Oklahoma Association for Justice

CONTINUING LEGAL EDUCATION

Tort Cases You Need to Know About 2019

By

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ABOUT THE SPEAKERS

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He writes articles for the Oklahoma County Bar Association Briefcase, frequently writes briefs for the Oklahoma Association for Justice (OAJ) *amicus curiae* program, writes a regular insurance law column for the OAJ Advocate, and has taught Insurance Law at the University of Oklahoma College of Law and Oklahoma City University School of Law and frequently teaches CLE programs. He has published chapters in Matthew Bender Company's Law of Liability Insurance. He is a past president of the Oklahoma Association for Justice and the Oklahoma County Bar Association (OCBA) and serves on the Legal Ethics Committee of the Oklahoma Bar Association (OBA). He has received the Earl Sneed Award for CLE from the OBA, the Journal Record award from the OCBA and the Tommy D. Frazier Award from the OAJ, both for lifetime achievement. He is a retired Lt. Col. from the U.S. Air Force Reserve.

Margaret Travis has practiced in the areas of bankruptcy, insurance law, and personal injury since she was admitted to the Oklahoma Bar in 1991. Margaret has served Travis Law Office's insurance and injury clients for many years, including making court appearances and presenting clients for depositions. For the past fifteen years, Margaret has also practiced in the area of bankruptcy law and has developed a successful bankruptcy practice handling both Chapter 13 and Chapter 7 bankruptcies. She has recently taken on a more active role at Travis Law Office and brought her well established bankruptcy practice under the Travis Law Office roof.

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STATUTE OF LIMITATIONS – FAILURE TO SERVE – SAVING STATUTE

Effective date of dismissal is date order dismissing becomes final, not date "deemed dismissed" for purposes of determining when the one year permitted for refiling under 12 O.S.§100 – *Cole v. Josey,* 2019 OK 39, __ P.3d __

Cole v. Josey [1] holds a case in which the Plaintiff fails to serve summons can be refiled any time within one year from the date of the order dismissing the case and the time to refile is not measured from the 181st day from the original filing when the suit is "deemed dismissed" by statute.

This is not just a case you should read but one you should study carefully and then review your files to see if you need to refile a dismissed case or move to dismiss, if you represent the defendant, to get the time running when the case cannot be refiled. It is an important case.

Cole was injured in a car wreck May 15, 2013. A lawyer (not the one who handled the later appeal) filed suit nearly 2 years later, on April 29, 2015. No summons was served so the case was "deemed dismissed" under 12 O.S.§2004(I) on October 26, 2015, after 180 days from the filing date.

On November 16, 2015, the Defendant filed a Motion to Dismiss for failure to serve within the 180 days. The trial court, Judge Leah Edwards, in McClain County granted the Motion to Dismiss on January 4, 2016. On January 3, 2017, Plaintiff's attorney refiled the case. The Defendant moved to dismiss again, arguing the case was not refiled within one year of the 181st day after the original filing, pursuant to 12 O.S.§100 (the "saving statute") when 12 O.S.§2004(I) says it was "deemed dismissed." The trial court again sustained the second Motion to Dismiss. The Court of Civil Appeals (COCA) affirmed, and the Supreme Court granted

[1] 2019 OK 39, __ P.3d __.

certiorari. The Supreme Court reversed the trial court and the COCA, in this unanimous opinion by Justice Combs.

The Supreme Court holds:

> ¶4 . . . . We hold, the day after the filing of an appealable order dismissing the case is the date from which the 12 O.S. 2011, §100 "savings statute" one year refiling period begins, if the order is not appealed. Where the dismissal order is appealed the one year period commences on the day after the appeal is final.

To reach this result, the Supreme Court overrules a number of COCA opinions[2] and a Supreme Court opinion.[3] So, while many of us (certainly including me) thought that no further court action was necessary to cut off the ability to refile within a year under 12 O.S.§100. the law is now clear that only an appealable court order can cut off that right. Until there is such a court order, the plaintiff may refile any time up to one year after the court order.

