Oklahoma Association for Justice

CONTINUING LEGAL EDUCATION

Tort Cases You Need to Know About 2020

By

Rex Travis and Margaret Travis

ABOUT THE SPEAKERS

Rex Travis is a graduate of the University of Oklahoma College of Law (1962). He limits his practice in Oklahoma City to plaintiffs' insurance and personal injury claims. He has done this practice more than 57 years.

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 graduated from University of Oklahoma with a Bachelor of Arts in 1986. She earned her Juris Doctorate from the University of Oklahoma College of Law in 1991. She has practiced in the areas of insurance law, bankruptcy, and personal injury since she was admitted to the Oklahoma Bar in 1991. Margaret went back to the University of Oklahoma Health Sciences Center and earned a Master of Health Administration in 2013. Additionally, she serves the City of Oklahoma City as a Special Municipal Judge.
For the past fifteen years, Margaret practiced in the area of bankruptcy law and has developed a successful bankruptcy practice handling both Chapter 13 and Chapter 7 bankruptcies. During this time, Margaret also served Travis Law Office's insurance and personal injury clients through handling motions, making court appearances, presenting clients for depositions, and more. Margaret has taught continuing legal education seminars (CLEs) on numerous topics in the area of bankruptcy over many years. She also presents CLEs on "Malpractice Avoidance" and a yearly "Insurance Law Update." Margaret has contributed to the Oklahoma Bar Journal's "The Back Page" feature. She has received Martindale Hubble's highest Peer Review Rating of "AV" for Legal Ability and General Ethical Standards. Margaret's numerous awards include: The Briefcase Award from the OK County Bar Association in 2000; the Mona Lambird Service to Children Award from the Oklahoma Lawyers for Children in 2003; the Pro Bono Service Award from Legal Aide Services of Oklahoma, Inc. in 2019; and she has been chosen by residents of Oklahoma City for the Oklahoman Readers' Choice Award for Best Bankruptcy Lawyer several times.

Note: written materials available to download as PDF at www.TravisLawOffice.com

Table of Contents

ARBITRATION

Arbitrator, not court, determines arbitrability, where claim is that there was fraud in the inducement to the entire contract, not just the arbitration provision – *Signature Leasing, LLC v. Buyer's Group, LLC*, 2020 OK 50, 466 P.3d 544

Signature Leasing, LLC v. Buyer's Group, LLC[1] holds the arbitrator, not the court, determines arbitrability of the contract when there is a claim of fraud inducing the party to sign the whole contract, as opposed to fraud in inducing entering into the arbitration provision.

Plaintiff bought a golf course in Tulsa at auction. The deal went bad and Plaintiff claimed it was induced to enter into the contract, which included an arbitration provision, by fraud. Plaintiff sued for a declaratory judgment to that effect. Defendants, the seller and auction broker, demanded arbitration, which the trial court, Judge Dana Kuehn, in Tulsa County, granted.[2]

The Court of Appeals Tulsa divisions reversed, in a two to one vote, holding that, under either the Oklahoma Uniform Arbitration Act[3] (OUAA) or the Federal Arbitration Act,[4] (FAA) the courts, not the arbitrator, decide the issue of whether the contract is subject to arbitration when the challenge is fraud in the inducement to enter into the entire contract and not just the arbitration provision. The Supreme Court reversed the Court of Civil Appeals and affirmed the trial court's referral to the arbitrator to decide the issue of arbitrability, in this opinion by Justice Darby.

He notes the Oklahoma Supreme Court previously held to the contrary in *Shaffer v. Jeffery*.[5] However, since that case, the Oklahoma Legislature adopted a new and updated version

---

[1] 2020 OK 50, 466 P.3d 544.
[2] The trial judge is not identified in the opinion but is on OSCN.
[3] 12 O.S.2011, §§ 1851-1881.
[4] 9 U.S.C. § 1 *et seq.*
[5] 1996 OK 47, ¶ 26, 915 P.2d 910, 917–18.

of the OUAA[6], in 2005. That version of the OUAA includes § 1880(A) which provides: "in applying and construing the Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

The new OUAA also adopts § 1857(C) which provides: "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." Since the federal law[7] had previously held arbitrability would be decided by the arbitrator, not the courts, this indicates an intent by the legislature to change the law to conform to the former federal rule. This federal rule is known as the "separability doctrine."

It appears clear the rule is that when the fraud attack is upon the whole contract, the arbitrability issue will be decided by the arbitrator. However, Justices Kane and Rowe join in a separate concurring opinion by Justice Combs indicating they think a different rule will apply if the fraud attack is made only against the arbitration provision. They would seem to leave the issue in that situation to the courts. However, they concur because that is not the fact situation before the Court in this case.

---

[6] 12 O.S. 2005 Supp. § 1851-1881.

[7] *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17, 21, 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012)(". . . [A]nd when the parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a state or federal court.")

