Filing a 'Reservation of Time' May Waive Certain 12 O.S.§2012 (B) Defenses Because the Rule Under *Young* May Have Been Superseded by Statute

By Kraettli Q. Epperson

Defendants in a civil case often desire an extension of time to prepare and file their answer to the plaintiff's petition beyond the standard 20 days,[1] but they want "to have their cake (more time) and eat it too (not waive any 12 O.S. §2012(B) defenses)." Since 1991, defendants have relied on *Young v. Walton*[2] to achieve this miracle. The defendant usually files a "special appearance" or an "entry of appearance" that states (something like):

> Defendants [ABC] ("Defendants") enter their special appearance herein and reserve an additional 20 days from [Date 1] until and through [Date 2], within which to answer or otherwise respond to the allegations contained in Plaintiffs' Petition on file herein.
>
> By appearing specially and reserving additional time within which to answer or otherwise respond to said Petition, Defendants do not waive any defenses or objections and expressly reserve their right to assert any and all defenses enumerated in 12 Okla. Stat. §§2008 (C), 2012(B), and other Oklahoma laws, including, but not limited to, failure to state a claim upon which relief can be granted and any other matter constituting an avoidance or affirmative defense. See *Young v. Walton*, 1991 OK 20 ¶4, 807 P.2d 248, 249-250 and 12 Okla. Stat. §2005.2(A). (Filing an entry of appearance as required by this section does not waive any defenses enumerated in subsection B of Section 2012 of Title 12 of the Oklahoma Statutes).

This recitation, relying on the *Young* case, arguably allows the defendant to unilaterally (*i.e.*, without a court order) achieve this result.

Several cases, decided soon after this 1991 holding in *Young*, have echoed such ruling.[3] [4] Any reliance on the 1991 *Young* case, at the current time, is possibly misplaced because the relevant statute, 12 O.S. Supp. 1984 §2012, was subsequently amended in 2000, 2002 and 2004 and, most significantly, was split into two separate statutes in 2002. There is a recent case, *Smith v. Lopp*,[5] that follows the holding in the *Young* case. However, this case fails to acknowledge such legislative changes and, consequently, does not explain how the holding in *Young* survived these subsequent express substantive legislative amendments.

The law is clear: "Further, the Legislature will not be presumed to have done a vain and useless act in the promulgation of a statute [*Cunningham v. Rupp Drilling, Inc.*, 783 P.2d 985, 986 (Okla.Ct.App.1989)] …"[6] If the Legislature changes an existing statute, the courts must recognize and implement such pronouncement by treating the law as being changed/altered or clarified.[7] Because the meaning of this statute (§2012) had been "judicially determined" in *Young*, "The [post-1991] amendment may reasonably indicate that the intention of the legislature was to *alter* the law."[8]

To understand the impact of such legislative changes to this particular statute, it would perhaps be helpful to review the sequence and content of such changes.

At the time of the 1991 decision in *Young*, the statutory language dealing with filing an "appearance" and an "answer" (aka a "response") in a civil matter was found *combined* in a single statute.[9] That statute required that there be *two* distinct pleadings filed within 20 days of service of the petition: the appearance and the answer.

The answer was required to list every defense, except that certain specified defenses could be asserted, in the same 20-day period, in a *motion* instead of in the answer. Such itemized defenses included, among others, "Failure to state a claim upon which relief could be granted."

A general appearance could be filed within that initial 20-day window to avoid filing both an appearance and an answer. Filing an appearance was for the purpose of, and with the result of, extending the time to file that answer (by another 20 days); however, such unilateral extension (without a court order and between 1984 to 2002) came at a "cost":

> WHEN PRESENTED. A defendant shall serve his *answer* within twenty (20) days after the service of the summons and petition upon him, except as otherwise provided by the law of this state. Within twenty (20) days after service of the summons and petition upon him, *a defendant may file an appearance which shall extend the time to respond twenty (20) days* from the last date for answering. *The filing of such an appearance waives defenses of paragraphs 2, 3, 4, 5, 6, and 9 of subsection B of this section*.[10] [11]

In the *Young* case, the defendant did not file an answer but an appearance; the appearance filed by the defendant was titled a Special Appearance and Request for Enlargement of Time in Which to Further Answer and Plead. It contained an express request to the court for an extension of time. A review of the trial court file shows the trial court entered an order granting such request for an extension of time. Such request was based on extenuating circumstances: The defendant's attorney, an assistant Oklahoma attorney general, was sick, and he asserted the need for more time to prepare a full answer. This was not a

free-standing, *unilateral* (self-executing) "appearance with a reservation of time."