This opinion should strongly suggest to you that, if you have a case which got dismissed for failure to serve, you look carefully at whether the case has sufficient merit that you should now refile it to take advantage of this ruling. If you have defended such a case, you will probably want to now file a motion to dismiss and get a final order to start the time running when the case will be forever barred.

A word of caution. Because this opinion does not specifically say the COCA opinions are overruled by name, when you Sherardize them, they will not show up as "overruled." Rather, they show 'Distinguished by *Cole v. Josey*." This may cause a defense lawyer to file a motion to

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[2] *Thibault v. Garcia*, 2017 OK CIV APP 36, 398 P.3d 331; *Hough Oilfield Service, Inc. v. Newton*, 2017 OK CIV APP 31, 396 P.3d 320, and *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682.

[3] *Mott v. Carlson*, 1990 OK 10, ¶9, n.5, 786 P.2d 1247: "As far as *Mott v. Carlson* may be interpreted to require the refiling of a petition within one year from the 181st day after the filing of the first petition, it is hereby overturned."

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dismiss your refiled case to cite the overruled COCA opinion and cause you to think it is still good law.

This exact thing has happened with regard to the Supreme Court opinion reversing COCA decisions which had held that 12 O.S.§100 did not apply to a Governmental Tort Claim Case[4] (on the theory it was a "special proceeding"). I have seen instances where the Plaintiff's lawyer dismissed or simply let his case be dismissed after defense counsel cited the overruled (but not by name) COCA cases. Don't get in that trap!

LANDLORD LIABILITY – CONDITION V. PROXIMATE CAUSE

> **Summary Judgment not proper where landlord fails to repair water heater and tenant gets burned trying to boil water for a warm bath; Jury, not Court on summary judgment must decide whether the landlord's defalcation was condition or proximate cause – *Saunders v. Smothers*, 2019 OK 54, __ P.3d __**

Saunders v. Smothers5 holds that summary judgment for a landlady was improper where she failed to provide repair of a defective hot water heater and the tenant was burned by hot water while trying to boil water to get a warm bath and that the issue whether the landlady's failure to repair the water heater was the condition or the proximate cause of the injury was for the jury where it was foreseeable that this would happen.

Ms. Saunders was burned when she slipped and fell while carrying hot water from a kitchen stove to her bathroom to try to get a warm bath after the landlady failed to timely repair a defective water heater. The trial court, Judge Bryan Dixon, in Oklahoma County, sustained Defendant, landlady's (Ms. Smothers) Motion for Summary Judgment. The Court of Civil

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[4] *Cruse v. Board of County Commissioners of Atoka County*, 1995 OK 143, 910 P.2d 998.
[5] 2019 OK 54, __ P.3d __.

Appeals (COCA) affirmed and the Supreme Court reversed in this opinion by Justice Edmondson. Only Justice Winchester dissented.

The Defendant/landlady argued that (1) the landlady had no legal duty to provide a workable water heater and so owed no duty and (2) that the failure to timely repair the water heater constituted only a condition and not the proximate case of the Plaintiff/tenant's burns. The Supreme Court noted that, at one time, the landlord owed no duty to the tenant for an injury on the leased premises but cited *Miller v. David Grace, Inc.*6 which changed that law and held the landlord owes a duty to exercise ordinary care to avoid injury to the tenant.

As to the Defendant/landlady's "condition v. proximate cause" argument, the Court notes that the question whether negligence constitutes condition or proximate cause turns on whether the injury is foreseeable. The Supreme Court found it quite foreseeable that a tenant forced to heat water in one part of the house and carry it to a bathtub might spill that water and be burned.

This case will be very useful in defining the outer limits of condition v. proximate cause. Keep a note of it.

WORKERS' COMPENSATION – EXCLUSIVE REMEDY – INTENIONAL ACT

This *Parret* is not dead! – *Wells v. Oklahoma Roofing & Sheet Metal*, 2019 OK 45, __ P.3d __

Wells v. Oklahoma Roofing & Sheet Metal[7] holds that series of statutes the legislature passed to reverse *Parret v. Unico* are invalid so that workers injured by action of their employer virtually certain to cause injury or death have a district court claim.

