Seeking Default Judgment: After *Schweigert*

By Kraettli Q. Epperson

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.'"[1]

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.*[2]

This *Schweigert* decision apparently created significant turmoil among many members of the bench and bar, especially among the collection bar which relies extensively on default judgments. The usual practice – in many counties – entails submitting a proposed order for default judgment, with or without a motion, with no notice, and no hearing, followed by the district court entering the proposed order. The resulting turmoil continues to the present time.

There are two questions: 1) when is a default judgment allowed and 2) what motion, hearing and notice of such motion and hearing, if any, is required, to secure a default judgment?

Regarding the facts in *Schweigert*, a wife filed for divorce and properly secured personal service of her petition on her husband at a nonresidential location.[3] The petition included an application for a temporary order, and at the initial hearing, set by the wife, where she sought relief regarding temporary custody of their two children and child support, the husband physically appeared (pro se). However, he still failed to file an entry of appearance, failed to file an answer and, apparently, failed to provide a service address.[4] A temporary order was issued granting the wife's requests, and a year later the order was filed, but a copy was not provided to the husband.

A year after this initial hearing, the court held a second hearing – at the request of the wife – at which a final default order was issued which granted a divorce, gave custody of the children and granted child support.[5]

The wife did not file a motion for the default (but did "tender a minute order setting the matter") and failed to serve the husband with notice of such default motion and of the second hearing. A default judgment was granted against the defaulting husband at such second hearing. The order was filed, but, apparently, was not served on the husband.[6]

Less than two years later, the husband hired an attorney and sought to vacate the default judgment. His request was denied by the trial court, and he appealed. The Oklahoma Court of Civil Appeals affirmed the trial court judgment, and the Oklahoma Supreme Court accepted certiorari and, as shown in the quote above, reversed the trial court.[7]

Initially, the bar attempted to downplay the impact of this case by assuming its holding was limited to divorce cases, which are "special" statutory "proceedings," and not civil "actions." However, as shown in the later holding in *Asset Acceptance* (discussed below), this ruling is not limited to divorce proceedings.

While an argument might be made that the holding in the *Schweigert* case was incorrect (see the discussion below), this article primarily focuses on providing guidance on how to comply with the holding.

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…"[8] (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)).

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. B. 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. A. 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))

It should be noted that the Oklahoma Supreme Court does not cite or rely upon these two appearance statutes in its *Schweigert* opinions, but instead relies exclusively on its own Rule 10.

The brief answer to the two threshold questions, based on the holding in *Schweigert*, is:

a. Entitlement to Default Judgment: A default judgment may be requested when the defendant fails to "file an answer"; and
b. Process for Taking a Default Judgment:
   1. If a defendant either makes or files an appearance, but fails to file an answer, then the plaintiff must follow Rule 10,[9] and:
      a) File a motion for default; and
      b) Set the motion for hearing; and
      c) Give at least a five-day notice of such motion and hearing.

While the holding in *Schweigert* is precedential and must be followed by both the lower courts and the members of the bar, such policy is apparently contrary to the practice in many counties across the state.

2. If a defendant fails to make or file an appearance, and fails to file an answer, then (according to Rule 10) "Notice of taking default is not required where the defaulting party has not made an appearance." While this fact pattern was not in front of the *Schweigert* court, one might assume – due to dicta in the case (discussed below) – that the filing of a motion and the setting of a hearing with notice is required.

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The results of a recent informal survey[10] 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

The bar and the bench are required to adjust their practices to adhere to the holding in *Schweigert*. For instance, Oklahoma County has – since *Schweigert* – amended its Local Rule 16 to add a requirement for the filing of a default motion and a hearing, and such motion must state the following:

A. 1. a. Whether the defaulting party has filed any pleading/documents;
b. Whether the defaulting party has appeared in open court; and
c. What notice was given, and, if none were given, the reason therefore.

And in regard to setting a hearing:

B. If the defaulting party has filed a pleading/document or has appeared in open court, a hearing must be set and notice must be provided to the defaulting party.

In order for the court record to reflect whether a physical nonwritten "appearance has been made," so that the trial court can be informed and then know what steps need to be followed to grant a default judgment, the practice of having at least a court minute entered reflecting such "physical appearance" will probably need to be followed.

It should be noted that an error in the text of the *Schweigert* decision has spawned additional confusion as to what action or inaction by a defendant triggers the need for notice and a hearing, before taking a default judgment. Such language misstated the court's core holding (calling for a motion, hearing and notice *if* at least "an appearance was made"):

"This language [Rule 10] mandates that a motion must be filed in all instances, *even when a party fails to make an appearance...*"[11]

One might simply assume that such surplus language could be ignored as only being dicta. However, a 2018 Oklahoma Court of Civil Appeals case adopted such "dicta" as its guiding light. As shown in *Asset Acceptance v. Pham*, 2018 OK CIV APP 26, 415 P.3d 47 (a credit card collection case), 1) the core ruling in *Schweigert* was expanded beyond "divorce proceedings," 2) the "dicta" took on

a life of its own and 3) the COCA took *Schweigert* several steps farther.

