DEFAULT JUDGMENT PROBLEMS AND SOLUTIONS: THE AFTERMATH OF *SCHWEIGERT*

FOR THE OKLAHOMA CITY COMMERCIAL LAW ATTORNEYS ASSOCIATION

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PRACTICE AREAS:

- Mineral/Surface Title Matters: Curative, Litigation, Expert Consultant/Witness, and Opinions
- Mediations and Arbitrations

SUCCESSFUL APPELLATE CASES AND SAMPLE ENGAGEMENTS:

- 2020—Amicus Brief: Washing Out ORRI (Arnold v. ___, ___)
- 2019--Appellant Counsel: Inadequate Legal Description (Riverbend Lands, LLC v. State of Oklahoma, ex rel, Oklahoma Turnpike Authority, 2019 OK CIV APP 31)
- 2017--Amicus Brief: Enforcement of Ancient Probate (Bebout v. Ewell, 2017 OK 22)
- 2016--Expert Opinion: Reformation of Deeds (Scott v. Peters, 2016 OK 16)
- 2009--Secured AG Opinion: Safe Distance Between Residences and Well Sites (2009 OK AG 5)
- Arbitrator: Horizontal Well Damages to Vertical Wells
- Court-appointed Receiver for 5 Abstract Companies
- Arbitration Assistance: Defended Billion Dollar PSA Title Dispute

SPECIAL ACTIVITIES:

- OBA Title Examination Standards Committee (Chairperson: 1988-2020)
- Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982-2018)
- Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author

SELECTED PUBLICATIONS:

- *"Seeking Default Judgment: After Schweigert", 91 OBJ 54 (April 2020)*
- *"Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests", 80 OBJ 40 (January 2018)*
- *"The Oklahoma Marketable Record Title Act (aka The Re-Recording Act): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies", 87 OBJ 27, (October 15, 2015)*

DEFAULT JUDGMENT

THE PROBLEM?

1. WHEN IS A MOTION FOR DEFAULT REQUIRED?
2. WHEN IS A HEARING REQUIRED?
3. WHEN IS NOTICE OF THE MOTION AND HEARING REQUIRED?

The general rule of law is that "This Court [the Oklahoma Supreme Court] has consistently viewed default judgments with disfavor, preferring, 'whenever possible, that litigating parties be allowed their day in court so that a decision on the merits can be reached.'"

***Williams v. Meeker*, 2019 OK 80, ¶12, 455 P.3d 908, 913 (Vacation of a default judgement by both the trial court and the COCA was overturned on appeal, where the losing defendant attacked the initial default judgment based solely on an alleged lack of notice of the petition and due to an alleged unavoidable casualty and misfortune, all caused by a failure of the service agent to advise the principal of the receipt of the petition. There was extensive proof that the petition, the motion for default judgment and a hearing on damages were properly served.)**

In 2015, the Oklahoma Supreme Court issued a ruling in regard to a divorce proceeding, wherein it reversed a trial court default judgment by concluding:

> **The dispositive question raised for our review is *whether a party must file a motion for default and give the adverse party notice under Rule 10* of the Rules for District Courts, 12 O.S. 2011, ch. 2, app. (Rule 10), *when the adverse party fails to file an answer or an entry of appearance but physically appears at a hearing. We answer in the affirmative.***

***Schweigert v. Schweigert*, 2015 OK 20, ¶1, 348 P.3d 696, 697**

1. SCHWEIGERT V. SCHWEIGERT (2015 OK 20)
[SEE AUTHOR'S COMMENTS]

- **TOPIC:**
  - **Default Judgment; Entry Of Appearance**

- **HOLDING:**
  - **No Default Judgment May Be Granted In the Absence of a Motion and Hearing for Default Judgment, if a Party Either Files an Entry of Appearance or Physically "Makes" an Appearance.**

- **FACTS:** Wife filed for divorce. Husband was properly served, but he never filed a written entry of appearance or an answer. At an initial hearing to grant temporary custody, the husband physically appeared in person, but again he never filed an entry of appearance or answer. An appropriate order was filed, but no copy was sent to the husband. A year later, a minute order set a hearing for default judgment, and after the hearing a permanent order was issued granting the divorce, giving custody of children to wife with supervised custody to husband, and awarding child support to wife. No motion for default was filed and no notice of this second hearing was sent to the husband, who was not represented by counsel. No copy of the final order was sent to the husband. Husband filed a motion two years later to vacate the divorce decree based on fraud and lack of due process.