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[6] 2009 OK 49, 212 P.3d 1223,
[7] 2019 OK 45, __ P.3d __.

The Plaintiff's decedent (her father) was killed when he fell from the roof of a three-story building because he had to disconnect his safety harness in order to work around other employees on the roof. The Defendant/employer had previously been cited due to the safety harness problem. As personal representative of his estate, she sued the employer.

The trial court sustained a motion to dismiss based on the exclusive remedy of the Workers' Compensation Act. The Court of Civil Appeals reversed and the Supreme Court granted certiorari and likewise reversed the trial court, in this 5 to 4 decision by Justice Colbert. Four Justices concurred while a fifth, concurred specially.

The history to this is that the Supreme Court in 2005 held in *Parret v. Unico Serv. Co*,[8] that an employer is not entitled to the exclusive remedy of Workers' Compensation for an intentional injury so an employer could be held liable if the employer's acts were virtually certain to cause injury. *Parret* applied the rule where the employer required an electrician to work on large lights which had power to them.

The legislature responded with a statute, then 85 O.S. §12[9] providing that the virtual certainty proof would not constitute proof of intentional injury but rather that the employee had to show actual intent to inflict injury. This opinion holds that the legislature cannot simply redefine the meaning of the words which make up the "grand bargain" between labor and employers which justified the Workers' Compensation system.

So, it appears *Parret* is back!

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[8] 2005 OK 54, 127 P.3d 572.
[9] Now 85A O.S. §5.

DAMAGE CAPS, PAID v. INCURRED

Caps are no more; paid v. incurred does not apply to future medical expense damages – *Beason v. I. E. Miller Services, Inc.*, 2019 OK 28, 441 P.3d 1107

Beason v. I. E. Miller Services, Inc.[10] holds that a statute purporting to cap non-economic damages in a bodily injury case at $350,000 is invalid as a special law and that the paid-vs-incurred statute does not apply to future medical damages.

Beason was badly injured in a crane collapse and sued the company operating the crane. Beason and his wife got a $15 million verdict, designating $5 million of the damages as "non-economic" damages. The trial court, Judge Patricia Parrish, in Oklahoma County, reduced the $5 million in non-economic damages to $350,000 pursuant to 23 O.S. 2011 §61.2. She also held that the "paid-vs-incurred" statute, 23 O.S. §3009.1 does not apply to reduce future medical expense damages but applies only to past medical expenses.

The Supreme Court reversed the caps ruling but affirmed the "paid-vs-incurred" ruling in a 6 to 3 opinion by then-Justice Reif. Justice Kauger recused and Justice Combs disqualified. This and vacancies on the Court caused appointment as Special Justices of Court of Civil Appeals Judges Goodman and Fischer and District Judge Walkley. Justices Darby and Colbert and Special Justices Goodman and Walkley joined in Justice Reif's majority opinion.

I'm going to assume all of you who do not live under a rock know about the caps ruling so we won't talk much about that. The opinion holds the cap law was invalid as a special law under Article 5, §48 of the Oklahoma Constitution. Much less well-publicized is the part of the opinion upholding refusing to apply the "paid-vs-incurred" statute to future medical expense damages. That part of the opinion, found at paragraph 16, rejects various complaints of the

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[10] 2019 OK 28, 441 P.3d 1107.

Defendant, in pretty summary fashion, the most important of which is the future medical expense ruling. That one is extremely important and you really have to read the opinion carefully to find it.

TREBLE DAMAGES

Statute providing treble damage for leaving the scene applies even where injury occurs – *Mcintosh v. Watkins*, 2019 OK 6, 441 P.3d 1094

Mcintosh v. Watkins[11] holds that a statute providing for treble damages for vehicle damage in a hit-and-run collision "resulting only in damage to a vehicle" applies and provides for treble property damages in a wreck with both property damage and bodily injury.