A simple reading of the holding in *Asset* might lead one to conclude that in every instance, "even when a party fails to make an appearance," there must be not only a motion, but a hearing with at least a five-day notice.

Such sweeping new procedures can be adopted by the bar and the bench, but it should be noted that 1) such new practices will burden an allegedly overburdened judicial system and 2) such new practices could be reversed by legislative action. Such legislative action is currently pending in this 2020 session (HB 3660, by Kannady), with this additional language being suggested:

> 12 O.S. §2012:
> H. MOTION FOR DEFAULT JUDGMENT NOT REQUIRED IF DEFENDANT FAILS TO FILE RESPONSE. Nothing in any provision of this title or in any court rule shall be construed to require a motion for default judgment, with or without notice, if after service of summons and petition, a defendant fails to file with the court clerk an appearance, answer, motion, pleading, or response. Contact or communication with the plaintiff or attorney of the plaintiff shall not constitute an appearance unless the contact or communication is also filed by the defaulting party in writing with the court clerk.

It should be noted that legislative enactments adopted subsequent to an appellate court ruling supersede such ruling.[12]

In regard to whether the holding in the *Schweigert* case was correct, it should be noted:

1) The answer statutes clearly require a written appearance and service of a written answer;[13]
2) Contrary to the assertions in *Schweigert*, Rule 10 was never a statute, but was issued as part of the overall set of District Court Rules by the Oklahoma Supreme Court at the request of the Oklahoma Bar Association;[14] and
3) The language of 12 O.S. §2005.2(A), which requires the defendant to "file an entry of appearance," was adopted after the adoption of Rule 10, and such facts do not mean – as asserted in *Schweigert* – that the earlier rule somehow "preempted" the later adopted statute; instead it means the legislature superseded such Rule 10.[15]

ABOUT THE AUTHOR

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ENDNOTES

1. *Williams v. Meeker*, 2019 OK 80, ¶12, 455 P.3d 908, 913 (Vacation of a default judgement by 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.); also *see White v. White*, 2007 OK 86, 173 P.3d 78, wherein a default judgment was reversed after being granted against the defendant for failure to file a response to a motion, under 4(e) Rules for District Courts, with such default judgment being permitted in the discretion of the court, and *see Guyton v. Guyton*, 2011 OK CIV APP 92, 262 P.3d 1145 – citing White – wherein a default judgment was reversed after being granted against the defendant for failure, under Rule 5(j), Rules for District Courts, to provide the required pre-trial conference statement as required by the pre-trial order, where such default judgment was permitted in the discretion of the court, and also for failure to respond to a pending motion to modify custody where such default judgment was permitted in the discretion of the court. Both cases turned on there being discretion under the two rules, the older rule of law, as expressed in *White*, that "[U]nder no circumstances may a modification in custody based on a change of circumstances be effected unless the requesting parent demonstrates" specific elements. Allegations alone are inadequate, and, instead, there must be an evidentiary hearing, before judgment can be granted; otherwise, it is an abuse of discretion. These cases point out a specific area where a normal default judgment cannot be granted – custody/visitation matters.

2. *Schweigert v. Schweigert*, 2015 OK 20, ¶1, 348 P.3d 696, 697; Rules for District Courts of Oklahoma, Rule 10. Notice of Taking Default Judgment. 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. Notice of taking default is not required where the defaulting party has not made an appearance.

3. *Schweigert*, ¶2 ("Father was personally served at CeeDee's Country Store in Dustin, Oklahoma.").

4. *Schweigert*, ¶2.

5. *Schweigert*, ¶4.

6. *Schweigert*, ¶4.

7. *Schweigert*, ¶5.

8. 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."

9. Rule 10: "…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.

10. By the Oklahoma City Commercial Law Attorney's Society.

11. *Schweigert*, ¶15.

12. *Minie v. Hudson*, 1997 OK 26, ¶8, 934 P.2d 1082, 1086.

13. 12 O.S. §2004(B)(1) and 2005.2(A); *Boston Ave. Management, Inc. v. Associated Resources, Inc.,* 2007 OK 5, ¶11; and *Kohler v. Chambers*, 2019 OK 2, ¶6.

14. *Schweigert*, ¶14; 32 OBJ 1731 (1961).

15. *Schweigert*, ¶14; *Minie v. Hudson*, 1997 OK 26, ¶8, 934 P.2d 1082, 1086.