ATTORNEY FEE AWARD – PREVAILING PARTY

Voluntary dismissal does not make the defendant the prevailing party for purposes of being entitled to an attorney fee award against the dismissing plaintiff – *Waits v. Viersen Oil & Gas Co.*, 2020 OK CIV APP 2, 456 P.3d 1149

Waits v. Viersen Oil & Gas Co.[8] holds a dismissal without prejudice by the plaintiff does not make the defendant the prevailing party so as to be entitled to an attorney fee award against the plaintiff.

Mr. Waits was vice-president of Viersen Oil & Gas. His employment contract provided him a substantial severance payment if he was fired without cause. Viersen fired him and he sued. Not surprisingly, Waits claimed he was not fired for cause while Viersen claimed he was.

The trial court, Judge Damon Cantrell, in Tulsa County, granted Viersen's motion for partial summary judgment that there was a *bona fide* dispute whether the firing was without cause, so any damages could not be doubled under 40 O.S. § 165.3. Viersen dismissed a counterclaim it had filed.

Waits appealed the partial summary judgment. The Court of Civil Appeals (COCA), in an earlier opinion, dismissed the appeal, finding there was no appealable order. Viersen filed a motion for an $800,00 attorney fee, which ultimately resulted in this appeal. Waits filed another suit, seeing to have an arbitrator appointed, pursuant to a provision of his employment contract. The trial court and the COCA, in a second appeal, held Waits, having pursued the earlier district court case through an appeal, had waived his right to arbitrate.

The trial court denied the attorney fee motion, holding Viersen was not the prevailing party, having not obtained affirmative relief. The COCA affirmed, in this opinion by Judge

---

[8] 2020 OK CIV APP 2, 456 P.3d 1149.

Thornbrugh, in the Tulsa divisions.

His opinion does an exhaustive analysis of *Professional Credit Collections, Inc. v. Smith*,[9] which he finds to be the controlling Supreme Court authority. That case held (in something of a surprise to me) a collection agency owed a prevailing party attorney fee to an alleged debtor against whom it took a default judgment where the debtor vacated the default judgment, following which the collection agency dismissed without prejudice. The Supreme Court held there the vacation of the default judgment was "affirmative relief" or "success" sufficient to entitle the Defendant to a prevailing party attorney fee under 12 O.S. § 936.

In the present case, Vierson claimed a prevailing party attorney fee because of having made an offer to confess judgment under 12 O.S. § 1101.1. The trial court denied the attorney fee, and the COCA affirmed after doing an extensive analysis of cases subsequent to *Professional Credit*. COCA found that only in *Capital One Bank, N.A. v. Parsons,*[10] did a court affirm granting a prevailing party attorney fee to a party as to whom a claim was dismissed after some default judgment was vacated. This caused the COCA to conclude *Professional Credit* should be narrowly construed and not interpreted so broadly that an attorney fee was proper in this case.

CONTINGENT FEE DISPUTES

Lawyer discharged without cause entitled to full contingent fee if case later settles for offer obtained by discharged lawyer; subsequent lawyer who did not get greater offer not entitled to share of first lawyer's fee for doing work which first lawyer willing and able to do – *Miller v. Magnus*, 2019 OK CIV APP 62, 452 P.3d 440

Miller v. Magnus[11] holds a lawyer discharged without cause is entitled to the full

---

[9] 1997 OK 19, 933 P.2d 307.
[10] 2009 OK CIV APP 71, 217 P.3d 636.
[11] 2019 OK CIV APP 62, 452 P.3d 440.

contingent fee agreed upon if the case later settles for the offer obtained by the discharged lawyer and a subsequent lawyer who did not get any greater offer is not entitled to a share of the first lawyer's fee for doing work which the first lawyer was willing and able to do.

Plaintiff was injured when a truck driven by a 17-year-old boy went left of center to avoid a truck stopped in the road and hit plaintiff head on. He was badly injured. Plaintiff hired on a 1/3rd contingent fee a lawyer. That lawyer investigated, settled the property damage, secured $100,000 med-pay and negotiated successfully to get the plaintiff's health insurance to waive its subrogation as to the med-pay. He did not charge a fee for any of this.

He also investigated and found the 17-year-old driver and his parents had only a $250,000 liability policy to which he secured an offer. He investigated and determined the boy and his parents had no recoverable assets. He discussed with the plaintiff the possibility of suing the stopped truck's owner and driver and offered to do so.

Instead, the plaintiff fired him and hired a second lawyer. The second lawyer sued the 17-year-old and the stopped truck's owner and driver. The first lawyer filed a lien in the case for his 1/3rd fee, $83,333.33. The second lawyer ended up settling for the $250,000 and ultimately dismissed without prejudice the owner and driver of the stopped truck. The second lawyer did negotiate a reduction of some medical liens which increased the net settlement going to plaintiff but did not increase the settlement amount.

The trial court, Judge Phillip Corley, in Payne County, held a hearing to apportion the 1/3rd attorney fee and awarded the entire fee to the first lawyer. The Court of Civil Appeals affirmed, in this opinion by Judge Thornbrugh, in the Tulsa divisions.

