

RECENT CASES: *Res Ipsa Loquitur*,

Summary Judgment & Directed Verdict

[Text Attached: Oklahoma Statutes Citationized, 76 O.S. Section 21 - Presumption of Negligence, and *Harder V. F.C. Clinton, Inc.* 1997 OK 137, 948 P.2d 298; Superb and Scholarly Opinion by Justice Marian P. Opala on *Res Ipsa Loquitur*.]

CASE #1 – Res Ipsa Loquitur – Court Judgment Reversed

Norman v. Mercy Memorial Health Center, Inc., 2009 OK CIV APP 55 (Okla. Civ. App., 2009)

In July 2001, Plaintiff was admitted to Defendant Hospital for laparoscopic abdominal surgery. She was discharged the same day and went home. Later the same day, she returned to Hospital complaining of pain in her right shoulder. The diagnosis was Type II posterior labrial tear injury to her shoulder.

Plaintiffs sued Hospital for malpractice claiming that she had sustained the shoulder injury during the surgery, while she was unconscious, and as a result of Hospital's negligence. Her husband also sued for loss of consortium.

At trial, in 2006 and 2007, Plaintiffs testified that she had sustained no pre-operative injury and had no pre-operative pain in the shoulder. She also presented evidence that doctors had examined her shoulder four days before the surgery and found no injury, swelling, or tenderness. However, she presented no direct evidence that any Hospital employee dropped her arm during the surgery or otherwise caused her injury. The Plaintiffs presented no evidence that Rhonda's injury was caused to a reasonable degree of medical certainty by Hospital negligence.

The hospital denied negligence and claimed that it used due care to prevent such an injury. Hospital's expert testified that the evidence relating to Rhonda's shoulder injury was inconsistent with an arm dropping injury during surgery. He also testified that her shoulder pain was a classic referred pain from the surgery.

At the conclusion of the trial, the court found in favor of Hospital, stating:

[T]he Court finds as follows:

- 1) The burden is on the plaintiff to prove the actions of the defendant caused her injury;
- 2) The plaintiff relies on the doctrine of res ipsa loquitur to prove her cause of action;
- 3) As of this time, the plaintiff has come nowhere close to persuading the trier of fact that an accident occurred while Ms. Norman was under the defendant's control;

- 4) Dr... has no way of knowing how the plaintiff's alleged injury occurred. Assuming that Dr...will testify that her injury is consistent with having her arm drop, he would be unable to testify whether in fact those events happened.

I don't know why Ms. Norman had shoulder pain after the surgery; I don't have an explanation for that, but in order to prevail, the plaintiffs must prove that they dropped her during the surgery. There's no evidence of that. So_____ the evidence is to the contrary; so, Court finds for the defendant.

On Appeal, the Oklahoma Court of Civil Appeals stated that "the doctrine of res ipsa loquitur was designed to aid plaintiffs in making a prima facie case of negligence where direct proof was beyond their power and control, but within the power of the defendant. This is precisely the type of case for which the rule was designed: Plaintiffs presented proof that Rhonda was unconscious when she sustained her injury, and direct proof of the event was solely within the power and control of Hospital. Common knowledge infers negligence from these facts. In reaching its decision, the trial court failed to apply a presumption of negligence which would have shifted the burden of proof to Hospital. See *Harder v. F.C. Clinton, Inc.* at ¶ 8, 948 P.2d at 303. The court's failure to do so prevented it from properly weighing the evidence."

CONCLUSION

For these reasons, the judgment in favor of Hospital is reversed and this cause is remanded for a new trial.

CASE #2 – Res Ipsa Loquitur & Summary Judgment - Reversed

Parris v. Limes, 2009 OK CIV APP 19 (Okla. Civ. App., 2009)

In September 1999, Plaintiff Parris was discovered to have a positive prostate specific antigen (PSA) by urologist-1. On October 6, 1999, the Plaintiff underwent a needle biopsy of his prostate by urologist-1. The next day, pathologist-1 examined the biopsy specimens and reported that Plaintiff's prostate had adenocarcinoma and high-grade prostatic intraepithelial neoplasia. After reviewing the pathology report, urologist-1 advised the Plaintiff that he had "highly aggressive" Stage II prostate cancer and needed a radical prostatectomy. Urologist-1 also recommended that Plaintiff obtain a second opinion. The next day, based upon the report by urologist-1, urologist-2 gave the Plaintiff the same diagnosis and recommendation.

