amended Journal Entry of Deficiency Judgment was adequate because it lacked the specific language required to support a notice by publication. However, because such amendment was a nunc pro tunc order, it was retroactively effective back to the date of the original Journal Entry of Deficiency Judgment. Because this appeal was filed more than 30 days after the Original Journal Entry was filed it was not timely, and was dismissed.

[Author's Comment: By statute (12 O.S. §686), the deficiency is determined by subtracting the market value of the land being sold from the amount of the judgment. It is impossible to determine with certainty from this appellate opinion: (1) the amount of the judgment, or (2) the market value of the land used at the deficiency hearing. Using the sale price of $180,000 and the deficiency amount of $93,769.78, one must conclude that the value of the land was $180,000 and that the amount of the judgment was the total of these two numbers meaning $273,769.78. However, based on this incomplete appellate opinion, it appears that the only market value available was the original pre-sale appraisal value of $278,769.78. Consequently, the minimum bid had to be 2/3 of that, or $185,846.52 ($5,846.52 more than the sale price). It appears that two errors were made by the trial court, and not corrected by the COCA: (1) the minimum 2/3 bid was not made, and (2) there was no deficiency at all.]

5. THE PEOPLE'S NATIONAL BANK v. ALLISON (2016 OK CIV APP 51)

GENERAL TOPIC:

Guaranty Exoneration

SPECIFIC TOPIC:

Does the dismissal of a motion for deficiency judgment against the debtor exonerate the guarantor?

HOLDING:

UNLESSS THE GUARANTY AGREEMENT EXPRESSLLY WAIVES THE PROTECIONS OF 15 O.S. §§338 AND 344, A GUARANTOR IS EXONERATED BY THE VOLUNTARY DISMISSAL OF THE DEBTOR BY THE CREDITOR.

FACTS:

A couple signed a note and mortgage and another person signed a guaranty. The note went into default and the creditor sued the promisors and guarantor, to foreclose the note and mortgage and to seek a deficiency judgment on all defendants.

TRIAL COURT RULING:

Trial court granted a default summary judgment against all defendants on the note and mortgage, and conducted and confirmed a sale of the mortgaged property. The creditor filed a motion for determination of a deficiency judgment against all defendants, because the land sold for less than the debt. The promisors objected to the motion for deficiency claiming it was filed more than 90 days (12 O.S. §686) after the sheriff's sale. The creditor dismissed the motion for deficiency against the debtors, but continued to assert it against the guarantor. The trial court granted the deficiency determination against the guarantor. The guarantor paid the judgment, but still appealed.

COURT OF CIVIL APPEALS RULING

The creditor asserted the appeal by the guarantor was moot, because the guarantor paid the judgment. But the appellate court held that unless the payment was made as a settlement, the liability could be appealed and the funds repaid if the payor won; and held that there was no settlement (Ok. Sup. Ct Rule 1.6(C)(1)). In regard to whether the guaranty language waived the protections of 15 O.S. §338, the appellate court held: "Bank's failure to seek a deficiency judgment against the [debtors] impaired Guarantor's future right to recover from the [debtors]. Pursuant to §§338 and 344, Guarantor's liability is therefore exonerated." The case was reversed and remended.

6. **DEUTSCHE BANK NATIONAL TRUST CO. v. MYERS (2016 OK CIV APP 54)**

GENERAL TOPIC:

Local Rules

SPECIFIC TOPIC:

Does failure to file the resulting judgment (or a motion to settle JE) within the 30 days required by local court rules make the judgment void?

HOLDING:

WHERE THE STATUTES ALLOW A LOCAL COURT TO SPECIFY ANY DEADLINES FOR THE SUBMITTAL AND APPROVAL OF A JUDGMENT, A LOCAL RULE, EVEN IF MANDATORY, CANNOT OVERCOME SUCH STATUTE.

FACTS:

A note and mortgage went into default. There was a local court rule requiring the final judgment or a motion to settle JE be filed within 30 days. Due to the parties' inability to agree on the judgment, the motion to settle JE was filed after that 30 day deadline. At the hearing, the Bank's judgment was accepted and signed by the court. The debtor filed a motion to vacate asserting that the missed deadline made the judgment void.

TRIAL COURT RULING:

The motion to vacate filed by the debtor was denied, and the debtor appealed.