The *Young* appellate court distinguished a "general" (or "unspecified") appearance from a "special" appearance. A *special* appearance could apparently be filed to challenge the plaintiff's right to be in court by asserting improper venue and failure to state a claim:

> The plaintiff argued on appeal that when the defendants responded to the original petition by making a 'special appearance,' they waived the defenses of improper venue and of failure to state a claim upon which relief can be granted. The terms of 12 O.S. Supp. *1984* § 2012(A) do provide that the filing of 'an appearance' within the twenty-day period after service of process extends the time to respond and operates as a waiver of certain challenges. *This statute, though, applies only to a defendant's general or perhaps to an unspecified appearance*, not to one that is explicitly qualified. The defendants were not precluded by law from either objecting to venue or questioning the sufficiency of the allegations to state a claim for relief.[12]

If this 1984 statute[13] had remained intact thereafter, the holding in the *Young* case might still be the existing law (*i.e.*, a general appearance would waive certain defenses, but a special appearance would not). However, after 1991, this statute was amended several times. The current version of §2012 (last amended in 2004) makes no mention of an appearance, special or general, and now provides:

> A. WHEN PRESENTED.
> 1. Unless a different time is prescribed by law, a defendant shall serve an answer:
> a. within twenty (20) days after the service of the summons and petition upon the defendant,
> *b. within twenty (20) days* after the service of the summons and petition upon the defendant, or within the last day for answering if applicable; provided, a defendant may file a *reservation of time* which shall extend the time to respond twenty (20) days from the last date for answering. The filing of such a *reservation of time* waives defenses of paragraphs 2, 3, 4, 5, 6, and 9 of subsection B of this section.
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> B. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ***
>
> 6. Failure to state a claim upon which relief can be granted.[14]

In 2002, 12 O.S. Supp. *1984* §2012 was amended, and the language was changed substantively, so the pleading known as an appearance (whether general or special) was totally removed from Section 2012 and placed into a separate, new statute: 12 O.S. Supp. *2002 §2005.2. The totally new §2005.2 made it clear that the filing of this* "entry of appearance" did *not* waive any defenses: "Filing an *entry of appearance* as required by this section [2005.2] does *not* waive any defenses enumerated in subsection B of Section 2012 of Title 12 of the Oklahoma Statutes." However, significantly, such amendment of §2012, which included the availability of the *unilateral* right to take an additional 20 days to file an answer, came with explicit, negative consequences.

The new appearance statute, 12 §2005.2, had a limited new purpose and provided:

> A. ENTRY OF APPEARANCE. *Every party* to any civil proceeding in the district courts *shall file an entry of appearance* by counsel or personally as an unrepresented party when no other pleading or other paper in the case by that counsel or party has been filed, but no later than the first filing of any pleading or other paper in the case by that counsel or party. In the event a party changes, adds, or substitutes counsel, new counsel must immediately file an entry of appearance as set forth in this section. *The entry of appearance shall include the name and signature of counsel or the unrepresented party*, the name of the party represented by counsel, the mailing address, telephone and fax numbers, Oklahoma Bar Association number, and name of the law firm, if any. Copies shall be served on all other parties of record.[15] [16]

Consequently, any attempt to seek a 20-day extension was no longer related to an appearance but was changed to be achieved by the filing of a new pleading called a "reservation of time" (done in lieu of filing the answer) under the surviving, but amended, statute, §2012. This amended surviving statute no longer included any language providing for an appearance

at all. Instead, such unilateral reservation of time was separated from the appearance statute and, instead, such extension was triggered by the new reservation of time pleading (in lieu of filing the answer) and was covered under this 2002 amended version of §2012.[17]

The result is that this current version of 12 O.S. Supp. 2004 §2012 deals exclusively with the filing of an answer (the response) and provides that if the defendant desires to unilaterally (without court order) file a reservation of time in order to be allowed to take an additional 20 days to file a formal answer, *then there is a consequence*:

> WHEN PRESENTED. 1. Unless a different time is prescribed by law, a defendant shall serve an answer:
>
> a. within twenty (20) days after the service of the summons and petition upon the defendant,
> b. within twenty (20) days after the service of the summons and petition upon the defendant, or within the last day for answering if applicable; provided, a defendant may file *a reservation of time* which shall extend the time to respond twenty (20) days from the last date for answering. *The filing of such a reservation of time* waives defenses of paragraphs 2, 3, 4, 5, 6, and 9 of subsection B of this section.[18]

Such reservation of time clearly is not an appearance (special or general) because 1) it is in a different statute and 2) it does not contain the same content and does not serve the same purposes as an appearance (solely to identify the attorney or *pro se* defendant and their contact information). So it seems easily argued that under the current statutes 1) filing an appearance cannot and does not extend the answer date and does not waive any defenses, but 2) filing a reservation of time does waive certain defenses, including "failure to state a claim."