On October 15, 1999, urologist-2 performed a radical prostatectomy on the Plaintiff, and the total bill for the operation was approximately \$32,000. Post-operatively, urologist-2 continued to treat the Plaintiff for another five years and administered frequent PSA tests.

On September 2, 2004, the Plaintiff obtained the medical records related to his 1999 prostatectomy for the first time. Those records contained a report dated October 26, 1999, from the surgical pathologist-2 advising urologist-2 that he had examined Plaintiff's removed prostate three days after the prostatectomy and found no sign of cancerous cells in the prostate. The report indicated that the pathologist-2 had discussed his findings with urologist-2 on the day of his original examination and, again, on the day he issued his written report. According to Plaintiff, urologist-2 never advised him of the findings by pathologist-2.

Eventually, the Plaintiff and his wife, Carol, sued Defendants for malpractice. Plaintiff's amended petition alleged that Defendants were negligent in conducting the biopsy and examination which resulted in the diagnosis of cancer, that the pathology slides of the biopsy were in the exclusive custody of urologist-1, pathologist-1, and the Hospital, and that these slides were "negligently mismarked, misidentified or misread which ordinarily does not occur in the absence of negligence." Plaintiff also alleged that urologist-2 and his group "were negligent in the performance of said surgery and breached the standard of care in failing to appropriately perform said surgery." The amended petition also alleged that urologist-2 and his group had intentionally concealed the information that Plaintiff's prostate was cancer-free, thereby preventing Plaintiff from discovering Defendants' negligence until September 2004.

Although the Plaintiff was originally represented by counsel, his attorney withdrew in April 2007, and the Plaintiff began representing himself *pro se*. During the course of the litigation, the Plaintiff filed a motion requesting to proceed without a medical expert, citing the doctrine of *res ipsa loquitur* as authority. The trial court denied the motion and ordered the Plaintiff to name an expert within 30 days. The Plaintiff failed to do so, and the Defendants (except pathologist-1) filed motions to dismiss pursuant to what is now 12 O.S. Supp. 2008 § 683(5) for failure to comply with the court's order to provide them with the name of his medical expert. The Plaintiff responded that an expert witness was not necessary to make a prima facie showing of Defendants' negligence, but, if it was, then pathologist-2 would be his expert.

The Defendants obtained an affidavit from pathologist-2 stating that he had not agreed to be the Plaintiff's expert. The affidavit by pathologist-2 also stated that "[i]t is known and reported in the pathology literature that a needle biopsy will demonstrate cancer but a later surgical prostate specimen could show little or no signs of the malignancy." The trial court granted the motions to dismiss.

At about the same time, pathologist-1 filed a motion for summary judgment on the ground that his interpretation of the biopsy specimen was correct, and that Plaintiff's failure to identify an expert witness "demonstrates [Plaintiff's] inability to prove the prima facie elements of negligence." The trial court granted the motion for summary judgment by pathologist-1.

The plaintiff appealed. In his petition in error, Plaintiff raises the following errors:

1. The trial court erred in finding that an expert witness was necessary for Plaintiff to prove malpractice;
2. The trial court abused its discretion in dismissing Plaintiff's suit when he failed to name an expert witness; and,
3. Whether an expert may be compelled to testify on behalf of Plaintiff.

In 2009, DOUG GABBARD, II, PRESIDING JUDGE, Court of Civil Appeals of Oklahoma, Division IV, reversed the summary judgment granted in favor of Defendant/Appellee and remanded the case for further proceedings. BARNES, J., concurred, and RAPP, C.J., dissented.