Judge Thornbrugh notes there is little or no authority to guide the Court's decision. He says usually the second lawyer gets some increase in the settlement over the offer secured by the

first lawyer so there is a decision to be made about how to divide the increased fee. He says the determining factor in how the fee is to be divided is which lawyer or firm had how much effect on the amount of the fund created by the settlement. In this case, that would all be attributable to the efforts of the first lawyer. He rejects arguments by the second lawyer his efforts were effective because the plaintiff would not accept the investigation of the first lawyer that there were no recoverable assets over the coverage. He notes it would set a bad precedent to encourage hiring a second lawyer to check the work of the first lawyer.

DEFAULT JUDGMENT

Trial court erred in vacating default judgment absent valid statutory ground – *Williams v. Meeker North Dawson Nursing LLC*, 2019 OK 80, 455 P.3d 908

Williams v. Meeker North Dawson Nursing LLC[12] holds the trial court erred by vacating a default judgment absent a valid statutory ground for vacating the default judgment.

Plaintiff's mother was a disabled resident of a nursing home. A nursing home employee pushed her outside in her wheelchair to get some fresh air. She became cold and tried to wheel herself back inside but fell out of the wheelchair to the concrete and her leg was injured. The driver of a car passing by saw her and stopped to put her back in her wheelchair and push her back inside. The leg became infected. The leg injury led to sepsis. Her family hired a lawyer who wrote the nursing home, making a claim and urging the nursing home company to notify its insurance company. There was no response to the letter. She died a little more than four months later.

Seven months later, another lawyer sued the nursing home and served the nursing home by serving a summons and petition by certified mail on the company's service agent, The

[12] 2019 OK 80, 455 P.3d 908.

Corporation Company. Nothing was filed for the Defendant, so the Plaintiff's lawyer filed a Motion for Default Judgment.

The trial judge, Judge Cindy Ashwood, in Lincoln County, refused to grant default judgment but rather required Plaintiff to serve the Defendant again. Plaintiff served the Corporation Company again, this time by private process server. Still, nothing was filed. After the second service with no response, the trial court granted default judgment and, after hearing on damages, entered judgment for $3,020,055.42.

Finally, after an Order to Appear and Disclose Assets, the nursing home hired counsel, who filed a Petition to Vacate the default judgment, claiming it had no "actual notice" of the action and the default judgment resulted from "unavoidable casualty and misfortune" as contemplated in 12 O.S. § 1031(7).

At the hearing on the Motion to Vacate the default judgment, Defendant called as witnesses a nurse from the nursing home, who had no knowledge of the circumstances of the default judgment, and a house counsel for the Defendant, who testified that, while the service agent was served, there was some unknown failure of communication between the service agent and the employee responsible for receiving the service from the service agent. That employee "was unavailable for the hearing, as she was too busy."

The trial court vacated the default judgment and Plaintiff appealed. The Court of Civil Appeals affirmed the trial court and Plaintiff filed a Petition for *Certiorari*. The Supreme Court granted and reversed, in this opinion by Justice Colbert. Justice Kauger did not participate and all justices joined except Justice Kane, who dissented, saying only "I would find that the trial court did not abuse its discretion."

The Court expressed some shock the employee whose fault the default judgment was,

"was too busy to assist [Defendant] by testifying in a case with a $3,000,000 default judgment in place." The Court notes any blame placed upon Plaintiff for not sending the summons directly to the Defendant's operating address is invalid in light of the fact pre-suit notice was sent there and there was proper service multiple times.

The Court recognizes the law does not favor default judgments but seemed to find all this just too much. The Court fails to cite a number of cases over the years in which an error on the part of an insurance company or defense counsel in failing to timely answer was held to justify vacation on grounds of "unavoidable casualty and misfortune."[13]

For reasons not made clear, the Court remands "for a trial on damages." Maybe the Court has some mercy, after all!

DISCOVERY SANCTIONS

Extreme discovery misconduct justifies huge monetary sanction – *Hetronic Int'l, Inc. v. Curtis*, 2020 OK CIV APP 16, 466 P.3d 4

Hetronic International, Inc. v. Curtis[14] holds a monetary sanction totaling $336,681.67 was proper in a case in which the damages were $34,881.67 but where Defendant destroyed computer data after the trial court ordered the data preserved and turned over to the other side.

This case should serve as a prime example of how not to handle written discovery. Defendant was vice president of accounting for the Plaintiff. She had an employment agreement which had a strong confidentiality and noncompetition clause. When she resigned, the company

---

[13] *Burroughs v. Bob Martin Corp.*,1975 OK 80, 536 P.2d 339; *Crawford v. Gipson*, 1982 OK 31, 642 P.2d 248; *Crussell v. Osborn*, 1979 OK CIV APP 11, 592 P.2d 984; *Nw. Roofing Supply, Inc. v. Elegance in Wood, LLC*, 2012 OK CIV APP 13, 271 P.3d 800; *Erbar v. Rare Hosp. Int'l, Inc*., 2013 OK CIV APP 109, 316 P.3d 937; *Nguyen v. Kuzmicki*, 2000 OK CIV APP 105, 12 P.3d 489; *Ferguson Enterprises, Inc. v. H. Webb Enterprises, Inc*., 2009 OK 78, ¶ 14, 13 P.3d 480, 484.