COURT OF CIVIL APPEALS RULING:

The appellate court held that according to 20 O.S. §91.8, court rules "shall not conflict with statutes of this state." Also, 12 O.S.§696.2(A) provides: "…the court may prescribe procedures for the preparation and timely filing of the judgment…including but not limited to, the time within which it is to be submitted to the court." Hence, the judge can allow more time than the local rule requiring action in 30 days. The trial court was affirmed.

[Author's Comment: While the local judge might have been allowed to SET a different deadline for submittal of the JE, there is no evidence that the court SET a longer deadline. Instead, it appears that the trial court's action in considering and granting the Bank's judgment -- out of time -- was treated by the COCA as an IMPLIED retroactive granting of such extended deadline.]

7. GRINDSTAFF v. THE OAKS OWNERS' ASSOCIATION, INC. (2016 OK CIV APP 73)

GENERAL TOPIC:

Homeowners Associations.

SPECIFIC TOPIC:

Does an HOA have responsibility to protect lots adjacent to streams (in common areas) from damage from erosion and floods?

HOLDING:

WHERE THE BYLAWS AND COVENANTS MAKE IT CLEAR THAT THE ONLY DUTY OF THE HOA IS "TO MAINTAIN AND REPAIR", AND THAT THE LOT OWNER IS RESPONSIBLE FOR "ALL MAINTENANCE AND REPAIR WORK" ON HIS LOT, IT IS THE LOT OWNER AND NOT THE HOA WHO MUST TAKE AFFIRMATIVE ACTION TO PROTECT AGAINST THE STREAM DAMAGING A LOT.

FACTS:

A lot owner bought a lot in 1991 which abutted a stream, which stream was located in a "common area" of the addition. In 2007 a large tree washed into the stream and the homeowner advised the HOA of this threat. The HOA removed the tree but disclaimed any duty to prevent erosion in the common area or in the lot. Another large rain occurred in 2010 taking out another large tree and a "large portion" of the lot. The HOA again denied any responsibility. The homeowner filed this lawsuit in 2011 against the HOA and the City of Oklahoma City.

TRIAL COURT RULING:

The homeowner asserted negligence and breach of contract (the Covenants), but dismissed the City due to the Governmental Tort Claims Act. The trial court agreed with the HOA and it held (1) the HOA met its duty by removing debris from the stream, and it had no duty to restore the eroded dirt, (2) the storm of 2010 (a 500 year flood) was an Act of God, and excluded by the Covenants, and (3) the homeowner failed to mitigate.

COURT OF CIVIL APPEALS RULING:

The appellate affirmed the trial court. It specifically held that the Covenants were not a contract of adhesion in part because the homeowners could have tried (but did not) to amend the Covenants to change the HOA duties; in addition, the language of the Covenants on the allocation of duties was not ambiguous. The HOA met its duty by removing debris from the stream. The HOA cannot be required to incur expenses, such as ensuring the stream does not damage a single lot, which benefit one lot owner at the expense of all lot owners. Also, these damages were caused by an Act of God, and are

thereby expressly excluded from being the responsibility of the HOA, under the Covenants.

The appellate court rejected the homeowner's claim that the HOA had violated its common law duty to avoid damaging conduct, since the Covenants made the homeowner responsible and, in this instance, the HOA did not take any action which caused damages. The assertion that the HOA owed a statutory duty to provide lateral support (60 O.S. §66) was rejected because this statute only prohibits an adjacent land owner from undertaking excavation which removes such support. No excavation by the HOA is asserted.

The trial court was affirmed.

8. STAUFF v. BARTNICK (2016 OK CIV APP 76)

GENERAL TOPIC:

Residential Condition Disclosure Act.

SPECIFIC TOPIC:

If a seller and his realtor knew or might have known of prior residential defects, is a summary judgment for the seller and a dismissal of the realtor appropriate?

HOLDING:

WHERE THERE IS CONTROVERTED EVIDENCE ABOUT WHETHER THE SELLER AND REALTOR KNEW OF EXISTING MATERIAL DEFECTS IN A HOUSE WHICH WERE NOT DISCLOSED, SUMMARY JUDGMENT IS NOT APPROPRIATE.

FACTS:

Seller's realtor and seller were sued by a buyer after a closing on a home, where the Residential Condition Disclosure Statement failed to disclose existing material defects in the house.

TRIAL COURT RULING:

The trial court granted summary judgment to the seller based, allegedly on the buyer failing to offer proof of actual knowledge of the defects. The trial court granted a dismissal in favor of the realtor. Such dismissal was based on the assertion that while the company to which the realtor belonged had information about existing defects due to its assistance in the earlier purchase of the house by the current seller, the internal confidentiality policy of the company prevented the realtor from having access to such company information.