A drunk driver rear-ended Plaintiff and left the scene but was identified. Plaintiff had both property damage and bodily injury and sued for both. Defendant settled the bodily injury and property damage but Plaintiff also sought treble damages pursuant to 47 O.S, §10-103. The trial court, Judge Canavan, in Pottawatomie County, granted Defendant summary judgment as to the treble damages because §10-103 by its terms applies only to "an accident resulting only in damage to a vehicle" while a separate statute, 47 O.S. §10-104 provides for an accident involving property damage and does not contain a provision for treble damages.

The Supreme Court reversed, in a 5 to 4 opinion by Justice Combs and held the treble damage provision applies where there is both property damage and bodily injury. The majority traces the legislative history of the statute and concludes that the language appearing to restrict its application to property damage-only cases was really intended only to differentiate between the two statutes and not to, in effect, confer a benefit on the tort-feasor who injured someone.

[11] 2019 OK 6, 441 P.3d 1094.

The dissenters joined in an opinion by then-Justice Wyrick saying, in effect "Damn – can't you-all read." The dissent suggests the majority is just making the statute say what they think it ought to say, no "interpreting" the language.

Few of us have used the treble damages provision because we don't handle property-damage only cases. This case suggests we can profitably utilize the statute in cases with both types of damage.

Probably the treble damage part of a recovery will not be covered by the tort-feasor's insurance because of the punitive damage nature of the treble damage provision. However, if the tort-feasor has assets, those damages may be recoverable out of those assets. This could be worth pursuing if your client's $25,000 or $30,000 car was totaled!

GOVERNMENTAL TORT CLAIM ACT

Notice of Claim to Superintendent of Schools Instead of Clerk OK; Neither Request by Insurance Adjuster nor Plaintiff's Request to Negotiate Extended time to File GTCA Suit – *I.T.K. v. Mounds Public Schools,* 2019 OK 59, __ P.3d __

I.T.K. v. Mounds Public Schools [12] holds that notice sent to the superintendent of schools, instead of to the school board's clerk, was sufficient notice of claim but that Plaintiff did not thereafter file suit within 180 days of the "deemed denied" date so the GTCA suit was not timely commenced and should be dismissed.

A Mounds Public School District bus driver ran over a six-year old child after the child left the bus. The parents promptly hired a lawyer (not the one who ultimately handled the law suit and appeal). Two weeks after the injury, that lawyer gave written notice of the claim but sent it to the School Superintendent, as opposed to the Clerk of the school board, as required by 51

[12] 2019 OK 59, __ P.3d __.

O.S.§156(D).[13] The Superintendent sent the notice to the School District's insurance company but not to the School Board Clerk.

Twenty days later, the School District's insurance adjuster sent a letter to the lawyer requesting further information about the claim. That letter had a paragraph in it reading:

> My communications with you and my investigation of this matter are not intended to waive any statutory exemptions from liability or time limitations imposed by the Oklahoma Tort Claims Act. Further, any settlement negotiations or discussions do not extend the date of denial of your client's claim.

One year later, the lawyer sent a demand letter to the insurance adjuster, stating a settlement demand amount and saying it was the "first and only pre-suit formal demand in order to settle this matter without litigation." (The lawyer later claimed he had sent another letter attempting to negotiate the claim 3 months before but the School District claimed no such letter was ever received and the trial court found it had not been received.) The School District rejected the demand, saying the claim was untimely. Five months after the demand letter and more than a year after the accident, the lawyer filed suit.

The trial court, Judge Ken Adair, in Okmulgee County, granted the School District's Motion to Dismiss. He held the notice to the Superintendent, rather than the Clerk, was not valid and that, even if the notice was timely, the 180 day statute of limitation ran because the suit was not filed within 180 days of the ninety day "deemed denied" date after the notice was filed. The Court of Civil Appeals (COCA) affirmed and the Plaintiff sought *certiorari*, which the Supreme Court granted. The Supreme Court then reversed the COCA and affirmed the trial court in this unanimous opinion by Justice Edmondson.

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[13] "A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body."