What is the result now, under the new statutes, when the defendant combines such appearance and reservation of time into the same pleading? The Legislature clearly took steps to separate the two pleadings between two distinct statutes, with each pleading serving a different distinct purpose and to expressly provide that if the unilateral reservation of time is filed, certain defenses were definitely waived. To allow the simple act of combining the two distinct pleadings, appearance (special or general) and the reservation of time, into a single pleading to avoid the consequences explicitly mandated by the terms of the statutes would be treating the legislative amendments as a nullity.

As noted above, the law is clear: Every action of the Legislature in amending an existing statute must be treated as being done with the intention to *alter or clarify* the existing law. In this instance, after the statute's "meaning had been judicially determined" in the *Young* case, such amendment was presumably intended to *alter* the law. Therefore, it would appear to be a reasonable conclusion that it was the intent of the Legislature to *alter* the law existing in 1984 to now provide:

So it seems easily argued that under the current statutes 1) filing an appearance cannot and does not extend the answer date and does not waive any defenses, but 2) filing a reservation of time does waive certain defenses, including "failure to state a claim."

A. the filing of an "Appearance" (special or general), in itself, *does not waive* any defenses, but
B. the filing of a "Reservation of Time" (even if combined with a Special Appearance) *does waive* such specified defenses.

Consequently, it appears that the principle announced in *Young* may have been expressly overruled by the Legislature.

ABOUT THE AUTHOR

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ENDNOTES

1. 12 O.S. §2012(A).
2. 1991 OK 20, 807 P.2d 248.
3. *First Texas Savings Ass'n v. Bernsen*, 1996 OK CIV APP 24, 921 P.2d 1293; *Grazier v. First National Bank of Nowata*, 1998 OK CIV APP 117, 964 P.2d 950; and *Campbell v. American International Group, Inc.*, 1999 OK CIV APP 37, 976 P.2d 1102.
4. In the *Young* case, the defendant filed a request for an extension of time (due to extenuating circumstances), and there was an order granting such extension. However, these later cases apparently did not include such facts. Any Oklahoma cases decided after *Young* but before the amendment of 12 O.S. §2012 in 2002 cannot be relied upon to interpret the new (2002) statute.
5. 2020 OK CIV APP 24, FN2, 466 P.3d 642.
6. *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶5, 829 P.2d 15, 20.
7. *Magnolia Pipe Line Co. v. Oklahoma Tax Commission*, 1964 OK 113, ¶11, 167 P.2d 884, 888: "Where a statute is amended, the Legislature may have intended either, (1) to effect a change in the existing law, or (2) to clarify that which was previously doubtful … Which purpose was intended by a particular amendment is to be determined to some extent from the circumstances surrounding its enactment … *Where the former statute* was clear, or where its *meaning had been judicially determined, the amendment may reasonably indicate that the intention of the Legislature was to alter the law* … On the other hand, where the meaning of the former statute was subject to serious doubt, or where controversies concerning its meaning has arisen, it may be presumed that the amendment was made to more clearly express the legislative intention previously indefinitely expressed …"
8. *Magnolia*, ¶11.
9. 12 O.S. Supp. 1984 §2012(A).
10. *Id.*
11. 12 O.S. Supp. 1984 §2012(B), "(B) HOW PRESENTED. *Every defense*, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, *shall be asserted in the responsive pleading* thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: … (6) Failure to state a claim upon which relief can be granted."
12. *Young*, ¶4.
13. 12 O.S. Supp. *1984* §2012(A).
14. 12 O.S. Supp. 2004 §2012.
15. 12 O.S. Supp. 2002 §2005.2(A).
16. The original statute (12 O.S. Supp. 1984 §2012) was amended in 2000 for the sole purpose of acknowledging that, due to the enactment of the Federal Debt Collection Procedures Act, in any collection lawsuit, the answer deadline is extended from 20 days to 35 days to allow for a mandated exchange of communications between creditor and debtor.
17. 12 O.S. § Supp. *2002* §2012 again was amended in 2004, but such amendment did not affect this relevant language but only changed the arrangement of the subparagraphs.
18. Including: "Failure to state a claim upon which relief can be granted."