COURT OF CIVIL APPEALS RULING:

The COCA reversed the summary judgment for the seller and required further proceedings in the trial court, to determine what the seller really knew. And, after rejecting the real estate company's assertion of an internal confidentiality policy -- as being contrary to the law requiring disclosure -- reversed the dismissal of the realtor and required further proceedings in the trial court, to determine what information was held by the employer of the realtor. This trial court dismissal were especially unacceptable because it failed to provide the buyer the opportunity to amend its pleadings to assert a claim.

9. NUNCIO v. ROCK KNOLL TOWNHOME VILLAGE, INC. (2016 OK CIV APP 83)

GENERAL TOPIC:

Smoking Prohibition.

SPECIFIC TOPIC:

Are there any grounds in law or in Condo regulations prohibiting a person from smoking in a private residence?

HOLDING:

THERE IS NO DUTY UNDER NUISANCE, NEGLIGENCE, GROSS NEGLIGENCE, AND NEGLIGENCE PER SE TO PROHIBIT SMOKING IN A PRIVATE RESIDENCE, NOR IN THIS INSTANCE ANY PROHIBITION AGAINST SMOKING UNDER THE CONDO REGULATIONS.

FACTS:

The son of an owner of a condo unit occupied a unit, and complained about a neighbor who smoked in their home, patio and garage, and who allowed the smoke to enter the plaintiff's unit.

TRIAL COURT RULING:

Plaintiff sued for breach of contract (Condo declaration), nuisance, negligence, gross negligence, and negligence per se. The defendants filed a motion to dismiss for failure to state a claim. The trial court held (1) there was no contractual duty under the Condo declaration to prevent smoking, and (2) no negligence existed because there was no statutory or common law duty prohibiting smoking in a private residence (although smoking in public places is regulated). The case was dismissed.

COURT OF CIVIL APPEALS RULING:

The COCA reviewed the Condo declaration and the Smoking in Public Places act, and also reviewed cases from other states, and found that there was no prohibition on smoking in a private residence, and affirmed the dismissal.

10. IN THE MATTER OF THE ESTATE OF EAGLETON (2017 OK CIV APP 2)

GENERAL TOPIC:

Spousal Forced Share.

SPECIFIC TOPIC:

Can a second surviving wife defeat a conveyance of the homestead by the husband as an individual (from his own revocable trust -- set up and "funded" between marriages) made during his second marriage to a daughter of the first wife, where the children of the first marriage are the contingent beneficiaries, and claim a probate homestead, and claim a spousal forced share, and claim a surviving spousal allowance from such asset?

HOLDING:

THE HUSBAND'S DEED AS AN INDIVIDUAL (FROM HIS OWN PREMARITAL TRUST) WITHOUT HIS SECOND WIFE'S SIGNATURE IS SUBJECT TO HER PROBATE HOMESTEAD UNLESS WAIVED, AND THE SECOND WIFE CANNOT CLAIM A SPOUSAL SHARE BECAUSE 84 O.S. §44 WAS AMENDED IN 1985 TO LIMIT SUCH SHARE TO ONE HALF OF THE "JOINT COVERTURE PROPERTY" (WHICH THIS WAS NOT), AND THE SECOND WIFE CANNOT SEEK A SURVIVING SPOUSAL ALLOWANCE SINCE THE SOLE ASSET IS NOT GOING TO BE DISTRIBUTED TO HER.

FACTS:

Husband was divorced from his first wife, with whom he had several children. Shortly before getting married a second time, he conveyed his home into his own revocable trust, with him as sole trustee. The trust provided that the home would, on his death, go to one or more of his adult children. Once married, he and his second wife lived elsewhere and then occupied the home until his death. During this occupancy, he (individually) deeded the house to one of his daughters by the first marriage, without his second wife's signature. The daughter paid the taxes and insurance on the house thereafter. When the husband died intestate, the second wife filed a lawsuit to declare the deed to the daughter as being void due to the absence of the second wife's signature, to confirm her probate homestead, to receive a spousal forced share in the home, and to receive a surviving spousal allowance from the estate assets (being the home).