The opinion disagreed with the trial court that the original notice was no good. It said despite the failure to serve the Clerk, as the statute requires, the service on the Superintendent was substantial compliance with the statute and was good. The Court said the statute's directive that the notice be given to the clerk was "directory" and not "mandatory," which gave rise to the ruling that substantial compliance was sufficient. The Court said:

> ¶37 If a school superintendent does not immediately upon receipt transmit the written GTCA notice to the clerk of the governing body for filing and no filing occurs, then we will deem the date filed to be the date of delivery of the notice to the superintendent.

However, the Court held that the Plaintiff's later blowing of the statute of limitation was fatal to the case. The Plaintiff argued that the letter from the adjuster asking for more information triggered a new 90-day period before the claim was deemed denied under 51 O.S.§157(B) which provided:

> The claimant and the state or political subdivision may agree in writing to extend the time to commence an action for the purpose of continuing to attempt settlement of the claim except no such extension shall be for longer than two (2) years from the date of the loss.

However, the Court found the specific language of the adjuster's letter negated any intent to extend time by reason of the letter. The Court also held that the correspondence from the lawyer to the insurance company did not constitute an agreement to extend the time.

I was certainly wrong about the notice to the Superintendent being sufficient. I probably get a question 2 or 3 times a month about whether you can serve the notice on the Superintendent, I assume because it is easier to figure who the Superintendent is than who the Clerk is. This case means you can serve either.

This case serves as a "teaching moment" with regard to GTCA cases. Such cases remain very productive of malpractice claims. The rules are very technical and you just have to study the statutes and follow them scrupulously.

ARBITRATION

Arbitration agreement printed on shingle bundle wrapping not binding on homeowners who did not buy the shingles or see the arbitration agreement – *Williams v. Tamko Building Products Inc*, 2019 OK 61, __ P.3d __

Williams v. Tamko Building Products Inc14 holds that an agreement to arbitrate printed on the wrapping of packages of shingles meant to be thrown away after the shingles were unwrapped and never seen by the homeowners was not binding on the homeowners who never saw the arbitration agreement.

The Williams hired a contractor to shingle their house. Unbeknownst to them, the contractor bought shingles from Defendant which had an arbitration agreement printed on the wrapping on each bundle of shingles. The shingles proved to be defective and the Williams sued Defendant.

Defendant sought an order compelling arbitration, based on the arbitration agreement printed on the wrapping, which the homeowners never saw. The trial court, Judge Sullivan, in LeFlore County, granted the order compelling arbitration. The Supreme Court reversed that order in this unanimous opinion by Justice Combs.

The Court rejected an argument that the Federal Arbitration Act (FAA) pre-empted state law. The Court said the FAA does not pre-empt "the traditional principals [sic] of state agency and contract law."

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[14] 2019 OK 61, __ P.3d __.

Neither does the Oklahoma Arbitration Act (OAA) purport to bind the homeowners to an arbitration agreement they never saw nor had an opportunity to see and read. The Court rejected an argument that the homeowners made the roofing contractors who bought and applied the shingles their agents for the purpose of waiving their right to a jury trial. The roofers had no such relationship with the homeowners which would justify such a conclusion. The Court also rejected the argument that the homeowners were bound by the arbitration agreement as third-party beneficiaries of the contract by which the roofers bought the shingles. Similarly, the Court held the homeowners were not bound by estoppel to the knowledge the roofers may have had by seeing the wrapping on the shingle bundles.

This decision would seem to have broad application to arbitration contracts which the person sought to be bound did not actually see or agree to. It is an opinion you should study carefully if you are resisting arbitration.

SPOLIATION

Spoliation does not justify adverse inference instruction unless spoliation was "in bad faith, willful or intentional" – *Akins v. Ben Milam Heat Air & Electric Inc.*, 2019 OK CIV APP 52, __ P.3d __

Akins v. Ben Milam Heat Air & Electric Inc.[15] holds spoliation of evidence does not justify an adverse inference instruction unless it is in bad faith, willful or intentional.