[14] 2020 OK CIV APP 16, 466 P.3d 4.

directed her to turn over computer data kept in the course of her employment. Suspecting she had not done so, the company sued her and got a temporary restraining order not to destroy or alter the computer data.

Instead of complying with the TRO, she altered or destroyed the computer data, some of which she had evidently placed in a Dropbox file on her computer. After a lot of discovery, trial to a jury resulted in a verdict of $180,000, which the trial court, Judge Patti Parrish, in Oklahoma County, reduced by remittitur to $34,345. Then the trial court sanctioned her a total of $336,881.67 in a combination of attorney fees and expert costs incurred due to the discovery abuse.

In affirming the trial judge's award, the Court of Civil Appeals, Presiding Judge Joplin, noted the trial court in *Hess v. Volkswagen of America, Inc*.[15] awarded a $7 million attorney fee on a class action award of $45,780, which the Supreme Court reversed and which ultimately resulted in an affirmed attorney fee award of $983,616.75.

The take-away message here is apparently: (1) trial judges get real offended when your client doesn't do what the court tells them to do and (2) sometimes the appellate courts will affirm them!

DOGBITE LIABILITY – PARENTAL LIABILITY

No statutory dogbite liability on foster parents where dog bit foster child – *Archie as Next Friend of H.G. v. Schonlau*, 2020 OK CIV APP 9, 458 P.3d 1116

Archie as Next Friend of H.G. v. Schonlau[16] holds a former foster parent has common law parental immunity and is not liable to a former foster child under the dogbite statute.

---

[15] 2014 OK 111, 341 P.3d 662.
[16] 2020 OK CIV APP 9, 458 P.3d 1116.

The family dog of a foster family bit a foster child in the face. The child sued through his natural parents seeking liability under the Oklahoma Dogbite Statute.[17] The trial court, Judge Parrish, in Oklahoma County, sustained Defendants' Motion for Summary Judgment, on the basis of common law parental immunity from suit. The Court of Civil Appeals affirmed, in an opinion by Chief Judge Brian Jack Goree. The Supreme Court denied certiorari and ordered the Court of Civil Appeals' opinion published and given precedential effect.

Oklahoma had a rule of parental immunity for negligent injury to a child until 1984 when it decided *Unah v. Martin*[18] abolishing common law parental immunity to the extent of a motor vehicle liability policy. The Court there held family harmony would not be seriously disrupted by such a suit because the insurance would pay any judgment rendered.

Later in 1984, the Supreme Court refused to extend the abolition of family or parental immunity in *Sixkiller v. Summers*[19] noting:

> Although in *Unah* the existence of *compulsory* automobile liability coverage was a significant factor, the fact that the appellee-defendant happened to have homeowners' liability coverage does not displace the reasons for preserving immunity in cases of negligent supervision.

In the present case, the Defendant was represented by a house counsel office, but the issue of homeowners' insurance was not mentioned in the case. One would assume the Court reached the result it did in spite of homeowners' insurance on the basis of the earlier holding in *Sixkiller*.

---

[17] 4 O.S. §42.1.
[18] 1984 OK 2, 676 P.2d 1366.
[19] 1984 OK 14, ¶ 11, 680 P.2d 360, 362 (emphasis in original).

GOVERNMENTAL TORT CLAIM ACT (OGTCA) – NOTICE

Notice to school's insurance company, where school told plaintiff to deal with insurance company, was sufficient notice of claim – *Alburtus v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2020 OK CIV APP 39, 469 P.3d 742

Alburtus v. Independent School District No. 1 of Tulsa County[20] holds notice of a claim under the Oklahoma Governmental Tort Claims Act (OGTCA) to the school's insurance adjuster was sufficient where the school told the plaintiff to deal with the insurance company and the adjuster later told plaintiff's attorney the 90 days for the school district to respond to the claim was running.

A Tulsa school bus rear-ended plaintiff in his truck. When plaintiff called the school, he says a woman told him the school did not deal with collisions and he needed to talk to the school's insurance adjuster. He did so and the insurance company paid his property damage claim and acknowledged he had a bodily injury claim which he said he would deal with after the plaintiff completed treatment.

When no BI payment was forthcoming, he hired a lawyer. The lawyer contacted the adjuster and asked if further notice of the claim was required. The adjuster said no further notice was needed and the 90-day period the school had to pay or deny the claim was running. The lawyer calendared dates to file suit based on that information and timely filed suit.

The school district responded with a Motion to Dismiss, claiming no proper written notice had been given to the Clerk of the school board as required by 51 O.S. § 156(D). The trial court, Judge LaFortune, in Tulsa County, sustained the Motion to Dismiss. The Court of Civil Appeals reversed, in this opinion by Judge Buettner.

---

[20] 2020 OK CIV APP 39, 469 P.3d 742.