TRIAL COURT RULING:

On a motion for summary judgment by the second wife the trial court (1) denied that the deed of the homestead home by the husband alone from the trust without the wife's signature was invalid, (2) denied the forced share, (3) denied the surviving spousal allowance, and (4) granted the spousal rights to personal property (without identifying

such property). The trial court certified the judgment for immediate appeal, although it disposed of fewer than all of the claims or parties. Wife appealed.

COURT OF CIVIL APPEALS RULING:

As to the validity of the deed to the daughter, the COCA disagreed with the trial court and held that such deed of the homestead without the spouse's signature was not permitted due to 84 O.S. §44(B)(1), and that the spouse was entitled to a probate homestead right of occupancy, unless the spouse waived or abandoned such homestead rights. The spouse was not entitled to a forced share under 84 O.S. §44, because it was amended in 1985 to be limited to "an undivided one-half (½) interest in the property acquired by the joint industry of the husband and wife during coverture…", and this house was owned by the husband before the marriage. The request for a surviving spousal allowance from the estate was denied because this house was the only possible asset, and such allowance is an advance on an anticipated distribution, which in this case will not occur. In addition, the trial court was directed to determine whether the homestead rights were waived or abandoned, and identify the personal property to be received by the spouse.

[Author's Comments: The language of this ruling seems to confuse and blur the "marital" homestead with the "probate" homestead. This case also appears to require any conveyance from a grantor revocable tract to (1) include the grantor's signature as an individual (either instead of, or in addition to, signing as trustee), plus (2) the spouse's signature, due to possible homestead. Such ruling appears to create a nearly impossible situation for a title examiner who may not be able to determine, from the record, whether (1) it is a revocable trust, (2) it is a grantor revocable trust, (3) whether the grantor is married, and (4) whether the land is marital or probate homestead.]

11. IN THE MATTER OF THE ESTATE OF PIERCE (2017 OK CIV APP 25)

GENERAL TOPIC:

Prenuptial Agreement, and Power of Appointment.

SPECIFIC TOPIC:

Can a spouse grant by conveyance or will greater rights than specified in a prenuptial agreement, and does the failure to meet the formal requirements for exercising a power of appointment, which exceed the statutory requirements, make such appointment invalid?

HOLDING:

A SPOUSE CAN BY DEED OR WILL GRANT GREATER INTERESTS THAN ALLOWED IN A PRENUPTIAL AGREEMENT, AND A REQUIREMENT IN A TRUST FOR THE EXERCISE OF THE POWER OF APPOINTMENT SPECIFYING THAT SUCH EXERCISE MUST BE REFERENCED IN THE DOCUMENT EXERCISING SUCH APPOINTMENT IS NOT NECESSARY OR ENFORCEABLE.

FACTS:

A man's mother executed an irrevocable trust with her son as the primary beneficiary with title to a home (Nichols Hills) being distributed to her son under the trust. In the trust the son was given the power to appoint by will to a restricted group, being his issue. The man had several adult children by a first marriage. He remarried and prior to such second marriage he entered into a prenuptial agreement which did not contemplate receipt of title to such house. He had a child in the second marriage. He executed a will giving his second wife a life estate with the remainder to his child by the second marriage. When he died his second wife filed a petition to probate his will. The adult children of his first marriage challenged the second wife's right to the house.

TRIAL COURT RULING:

The trial court held that a spouse can voluntarily give more property to a spouse than is anticipated under a prenuptial agreement. It also held that although the trust required the husband to specifically reference the exercise of the power of appointment in devising by will the house to someone, that such formality, which the husband failed to satisfy, was not required because it exceeded the requirements of the statutes. Also, it held that the second spouse was not on the list of acceptable objects of such appointment, and, consequently, the granting of a life estate in his will was void. However, the grant of the remainder interest in the house to his son by his second marriage in his will was acceptable because such son was included in the list of acceptable objects of appointment.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed all three of the trial court's rulings, so that the son (a minor) by his second marriage received the fee simple title to the house, even though his mother (the second wife) would indirectly benefit because she lived with and cared for her minor son in the house.

12. WINN-TECH, INC. v. NUBUTOKO LAWSON (2017 OK CIV APP 28)

GENERAL TOPIC:

Attorney Fees.

SPECIFIC TOPIC:

If an offer of judgment is made with a specific reference to 12 O.S. §1101 (and not to §1101.1), and, if it is accepted, is the recipient of such judgment entitled to attorney fees, when the offer is silent?