- **<u>TRIAL COURT RULING</u>: Trial court denied the husband's motion to vacate the final order finding, "Respondent [husband] failed to meet Rule 10 requirement of entry pursuant to 12 O.S. §2005.2, and therefore Petitioner [wife] was not required to provide notice of default hearing to Respondent [husband]".**

- **COURT OF CIVIL APPEALS RULING: The trial court decision was affirmed. The husband sought Cert.**
- **SUPREME COURT RULING: The Supreme Court granted the Petition for Cert. The Supreme Court vacated the COCA opinion, and reversed the trial court's denial of the motion to vacate the judgment, and remanded with instructions.**

The Supreme Court's review of the facts of this case and Rule 10, led it to conclude:

(¶1) ***"The dispositive question raised for our review is whether a party must file a motion for default and give the adverse party notice under Rule 10 of the Rules of District Courts, 12 O.S. 2011, ch. 2, app. (Rule 10), when the adverse party fails to file an answer or an entry of appearance but physically appears at a hearing. We answer in the affirmative."*** **(emphasis added)**

The Supreme Court quoted from Rule 10 which provides in pertinent part:

"In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown."

"If the addresses of both the party and his attorney are unknown, the motion for default judgment may be heard and a default judgment rendered after the motion has been regularly set on the motion and demurrer docket. It shall be noted on the motion whether notice was given to the attorney of the party in default, to the party in default, or because their addresses are unknown, to neither."

***"Notice of taking default is not required where the defaulting party has not made an appearance...."* (emphasis added)**

In other words, the Supreme Court held that while 12 O.S. §2005.2 expressly requires that a party "file an entry of appearance" to avoid being in default, Rule 10 only requires a party to have "made an appearance" to require a motion, a hearing and, if possible, notice of an intention to take a default judgment. (¶14)

The court noted that an irregularity in securing a judgment (such as this failure to file the Motion and failure to attempt to give notice of the hearing on the Motion) can be challenged within three years of the judgment, and held that the challenge in this particular case was filed timely. [12 O.S.§ §651(1) can vacate for irregularity; and 1031(3)(B) request for vacation can be made within 30 days after the judgment is mailed to the other party, and, under 1038, within 3 years of an irregularity] The objectionable order was apparently never mailed to the husband. Presumably, this holding means that any existing or future default judgment, which is less than three years past the date the subject default judgment was mailed to the defaulting party, if taken in the absence of a motion and hearing, and attempted service, can be vacated due to such irregularity, where the losing party "made" a physical appearance.

[AUTHOR'S COMMENT]:

It should be noted that this decision is not expressly limited to divorce cases, and consequently probably applies to all civil matters, such as mortgage foreclosures and quiet title cases.

In addition, the language of this opinion includes two other troubling statements, which seem to go farther than the basic holding, and call for a change in current practice.

One states:

¶15 ***"This language [of Rule 10] mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore."***

This holding mandates that while no notice may be necessary -- where no entry of appearance was filed and no physical appearance was made -- that, nevertheless, a motion for a default judgment is always needed. You cannot just place the proposed order in the judge's in-box (and receive a signed copy in the judge's out-box) without a motion, even if you include language in the order showing the conditions allowing the default to be taken and disclosing whether notice was given, and, if not, why not.

This language in ¶15 fails to clearly state whether a hearing is also always required, even when no notice is required, in addition to requiring a motion, before taking a default judgment. However, the language of Rule 10 as quoted by the Supreme Court, which calls for a motion -- even in the absence of the filing of an entry of appearance or the making of a physical appearance -- makes it clear that the "notice" pertains not to notice of the filing of the motion, but to notice of the hearing on the motion: *"default shall not be taken until a motion has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered…".*

The usual mantra for satisfying due process requirements calls for "notice and an opportunity for a hearing". If such a hearing is always required in order to take a default judgment, that will require a significant change in the current practice of litigators.

Another troubling statement provides:

Footnote 1: ***"Because Father was within the time limitations of Title 12, Section 1038 for filing the motion to vacate [within three years of irregular judgment] and the district court was within the time limits of Title 12, Section 1031.1 [thirty days of the mailing of the judgment, which was never mailed], we need not address whether the divorce decree was void and subject to being vacated at any time."***

According to 12 O.S.§1038: ***"A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby."***

This raises two issues for the title examiner: (1) does he have to confirm that any final judgment that he is seeking to rely upon as part of his chain of title has been mailed to the opposing party (as shown on the face of the record), and (2) does he have to worry whether such omission -- i.e., not filing a motion and holding a hearing -- renders the judgment void, even after 3 years?]

2. ASSET ACCEPTANCE V. PHAM (2018 OK CIV APP 26) [SEE AUTHOR'S COMMENTS]

- **GENERAL TOPIC:**

  Default Judgment in Collection Action

- **SPECIFIC TOPIC:**

  Need For Motion, Notice and Hearing Before Any Default Judgment

➢ HOLDING:

Where a pro se Defendant communicates with the Plaintiff's attorney, such contact triggers the need for a: (1) motion, notice and hearing before default judgment, and (2) disclosure of contact to the Court.