Judge Buettner noted the Supreme Court recently held substantial compliance with the notice provisions had been complied with by notice to the School Superintendent instead of to the Clerk of the school board in *I.T.K. v. Mounds Public Schools*.[21] The opinion makes clear "We do not hold that written notice to an insurance agent is always effective notice under the GTCA" but says it is where the school directed the plaintiff to deal with the insurance adjuster.

OGTCA – SEWER BACKUPS

Lack of complaints of sewer backups does not relieve city of responsibility for damage caused by backups – *Crestwood Vineyard Church, Inc. v. City of Oklahoma City*, 2020 OK CIV APP 3, 457 P.3d 278

Crestwood Vineyard Church, Inc. v. City of Oklahoma City[22] holds a city is not relieved of liability for sewer backups by the fact there have been no prior complaints of sewer backups.

A church was damaged by a sewer backup. It sued the City alleging inadequate sewer inspection and maintenance. The City responded with an affidavit that no prior sewer backups had been reported in the area for the preceding 5 years. Relying on a Supreme Court case saying:

> [A city], is bound to use reasonable diligence and care to see that such sewer is not clogged with refuse and is liable for negligence in the performance of such duty to a property owner injured thereby after reasonable notice of the clogged condition of such sewer.[23]

The trial court, Judge Stallings, in Oklahoma County, sustained the City's Motion for Summary Judgment. The Court of Civil Appeals, Judge Barnes, in the Tulsa divisions, reversed. She explained the fact no sewer backups had been reported did not mean there were not problems which proper inspection and maintenance could have detected and cured.

---

[21] 2019 OK 59, 451 P.3d 125.
[22] 2020 OK CIV APP 3, 457 P.3d 278.
[23] *Oklahoma City v. Romano*, 1967 OK 191, ¶ 9, 433 P.2d 924, 926.

OGTCA – WORKERS' COMPENSATION EXCLUSIVE REMEDY FOR DEATH CASE

No OGTCA recovery for wrongful death covered by workers' comp; parents and siblings have no wrongful death recovery; widow of deceased fireman has no standing to seek injunction to better train firemen – *Farley v. City of Claremore*, 2020 OK 30, 465 P.3d 1213

Farley v. City of Claremore[24] holds there can be no recovery for the wrongful death of a fireman against his employer; siblings have no right of recovery in wrongful death and the fireman's widow has no standing to seek an injunction to require the employer-city to better train firemen.

Captain Farley was a Claremore fireman. He was killed while trying to rescue people in a flash flood allegedly made worse by a defective storm drain. His wife made a workers' compensation recovery for herself and a surviving minor child and then brought this wrongful death action for the benefit of herself, the minor child and the parents and a brother of the deceased. She also sought a mandatory injunction to require the City to better train firemen in swift water rescue techniques.

The trial court, Judge Condren, in Rogers County, sustained the City's Motion to Dismiss. The Supreme Court retained jurisdiction of the appeal and affirmed, in this opinion by Justice Edmondson which is unanimous, except for a dissent, without opinion by Justice Colbert and a disqualification by Justice Combs.

The lengthy opinion (30 pages in OSCN, not counting the list at the end of cited cases), is exhaustive. It explores in detail the issues involved in *Parret v. UNICCO Service Co.*,[25] the history of the wrongful death statutes, the OGTCA and requirements for standing. Strangely, it

---

[24] 2020 OK 30, 465 P.3d 1213.
[25] 2005 OK 54, 127 P.3d 572.

does not deal with the obvious internal conflict that requires an intentional wrong while intentional wrongs are not covered under the OGTCA.

On all counts, the case holds that, having recovered under Workers' Compensation, Mrs. Farley cannot also recover in a tort suit against the City, her deceased husband's employer, which is entitled to the exclusive remedy of Worker's Compensation. The fact the City had both created the flooding problem by reason of its maintenance of the drainage structures involved and allegedly failed to train the firemen properly did not give rise to a "dual capacity" liability which would escape the Workers' Comp exclusive remedy. One of the stated bases for allowing the claim is that the deceased left a brother who has no claim in Workers' Compensation and the parents, because there was a surviving spouse, could not bring a wrongful death claim. Neither of these arguments overcomes the exclusive remedy.

The widow, the Court holds, has no standing to seek an injunction. Her legal interest in the proper training of firemen is no greater than that of all citizens. This had to be a difficult opinion to write. It was certainly difficult to read.

JURISDICTION AFTER MOTION TO DISMISS

Trial Court's dismissal without prejudice terminated trial court's jurisdiction and precluded subsequent dismissal with prejudice – *Thacker v. Cowling*, 2020 OK CIV APP 41, 473 P.3d 518

Thacker v. Cowling[26] holds the trial court's sustention of a motion to quash for failure to timely serve summons resulted in a dismissal without prejudice which prevented the trial court from thereafter dismissing the case with prejudice for failure to state a claim.

[26] 2020 OK CIV APP 41, __ P.3d __.