CASE #3 – Summary Judgment - Reversed

Bray v. St. John Health System, Inc., 2008 OK 51 (Okla., 2008)

This case is about a nurse (business invitee) who was employed by a service and was assigned to work at a Hospital (business invitor). One morning she arrived for work and parked in the Hospital parking garage. There, she was kidnapped at knife point, driven to another location in the assailant's van, and raped. The assailant was arrested and eventually convicted for these actions.

The Hospital parking garage is continually monitored by a security guard who watches thirty monitors which display images generated by video cameras located throughout the hospital complex, including one monitor for cameras located in the parking garage. On the day of the abduction, the video cameras captured images of the assailant's van circling the parking garage with duct tape obscuring its tag. However, this was not observed by the security guard and no camera recorded the actual abduction.

After the assailant was convicted, the nurse and her husband sued the Hospital for common law negligence against the Hospital and also named the criminal assailant as a defendant. Defendant Hospital moved for summary judgment.

During the argument at the hearing on Defendant's motion for summary judgment, the trial court rejected Plaintiffs' argument that the past criminal activity at the Hospital parking garage was such that the Hospital should reasonably anticipate criminal activity and afford reasonable protection against it. The trial court granted summary judgment to the Hospital without stating the legal basis for its decision. The Plaintiff appealed.

The Court of Civil Appeals affirmed, holding that Oklahoma law does not impose that duty on a landowner.

The Oklahoma Supreme Court granted Certiorari to examine the duty of a landowner to provide reasonable protection from crimes against a business invitee and to resolve a conflict between divisions III and IV of the Court of Civil Appeals. In a 5:4 decision, the Supreme Court concluded that the defendant landowner was not entitled to summary judgment. The opinion of the Court of Civil Appeals was vacated and the summary judgment of the trial court was reversed.

CASE #4 – Summary Judgment - Reversed

KRENEK v. ST. ANTHONY HOSPITAL, 2009 OK CIV APP 3

Plaintiff was 89-years old when he was admitted to a Hospital for symptoms suggestive of neuro-degenerative dementia. Plaintiff required assistance with his hygiene, medications, personal care, dietary matters, and his ambulatory and transfer needs. His medications, advanced age and medical condition also affected his balance and stability. While in the Hospital, a healthcare aide employed by Hospital placed the Plaintiff in a wheeled shower chair in a shower facility. The shower facility had a sloped floor for drainage. Plaintiff alleges the aide failed to lock the wheels or restrain him in the shower chair. The aide left the Plaintiff unattended and the shower chair rolled forward to the center of the shower. The plaintiff fell from the chair onto the floor striking his head and upper body. According to Plaintiff, this fall caused him to sustain three fractured ribs, bruises, contusions, and mental anguish and emotional distress.

Plaintiff brought the instant lawsuit claiming Hospital negligently and carelessly failed to restrain him or lock the brakes on the shower chair, and it negligently failed to attend to him while he was in the shower facility. Hospital denied Plaintiff's claims, then sought summary judgment on the basis that Plaintiff failed to come forward with proper medical expert testimony on causation. Defendant argued that the nurse expert listed by the Plaintiff was not qualified to testify as to medical causation.

Plaintiff countered that medical knowledge was not necessary to establish the cause of her father's objective injury; thus, under *Boxberger v. Martin*, [1976 OK 78, 552 P.2d 370](#), it was unnecessary to prove causation with expert witness testimony. Plaintiff explained her purpose for retaining the nursing expert was to provide expert witness testimony about the applicable standard of care for Hospital employees caring for and attending to patients in a hospital shower facility. The trial court entered judgment on behalf of Hospital.

The Appellate Court stated, "We acknowledge Hospital presented evidence disputing Plaintiff's facts relevant to causation. However, "[t]he determination of causation may be removed from the province of the fact-finder *only* when there is a complete lack of evidence and no reasonable inference tending to link the defendant's negligence to the plaintiff's harm." *Jones*, [2006 OK 83](#) at ¶24, 155 P.3d at 16 (emphasis in original). Therefore, the determination as to whether Ulicky's fall from the chair onto the sloped shower floor actually caused or contributed to Ulicky's injuries should have been left to the fact-finder. For the foregoing reasons, we hold the trial court erred in granting summary judgment to Hospital and reverse and remand for further proceedings.