The Plaintiff family all became ill and had to be taken to the hospital due to carbon monoxide poisoning caused by a malfunctioning furnace on which Defendant had worked. While the family was in the hospital, the Defendant heating and air contractor, together with the fire department found the furnace was giving off excessive CO2. After the husband left the hospital,

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[15] 2019 OK CIV APP 52, __ P.3d __.

he had the furnace replaced with an electric heat pump. He stored the furnace in an outbuilding and, at the request of the Defendant's insurance company, let Defendant take the furnace to a place where both sides' experts tested it and it was lost.

At the trial, several years later, the Defendant moved for sanctions, including an adverse inference assumption, arguing that in order for the evidence to be properly preserved, the Plaintiff should have preserved the furnace in the closet in which it operated and that it should have remained hooked up to the exhaust flue to which it was connected when it poisoned the family. Apparently, Defendant argued the Plaintiffs should have abandoned their house for this purpose.

The Court granted Defendant its requested adverse inference instruction, against the whole family, including a minor child. Predictably, there was a Defendant's verdict. The Court of Civil Appeals reversed, in this unanimous opinion by Judge Swinton, in the Oklahoma City divisions of the Court.

The Court held that an adverse inference instruction for spoliation is a severe sanction which should only be imposed if the spoliation was in bad faith willful or intentional. Here, the loss of the furnace was none of these.

Judge Swinton was joined in her opinion by Judge Mitchell and Vice Chief Judge Goree, normally the more conservative members of the Court.

GOVERNMENTAL TORT CLAIM ACT

Sloppy writing by supreme court makes life difficult for appealing lawyer and court of civil appeals – *Reeves v. City of Durant,* 2019 OK CIV APP 12, 435 P.3d 140

Reeves v. City of Durant[16] holds that sloppy wording by the Supreme Court in a published opinion requires the Court of Civil Appeals in a later, similar case to refuse to rule consistently with more recent Supreme Court opinions.

Plaintiff was hit by a car at night while crossing a street in Durant. She sued the City of Durant, claiming that part of the cause of her injury was that the City had failed to maintain an existing streetlight, causing the street to be too dark. The City defended on the argument that its failure to have the street light burning was a discretionary act, bringing it within the exclusion from the Governmental Tort Claim Act (GTCA) of 51 O.S. §155(5) that a governmental entity is not liable for a claim resulting from "[p]erformance of or the failure to exercise or perform act or service" in the discretion of the entity. The trial court, Judge Ogden, in Oklahoma County,[17] sustained the City's Motion to Dismiss and certified an interlocutory appeal. The Court of Civil Appeals affirmed in this sharply divided opinion by Judge Rapp.

The problem in the case is that the Supreme Court has consistently held that the "discretionary act" exclusionary provision applies only to the decision by the governmental entity to install an improvement, not neglect in maintaining the improvement.[18] However, in

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[16] 2019 OK CIV APP 12, 435 P.3d 140.
[17] OG&E was joined as a defendant.
[18] See, for example, *Gunn v. Consol. Rural Water & Sewer Dist, No. 1, Jefferson Cnty*., 1992 OK 131, ¶11, 839 P.2d 1345: ". . . .the layout of a street and its traffic markings are discretionary acts, but maintenance of existing pavement markings is an operational and ministerial function outside the §155(5) exception. Initial policy-level or planning decisions are typically considered discretionary and exempt from liability; on the other hand, operations level decisions made in the execution of policy are viewed as nonexempt ministerial duties." To the same effect, see: *Walker v. City of Moore,* 1992 OK 73, 837 P.2d 876.

Ochoa v. Taylor[19] the Supreme Court said, in dealing with an issue identical to the present case: " . . . the installation and maintenance of street or area lighting is a discretionary act or service of a political subdivision and therefore exempt from liability . . ." *Ochoa*, however, dealt with the decision to light, not the duty to maintain the lighting.