This case arises from a grand jury petition filed August 26, 2013 seeking an investigation of the Plaintiff, a county commissioner, alleging bid-splitting and use of county assets for private purposes. Plaintiff eventually pled guilty to a misdemeanor.

The local newspaper wrote articles about the grand jury petition and the charges. On November 30, 2015, Plaintiff filed this civil action claiming he just learned November 30, 2014 that Defendants, including the editor, publisher and a reporter for the paper were involved in circulation of the petition. His Petition claimed libel and slander (subject to a one-year statute of limitation), abuse of process, false light invasion of privacy and conspiracy (all subject to a two-year statute of limitations) and filing a false grand jury petition, in violation of 38 O.S. § 108 (which the Court suggests would carry a 3-year statute of limitation) for a cause of action created by statute. However, he did not serve summons in this action until two years later, well after the 180 days within which he had to serve the summons to avoid the action being deemed dismissed under 12 O.S. § 2004(i). He pleaded the discovery rule to excuse the delay in filing beyond the statutes of limitation.

The Defendants moved to quash the summons for failure to timely serve it and, at the same time, moved to dismiss for failure to state a claim under 12 O.S. § 2012(B)(6). The trial court sustained both and held the one year within which Plaintiff could refile after the dismissal without prejudice commenced with the dismissal without prejudice so the action could not be refiled. Since then, the Supreme Court held in *Cole v. Josey* the one-year did not begin to run until an order was entered dismissing the case.[27] Plaintiff appealed.

---

[27] 2019 OK 39, 457 P.3d 1007.

In an earlier opinion, the Tulsa divisions of the Court of Civil Appeals, held the 2013 version of 12 O.S. Supp 2014 § 2004.(I) applied and Plaintiff was not required to make a showing of good cause as to why he had been unable to serve the summons within 180 days and affirmed the dismissal without prejudice. It determined the trial court lost jurisdiction with the dismissal without prejudice and refused to consider the later dismissal with prejudice. The Supreme Court granted certiorari and remanded the case to the Court of Civil Appeals with direction to determine the effect of the dismissal without prejudice on the dismissal with prejudice. This unanimous opinion, by Judge Fischer, resulted.

Judge Fischer holds, on the basis of the Supreme Court's opinion in *Firestone Tire & Rubber Co. v. Barnett*,[28] the dismissal without prejudice (there a voluntary dismissal by plaintiff) terminated the case so the trial court had no jurisdiction to dismiss with prejudice.

PIERCING THE CORPORATE VEIL

Case permits piercing the corporate veil of an LLC to give creditor access to debtor's assets – *Mattingly Law Firm, P.C. v. Henson*, 2020 OK CIV APP 19, 466 P.3d 590

Mattingly Law Firm, P.C. v. Henson[29] holds a doctrine of reverse piercing of the corporate veil can be used to enable a creditor of a debtor using the LLC to protect assets and income.

Henson hired, but did not pay, the Mattingly Law Firm. The firm took a default judgment for its fee but was unable to collect it. Henson "worked for" two LLC's, a farm and an insurance agency, which he claimed were assets of his wife but which he managed. He admitted at a hearing on assets he "lived out of" the LLC's but drew no paycheck.

---

[28] 1970 OK 93,475 P.2d 167.
[29] 2020 OK CIV APP 19, 466 P.3d 590.

The trial court, Judge Trisha Smith, in Seminole County, entered a "charging order" pursuant to 18 O.S. § 2034 to give the Mattingly firm access to 50% of the LLCs' assets. In this unanimous opinion by Judge Buettner, in the Oklahoma City divisions of the Court of Civil Appeals he finds no charging order is necessary but that, under the evidence, it is appropriate the Mattingly firm get access to 50% of the LLCs' assets.

Judge Buettner notes this is a first impression case of applying "reverse piercing" to an LLC. Normally, piercing is used to give a creditor of a corporation access to a shareholder's assets upon a finding the corporation's or (in this case) an LLC's assets are collectible. In a reverse piercing, the opposite is true; it permits collection from the assets of the corporation or LLC for the debts of the owners.

Judge Buettner cites many cases, in and out of Oklahoma, in reaching this conclusion. If you want to research piercing the corporate veil, you will need to read this case!

PREMISES LIABILITY

> **Court of Civil Appeals puts narrow interpretation on *Wood v. Mercedes-Benz of Oklahoma City*; OSHA violation not negligence *per se* if victim is not employee of defendant; OK to attribute "contributory negligence" of employer to injured employee; OK to instruct on assumption of risk even absent consent to harm by victim; courtroom presentation expenses not allowed – *Norton v. Spring Operating Co.*, 2020 OK CIV APP 18, 466 P.3d 598**

Norton v. Spring Operating Co.[30] holds *Wood v. Mercedes-Benz of Oklahoma City*[31] is limited to narrow facts; an OSHA violation does not constitute negligence per se if the injured employee is not employed by the defendant; it is proper to instruct on assumption of risk even if

[30] 2020 OK CIV APP 18, 466 P.3d 598.
[31] 2014 OK 68, 336 P.3d 457.

the conduct doesn't reveal consent to harm by the victim and courtroom presentation costs were not recoverable by the prevailing party.