FACTS:

Lender filed action for collection of unpaid debt, and advised debtor the Plaintiff would not proceed until meeting all requirements under FDCPA. Defendant did not "enter an appearance or file any answer…", or otherwise "make an appearance". Plaintiff and Defendant exchanged communications about the debt, and Plaintiff ended contact telling Defendant "We will proceed with this matter." Then it secured a default judgment, without official notice to defendant.

When garnishment started, Defendant filed Petition to Vacate Judgment and filed Answer/Counterclaim.

TRIAL COURT RULING:

Trial Court entered default judgment for lender and denied Petition to Vacate, relying on Rule 10 which provides: "Notice of taking default is not required when the defaulting party has not made an appearance." Defendant appealed.

COURT OF CIVIL APPEALS RULING:

COCA reversed and remanded: (1) holding there must always -- in all circumstances -- be a motion, notice of motion, notice of a hearing and a hearing before taking default, but there was none, and (2) holding that due to the statement in the Summons that "all collection efforts, including our proceeding with this lawsuit, will cease until we respond as required by law, the Plaintiffs were required to disclose their intent to the debtor to seek a default, but there was no notice given, (3) holding that the Plaintiff must advise the court of (a) no notice to Defendant of intent to seek default, and (b) offer of settlement negotiations, and (4) no explanation for differences in actual debt of $245 versus claimed debt of $1,300.

[AUTHOR'S COMMENTS]

(1) Rule 10 provides. "Notice of taking default is not required where the defaulting party has not made an appearance." But Schweigert declares (¶15) "This [Rule 10] language mandates that a motion must be filed in all instances, even when a party fails to make an appearance." Which holding is correct?

(2) There is no discussion of how the Plaintiff failed to "respond as required by law." The Plaintiff provided the lender's name, and the amount of the debt.

(3) The Plaintiff told the Defendants "We will proceed with this matter," which clearly advises of the intent to proceed to take a default judgment.

(4) It is the Defendant's duty to dispute the amount of the debt, not the Plaintiffs.

(5) Disclosure of settlement negotiations are not admissible per 12 §2408.

3. SOUTHWEST CASING V. FOSTER (2020 OK CIV APP 37) [SEE AUTHOR'S COMMENTS]

- **GENERAL TOPIC:**
  - **Motion for Default Judgment**
- **SPECIFIC TOPIC:**
  - **Motion for Default Judgment Is Required Even When No Appearance is Made**

- **FACTS:**
  - **Plaintiff/employer filed lawsuit to collect for the value of a truck taken and resold by the defendant/employee.**
  - **Plaintiff served defendant using wrong case number.**
  - **Defendant failed to enter an Appearance and no Answer was filed.**
  - **Court entered a default judgment against the defendant.**
  - **Defendant filed a Motion to Vacate.**

HOLDING:

- Defendant appealed from denial of Motion to Vacate for Irregularity due to the absence of a Motion for Default Judgment under 12 O.S. Section 1031(3)
- COCA reversed and remanded the judgment because *Schweigert.* 2015 OK 20 held: "a motion [for default judgment] must be filed in all instances, even when a party fails to make an appearance…", and such failure to vacate the default judgment was an "irregularity" Such additional requirement created under *Schweigert* was echoed in *Asset Acceptance,* 2018 OK CIV APP 26,
- A dissent noted that this new requirement for a Motion for Default Judgment "in all instances" "would create new legal requirements for Plaintiffs that are not found in District Court Rule 10."

- **[AUTHOR'S COMMENTS]:**
  - **The author of this presentation published an OBJ article criticizing the holding in both the *Schweigert* and *Asset* cases (which cases failed to reflect the legislative amendment of the default statute), and especially noting the obvious unintentional "typographical" dicta in *Schweigert* which was picked up and applied in *Asset* and now in this *Southwest Casing* decision: "a motion must be filed in all instances…"**
  - **See: "Seeking Default Judgment: After *Schweigert*", 91 Oklahoma Bar Journal 54 (April 2020)**

Rules for District Courts of Oklahoma.

Rule 10. Notice of Taking Default Judgment.

"In matter in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed and delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown. If the addresses of both the party and his attorney are unknown, the motion for default judgment may be heard and a default judgment rendered after the motion has been regularly set on the motion and demurrer docket. It shall be noted on the motion whether notice was given to the attorney of the party in default, to the party in default, or because their addresses are unknown, to neither. Once a party or an attorney provides an email address for service in a specific case in accordance with the Rules for Electronic Filing in the Oklahoma Courts, the provided email address shall serve as the appropriate address for purposes of notice as required by this rule, unless the filer is informed that the electronic transmission failed. See Rules for Electronic Filing in Oklahoma Courts."

