FILING A "RESERVATION OF TIME" WAIVES CERTAIN 12 O.S.§2012 (B) DEFENSES BECAUSE THE RULE UNDER YOUNG MAY HAVE BEEN SUPERSEDED BY STATUTE

Defendants in a civil case often desire an extension of time to prepare and file their Answer to the plaintiffs' petition, beyond the standard 20 days (12 O.S. §2012(A)), but they want "to have their cake (more time) and to eat it too (not waive any 12 O.S. §2012(B) defenses)."

Defendants -- since 1991 -- have relied on Young v. Walton[1] -- 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 law 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 court order) achieve this result.

Several cases, decided soon after this 1991 holding in Young, have echoed such ruling:

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.[2]

[1] 1991 OK 20, 807 P.2d 248

[2] 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.

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, 2020 OK CIV APP 24, FN2, 466 P.3d 642, which follows the holding in the Young case. However, such recent 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)]….*

TRW/Reda Pump v. Brewington, 1992 OK 31, ¶5, 829 P.2d 15, 20..

If the legislature changes an existing statute, then the Courts must recognize and implement such pronouncement by treating the law as being changed/altered or clarified.[3] 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."[4]

To understand the impact of such legislative changes to this particular statute (§ 2012), 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 filing an "Answer" (aka a "Response") in a civil matter was found combined

[3] 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…".*

[4] Magnolia, ¶11.

in a single statute: 12 O.S. Supp. 1984 §2012(A). 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) (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.* (underlining added)

12 O.S. Supp. 1984 § 2012(A)[5]

In the Young case the Defendant did not file an "Answer", but filed an "Appearance"; the "Appearance" filed by the Defendant was entitled 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 that 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

[5] 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."*

-- 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.*[6] (underlining added)

If this 1984 statute (12 O.S. Supp. 1984 §2012(A)) had remained intact thereafter, then 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 (12 O.S. Supp. 1984 §2012) 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 (12 O.S. Supp. 2004 §2012):

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.*

[6] Young, ¶4

> 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.*

(underlining and bolding added)

In 2002, 12 O.S. Supp. 1984 §2012 was amended and the language was changed substantively so that the pleading known as an "Appearance" (whether general or special) was totally removed from this 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.*

(12 O.S. Supp. 2002 § 2005.2(A)).[7](underlining added)

[7] 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.

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 -- 12 O.S. Supp. 2002 §2012 -- 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.[8]

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.*[9] *(underlining added)*

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

[8] 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 subparagraph.
[9] Including: "*Failure to state a claim upon which relief can be granted."*

same purposes as an Appearance (solely to identify the attorney or pro se defendant and its 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 that (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, then 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:

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.