Mr. Norton worked for a company which bought oil from oil companies and sent Norton and other drivers to oil leases to pick up the oil and haul it to the employer's tanks to be put in the employer's pipelines. He complained about the dilapidated state of the steps down from the tank, which he had to traverse but the steps were not fixed. He fell on the steps and was seriously injured.

He sued the oil company claiming products liability, OSHA violations and willful and wanton negligence, based on the oil company's continued failure to repair the steps after it knew they were dangerous. The trial court, Judge Ogden, in Oklahoma County, refused to instruct on OSHA or the willful and wanton violation and instructed the jury there was no liability on the oil company for an open and obvious condition, despite *Wood v. Mercedes-Benz* which held under virtually the same facts that open and obvious was not a defense and instructed the jury it could attribute negligence on Norton's employer for having failed to insist the oil company fix the stairs.

The jury, on a white verdict form, found negligence 10% on Norton, 0% on the oil company and 90% on Norton's employer. The Court of Civil Appeals, Judge Barnes, in the Tulsa divisions, affirmed.

Wood v. Mercedes-Benz, like this case, involved an employee who went on behalf of her employer to the business of a customer (the Oklahoma City Mercedes-Benz dealer) to perform work. The dealership had left its lawn sprinklers on in cold weather and created a sheet of ice around the dealership.

Because she had to go there to work, the plaintiff, Ms. Wood, went across the ice, fell and

was injured. The Supreme Court held the open and obvious nature of the ice was not a defense under these circumstances because (1) she had to be there to work and (2) it was foreseeable people would try to walk across the ice, fall and be injured.

Wood v. Mercedes-Benz constituted a sea change in the law of premises liability and significantly changed the "open and obvious" defense. *Wood v. Mercedes-Benz* was soon followed by the decision in the 10th Circuit of *Martinez v. Angel Exploration, LLC*.[32] There, as in *Wood v. Mercedes-Benz* and the present case, Martinez had to be on the premises of his employer's customer to work as a contract pumper.

He got his sweatshirt entangled in an unguarded pulley and lost his thumb. In reversing summary judgment based on the open and obvious defense, the 10th Circuit held:

> *Wood* aligns Oklahoma with an emerging majority of states to reconsider the open and obvious doctrine. Although *Wood* does not cite the Restatement, many states have adopted the Second Restatement's formulation of the doctrine. As the Restatement puts it, "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*"[33]

The Oklahoma Court of Civil Appeals did not agree with the 10th Circuit. Saying *Wood* was decided by a "divided court" (as are many Supreme Court cases) the Court of Civil Appeals holds it was not error to instruct on open and obvious because *Wood* is limited to facts in which it was clear the employee would be fired if the employee did not endure the risk (a fact not present in *Wood*). This ruling significantly impairs premises liability cases in Oklahoma state courts. We will talk more of that in a moment.

---

[32] 798 F.3d 968 (10th Cir. 2015).
[33] *Id.* at 976 (emphasis added).

The Court of Civil Appeals also holds here OSHA violations do not constitute negligence *per se* unless the injured victim is the employee of the violator and not an employee of another company working on the defendant's premises. The Court of Civil Appeals declines to follow cases (again in the 10th Circuit) which hold OSHA violations can apply to injury to employees of other companies than the defendant where there are multiple employers with employees on premises controlled by the defendant.[34] It declines to follow these cases because they involve construction companies, instead of oil companies, where the same phenomenon of multiple employers arises.

The Court also affirmed instructing on assumption of the risk even though it appears what it was talking about was contributory negligence, which it also submitted. In fact, the instructions seem to permit the jury to attach contributory negligence of the Plaintiff's employer to the Plaintiff, apparently based on the theory the Plaintiff's employer should have more aggressively dealt with the oil company for the defective stairs. The Oklahoma Supreme Court cases suggest assumption of the risk and contributory negligence are quite different and assumption requires some consent to harm, not carelessness.

Finally, the Court threw the Plaintiff a bone: it found the trial court award of $4,000 in costs to the Defendant oil company for aid to courtroom presentation of evidence was not proper and struck that award.

This case will give us a lot of grief in premises liability and workplace injury cases. To the extent the state courts follow this non-precedential Court of Civil Appeals' case, you will lose a lot of these cases just as happened here.

---

[34] For example: *Universal Const. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 728 (10th Cir. 1999).

It may seem counter-intuitive, but you will now find those sorts of cases stand a better chance in federal court than in state court. *Wood* and *Universal Construction* will make premises or workplace injuries winnable in federal court where they may not be in state court. This is so because federal district courts are bound by *stare decisis* rules to follow Tenth Circuit cases such as *Wood* and *Universal Construction* until such time as the Tenth Circuit or the Oklahoma Supreme Court overrules them.[35] So, if you want to handle premises liability and workplace injuries, start working on your federal practice skills!