"Notice of taking default is not required where the defaulting party has not made an appearance. Also, notice of taking default is not required in the following cases even if the defaulting party has made an appearance: 1) Any case, whether a matrimonial action or otherwise, in which waiver of summons and entry of appearance has been filed; 2) any case prosecuted under the small claims procedure for money judgment or possession of personal property; 3) any forcible entry and detainer case, whether or not placed on the small claims docket; 4) any probate or juvenile proceeding; 5) any case that is at issue and has been regularly set on the trial docket in which neither the other party nor his or her attorney appears at the trial; 6) any case as to any party who has filed a disclaimer; 7) any garnishment proceeding; and 8) any statutory proceeding following rendition of final judgment in a case, including but not limited to, enforcement proceedings, or proceedings initiated by a motion or delayed petition for new trial, or by any motion petition or application to correct, open, modify or vacate the judgment, whether filed in the same action or as a separate action."

By way of background, the principal statutes requiring a written response from the defendant after proper service (answer statutes) provide:

1) **"Every party to any civil proceeding in the district courts *shall file* an entry of appearance…". (12 O.S. Section 2005.2 (A)), and**
2) **"…a defendant *shall serve* an answer: (a) within twenty (20) days after the service of summons and petition upon the defendant." (12 O.S. Section 2012(A)).**

This EOA is solely to provide to the plaintiff the contact information for the defendant: *"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."*

While the answer statutes call for *written* filings, two additional related statutes (appearance statutes) suggest that default judgment is only permitted upon a "failure to appear." These appearance statutes provide a slightly different view of what steps are required to justify taking a default judgment. They provide:

1. A. SUMMONS: FORM.

1. The summons…shall notify the defendant that *in case of failure to appear*, judgment by default will be rendered against the defendant for the relief demanded in the petition. (12 O.S. Section 2004 (B)(1)), and

2. B. SERVICE: WHEN REQUIRED.

Except as otherwise provided in this title…, every pleading subsequent to the original petition …, shall be served upon each of the parties. No service need be made on parties in default *for failure to appear*… (12 O.S. Section 2005 (A))

The results of a recent informal survey of the default judgment procedures followed in

Oklahoma's 77 counties found a wide range of practices:

1) Is a motion for default judgment required before presenting the default judgment?

Yes	**- 13 (in Oklahoma County, some judges do and some do not)**
No	**- 24**
Unstated	**- 40**

2) When is a hearing required for a motion for default judgment:

a. Always - 6
b. If court so determines - 3
c. Only if an entry of appearance, answer or correspondence received or filed - 25
d. Unstated - 43

By the Oklahoma City Commercial Law Attorneys Association.

HOWEVER, CONSIDER THE LANGUAGE OF 12 O.S. SECTION 2007:

B. *MOTIONS AND OTHER PAPERS.*

1. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

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"THE SOLUTION"

H. MOTION FOR DEFAULT JUDGMENT NOT REQUIRED IF DEFENDANT FAILS TO FILE RESPONSE. Nothing in any provision of this title or in any local or District court rule shall be construed to require either a motion or a hearing for default judgment, and no notice shall be necessary, if, after service of summons and petition, a defendant fails to file with the court clerk a written appearance, answer, motion, pleading, or response. Contact or communication with the plaintiff or attorney of the plaintiff shall not constitute an appearance, answer, motion, pleading or response unless the contact or communication is in writing and is also filed by the defendant in writing with the court clerk.

MY 10 MOST RECENTLY PUBLISHED ARTICLES

(last revised May 12, 2020)

324. "Seeking Default Judgment: After *Schweigert*", 91 Oklahoma Bar Journal 54 (April 2020)

306. "Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests"; 89 Oklahoma Bar Journal 40 (January 2018)

294. "The Oklahoma Marketable Record Title Act ('aka' The 'Re-Recording Act'): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies"; 87 Oklahoma Bar Journal 27 (October 15, 2016)

276. "Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can be A 'Root of Title'"; 85 Oklahoma Bar Journal 1104 (May 17, 2014)

256. "The Need for a Federal District Court Certificate in All Title Examinations: A Reconsideration", 83 Oklahoma Bar Journal 2367 (November 3, 2012)

248. "The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of *BAC Home Loans*", 82 Oklahoma Bar Journal 2938 (December 10, 2011)

239. "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 Oklahoma Bar Journal 622 (March 12, 2011)

226. "Marital Homestead Rights Protection: Impact of *Hill v. Discover Card?* "80 Oklahoma Bar Journal 2408 (November 21, 2009)

214. "Well Site Safety Zone Act: New life for Act", 80 Oklahoma Bar Journal 1061 (May 9, 2009)

162. "Real Estate Homesteads in Oklahoma: Conveying & Encumbering Such Interest", 75 Oklahoma Bar Journal 1357 (May 15, 2004)

Any questions?

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