HOLDING:

THERE ARE TWO OFFER OF JUDGMENT STATUTES WHICH CO-EXIST (12 O.S. §§1101 & 1101.1), AND IF THE OFFER IS MADE UNDER §1101.1 IT AUTOMATICALLY INCLUDED ATTORNEY FEES, BUT NOT IF MADE UNDER §1101.

FACTS:

A contractor filed a mechanics and materialmen's lien and filed a lawsuit to enforce it. The homeowner made an offer of judgment expressly under 12 O.S. §1101, with 5 days to accept it. No mention of attorney fees was included in the offer. The contractor accepted the offer and then requested attorney fees as the prevailing party under 12 O.S. §936 and 42 O.S. §176.

TRIAL COURT RULING:

The trial court heard testimony on the law and on the reasonableness of the fees. After reducing the fees by a small amount (reduced from 42 hours to 34.6 hours), it awarded such fees. It held that such offer was made under 12 O.S. §1101 which does not automatically include attorney fees (while §1101.1 would have). Such offer did not refer to attorney fees, so they were not covered. The homeowner appealed.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed the ruling, after noting that "We can only conclude the Legislature intended both statutes to co-exist in harmony."

[Author's Comment: Because (1) §1101 covers "recovery of money only" and the later §1101.1 covers not only "money" but "recovery of money or property" and is therefore more inclusive, (2) §1101.1 was adopted later, (3) §1101.1 expressly includes "costs and attorney fees", but §1101 does not, and (4) §1101.1 provides "[t]his section shall apply to all civil actions filed after the effective date of this act" (1995), it appears that §1101.1

was intended to replace the earlier less extensive §1101. The legislative failure to repeal §1101 appears to have been an oversight.]

13. CITY OF BLACKWELL v. BRUCE WOODERSON, et al (2017 OK CIV APP 33)

GENERAL TOPIC:

Water Rights, and Injunctive vs. Declaratory Relief.

SPECIFIC TOPIC:

If a request for a temporary injunction is denied, does that mean a request for a declaratory ruling is futile, and does a delay of 5 months between denial of the request for a temporary injunction and the request for leave to amend to ask for a declaratory ruling constitute undue and prejudicial delay, and does the absence of a current shortage of water preclude consideration of a declaratory request?

HOLDING:

THE DENIAL OF A TEMPORARY INJUNCTION DOES NOT MEAN A REQUEST FOR A DECLARATORY RULING OF RIGHTS TO WATER WOULD BE FUTILE, BECAUSE THE GOALS AND STANDARDS ARE DIFFERENT; AND A 5 MONTH DELAY DUE TO THE NEED TO SEEK CITY COUNCIL APPROVAL IS NEITHER UNDUE NOR PREJUDICIAL, ESPECIALLY SINCE THE SAME TYPES OF ISSUES ARE BEING LITIGATED.

FACTS:

Both the City of Blackwell and certain farmers held permits from the Oklahoma Water Resources Board to draw water from a common river with the City having the senior right. The farmers drew their water at a point before the City accessed the water. On occasion the farmers took so much water that there was insufficient water for the City's use. The City sought an injunction to prohibit the farmers from drawing water when two measuring gauges indicated the level of the river was too low for both parties to draw water.

TRIAL COURT RULING:

The trial court denied a request from the City for a temporary injunction prohibiting the farmers from drawing water when the level of the river reached a certain point. The City asked the farmers to agree to allow the City to file an amended petition asking for a declaratory decision to identify the point when the farmers' use of the water would allow the City to object. The farmers refused to agree to such amendment until the City Council approved such amendment. It took 5 months to secure such approval. When the City filed its motion for leave to file an amended petition, the farmers objected and filed a motion for summary judgment on the pending claim for an injunction. The trial court rejected the request to amend saying that such new claim would be futile since the court had already rejected the request for a temporary injunction and then it took too long to make such request (5 months). The trial court also granted the farmers' motion for

summary judgment denying the pending claim for a permanent injunction. The City appealed.

COURT OF CIVIL APPEALS RULING:

Reversed and remanded. The COCA held that the 5 month delay was not unreasonable considering the need to seek City Council approval, and that the subjects were not new (use of water) and no prejudice was shown. The issue of futility was rejected because the denial of a temporary injunction required a higher standard than a declaratory ruling, and the denial of the temporary injunction came at a time when no discovery had been conducted. Also, the COCA noted that amendment of a petition is liberally allowed to promote justice. The issue of whether to consider the summary judgment in favor of the farmers was deemed unnecessary in light of the COCA decision to allow the amendment of the petition.