Judge Rapp felt the specific language the Supreme Court used in *Ochoa* compelled the Court of Civil Appeals to rule that maintenance of the lighting was discretionary and protected and so affirmed the Motion to Dismiss. Judge Goodman concurred "by reason of stare decisis" while Presiding Judge Barnes dissented vigorously.

This seems like the perfect setup for the Supreme Court to grant *certiorari* and correct its error. However, the Supreme Court denied *certiorari*. Apparently, it prefers not to deal with its error in following language which is definitely *obiter dictum*.

PRODUCTS LIABILITY

Chemical manufacturer not liable for failure to warn of the danger of explosion when a cutting torch is used to cut open the empty barrel which had contained a flammable product but had been resold in the used barrel market – *McClain v. Brainerd Chemical Company Inc.*, 2019 OK CIV APP 15, 436 P.3d 752

McClain v. Brainerd Chemical Company Inc.[20] holds a chemical manufacturer is not liable where a worker attempts to cut open a used barrel which had previously contained the manufacturer's flammable chemical, either in products liability or negligence.

Defendant manufactured and sold a flammable chemical, toluene in barrels. The barrels bore a warning of the flammability of toluene but did not warn that the residue of toluene in an empty barrel could be flammable and cause an explosion. Plaintiff's decedent was doing work

[19] 1981 OK 120, 635 P.2d 604.
[20] 2019 OK CIV APP 15, 436 P.3d 752.

for a company which bought an empty barrel which had previously contained Defendant's toluene. He cut into the barrel with a cutting torch and the barrel exploded, killing him.

The trial court, Judge Caroline Wall, in Tulsa County, sustained Defendant manufacturer's Motion for Summary Judgment. The Court of Appeals (COCA) affirmed, in an opinion by Presiding Judge Barnes.

Plaintiff sought recovery both in products liability for creating a defective product by failure to warn and negligence for the same failure to warn. The products liability argument fails because the product the manufacturer sold was not a barrel to be sold on the used barrel market but rather the toluene contained in a barrel. Neither was the worker who attempted to cut open the barrel an expected consumer of the manufacturer's product (toluene).

The Court also rejected Plaintiff's argument that the manufacturer was liable in negligence for failing to foresee that the barrel would be resold and that consumers of that product (the empty, resold barrel) would need a warning that the residue in a barrel which formerly held toluene would be explosive. The Court relied heavily on "remarkably similar" Northern District Federal Court opinion, *Thompson v. TCI Products Co.*[21] in which the barrel which exploded when cut into had contained paint thinner. There, the Court rejected an argument that the manufacturer of the flammable product sold in barrels had a duty to include a warning about residual fumes of the flammable product.

[21] 81 F. SupP.3d 1257 (N.D. Okla. 2015).

GTCA SEWER BACKUP

Error to Give Negligence *Per Se* Instruction for Discharge of Sewage into Waterway in Residential Sewer Backup Case – *Chartney v. City of Choctaw*, 2019 OK CIV APP 26, 441 P.3d 173

Chartney v. City of Choctaw[22] holds it was error for the trial court to give a negligence per se instruction as to statutes or regulations dealing with discharge of sewage into waterways in a case involving a sewer backup into a home.

Sewage backed up into the Plaintiffs' home requiring replacement of carpets, sheet rock and other contents of the home. The Plaintiffs sued for property damage and bodily injury, under a nuisance theory.

The trial court, Judge Roger Stuart, in Oklahoma County, gave a negligence *per se* instruction based on 27A O.S. §2-6-105:

> It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state.
>
> And:
>
> 40 CFR Section 122.41 (e):
>
> (e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.

The jury returned a verdict for $25,000 property damage and $70,000 for each of the 3 family members. The trial court entered judgment based on the verdict. The Court of Civil Appeals reversed in this unanimous opinion by Chief Judge Goree, in the Oklahoma City Division.

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[22] 2019 OK CIV APP 26, 441 P.3d 173.

The statute forbidding release of sewage into waterways was not intended to apply to a sewer backup into a home. The statute as to which negligence *per se* is claimed must be intended to prevent the kind of harm involved in the lawsuit.