SUMMARY JUDGMENT/MOTION TO DISMISS

Granting dismissal without leave to amend in response to motion for summary judgment is error – *Bluff Creek Townhomes Ass'n, Inc. v. Hammon*, 2019 OK CIV APP 59, 451 P.3d 212

Bluff Creek Townhomes Ass'n, Inc. v. Hammon[36] holds granting dismissal with prejudice without granting leave to amend to correct a defect was reversible error.

This case is a comedy of errors which teaches us all to be careful handling cases against a *pro se* party. Defendant bought a condo townhouse from an owner. After a couple of years, he stopped paying the condo association after complaining water was leaking into the condo from outside, a problem he said was the condo association's responsibility.

He incurred around $10,000 in past due condo dues for which the condo association sued to foreclose on the condo. The condo owner filed a *pro se* answer and counterclaim for his $20,000+ in damage to the condo from the water and mold. The condo association moved for summary judgment. The owner responded with pictures of the damage and repair estimates

---

[35] *Wankier v. Crown Equipment Corp.*, 353 F.3d 862, 866 (10th Cir. 2003) (holding a panel of the 10th Circuit must follow the decision of a prior panel on the same issue of state law, unless a state court has intervened).
[36] 2019 OK CIV APP 59, 451 P.3d 212.

saying the damage was due to exterior water getting in the condo and moved for summary judgment on his counterclaim.

He did not appear for the hearing on the motions, saying later he didn't know he needed to. The trial court, Judge Lisa Davis, in Oklahoma County, granted the condo association summary judgment and dismissed the owner's counter claim. The Court of Civil Appeals reversed in this unanimous opinion by Judge Wiseman in the Tulsa divisions.

The appellate court said the owner's response to the Motion for Summary Judgment raised fact issues as to whether the counter claim could be successful. It was error to dismiss the counterclaim with prejudice without granting leave to amend, under the rule a Motion to Dismiss should be granted only when there is no way the pleading will support a judgment for the pleading party.

The "take away" rule in this case for us all is we should be very careful in dealing with *pro se* parties. Due to the ferocious volume of motions with which we inundate trial judges, the judges understandably tend to sign whatever we put in front of them. If you have two opposing lawyers, one or the other of them will likely catch situations which turn a case into a nightmare and fix it. When your opponent is *pro se*, you're on your own.

TORT OF INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Tort of intentional interference with prospective business relations requires bad faith on defendant's part so insurance company and adjuster were protected by insurance code provision barring civil action for reporting or revealing information to the Insurance Commissioner which keeps a plaintiff from getting a license – *Loven v. Church Mut. Ins. Co.*, 2019 OK 68, 452 P.3d 418

Loven v. Church Mut. Ins. Co.[37] holds summary judgment was appropriate in a suit by an

[37] 2019 OK 68, 452 P.3d 418.

applicant for a public adjuster's license denied because the insurance company and its adjuster told the insurance commissioner the applicant practiced as a pubic adjuster without a license and committed fraud in the process of submitting a claim due to an Insurance Code provision granting immunity from civil liability for reporting or furnishing information about anyone committing insurance fraud.

Ms. Loven ran a construction company. She wrote estimates for two churches damaged in storms. She proved her estimates were correct and Church Mutual ended up paying over $200,000 in each case more than its adjuster had estimated and for which Church Mutual had tried to settle the cases. Church Mutual claimed she committed insurance fraud because she claimed in an invoice a crane was used when instead it was a lift that was used. The criminal charge was dismissed.

Two years later, an unhappy customer claimed Loven had acted as a public adjuster without being licensed. She submitted an application to the Insurance Commissioner to be licensed as a public adjuster. Church Mutual and its adjuster told the Insurance Commissioner she had acted as a public adjuster in the two cases in which she made them pay more than the adjuster's estimate. The Insurance Commissioner held a hearing and denied her a license on the ground she had acted as a public adjuster without being licensed.

She sued Church Mutual and the adjuster for tortious interference with prospective business relations, claiming the information they communicated to the insurance commissioner was in retaliation. The trial court, Judge Tom Prince, in Oklahoma County granted the insurance company and adjuster summary judgment. The Court of Civil Appeals affirmed. In this unanimous opinion by Justice Kauger, the Supreme Court affirmed.

She held 36 O.S. § 363 protected the insurance company and the adjuster from liability

for tortious interference with prospective business relations by providing:

"No insurer, employee or agent of any insurer . . . .shall be subject to civil liability for libel, slander or any other relevant tort . . .by virtue of filing of reports or furnishing other information . . .concerning suspected . . .fraudulent insurance acts . . ." The Court says the tort of tortious interference with prospective business relations, like the related tort of tortious interference with contractual relations requires bad faith for there to be liability. Because there was no proof of bad faith on the part of the defendant, summary judgment was affirmed.

This ruling is consistent with other cases dealing with civil immunity of people who report claimed wrongdoing to the authorities, such as the DA or regulatory bodies. They are not liable unless the reporter "acts fraudulently, in bad faith, in reckless disregard for the truth or with actual malice."