Discussion: Summary Judgment

Standard of Review of Summary Judgment

The granting of a motion to dismiss or a motion for summary judgment upon undisputed material facts presents an issue of law requiring *de novo* review, that is, a plenary, independent and non-deferential re-examination of the trial court's legal rulings.¹

Definition of Summary Judgment

Summary Judgment is the most powerful, effective, efficient and cost-beneficial method of terminating a trial. It is defined as: "A final decision by a judge, upon a party's motion, that resolves a lawsuit before there is a trial. The party making the motion marshals all the evidence in its favor, compares it to the other side's evidence, and argues that there are no 'triable issues of fact.' Summary judgment is awarded if the undisputed facts and the law make it clear that it would be impossible for the opposing party to prevail if the matter were to proceed to trial."² It may be issued as to the merits of an entire case, or of specific issues in that case. Hence, a summary judgment may end the case completely or eliminate particular claims involved. Where a court awards summary judgment upon less than all claims that represents a "partial summary judgment."

¹ *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100, 1103; see also *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217 (1991).

² <http://www.nolaw.com/dictionary/summary-judgment-term.html;jsessionid=26749D1D0D5949DA347A89827D60F795.jvm1>

Summary Judgment Process

In *Shamblin v. Beasley* (1998)³ Justice Marian P. Opala called summary judgment procedure "summary process" and explained: "[s]ummary process [is] a special procedural track to be conducted with the aid of acceptable probative substitutes...It is a method for identifying and isolating non-triable fact issues, not a device for defeating the opponent's right to trial."⁴ Justice Opala emphasized that the summary judgment process is not concerned with testing the sufficiency of probative substitutes as evidence. The focus is not on facts a party *might* be able to prove at trial. Rather, the focus is on whether the tendered evidentiary material, viewed as a whole, shows undisputed facts as to some or all material issues, resulting in but a single inference that judgment for the movant is proper. "Only that evidentiary material which entirely eliminates from testing by trial some or all material fact issues will provide legitimate support for...use of summary relief in whole or in part."⁵

Factfinder versus Lawfinder

In most jurisdictions the jury is the traditional **factfinder** and has to decide what the facts are, what really happened, and apply the law. The Judge is the **lawfinder** who decides issues of law, i.e., what the law actually is in a particular case, except in cases of jury nullification of the law (a process whereby a jury in a criminal case nullifies a law by acquitting a defendant regardless of the weight of evidence against him or her.)⁶

Motion for Summary Judgment

Lawyers should consider filing a motion for summary judgment in every lawsuit they handle. A party moves (applies) for summary judgment in an attempt

³ 1998 OK 88, 967 P.2d 1200.

⁴ *Id.* at ¶ 9, 967 P.2d at 1207.

⁵ *Id.*

⁶ http://en.wikipedia.org/wiki/Jury_nullification

to eliminate its risk of losing at trial, and possibly avoid having to go through discovery. The party in a lawsuit seeking a motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure in federal court, and under Rule 13 of the Rules for District Courts of Oklahoma, and must show the court evidence establishing that there is no controversy as to the material elements of the claim, in the form of deposition transcripts, sworn affidavits, admissions in the pleadings, stipulations, answers to interrogatories and requests for admissions and exhibits attached to the motion. The motion must reference the pages, paragraphs and lines in any attached statement relied on to prove each statement of fact, and must cite the specific rules of law that are argued. The Summary Judgment can be filed at any time after a lawsuit commences, up to 20 days before trial.

A summary judgment will be issued based only upon the court's finding that there are no issues of "material" fact requiring a trial for their resolution, and in applying the law to the undisputed facts, one party is clearly entitled to judgment. A "material fact" is one which, depending upon what the factfinder believes "really happened," could lead to judgment in favor of one party, rather than the other. A motion for summary judgment by the defendant tends to be precisely targeted to the weakest points of the plaintiff's case. Each party may present to the court its view of applicable law by submitting a legal brief (memorandum) in support of, or in opposition to, the motion. In general, where the judge wishes to question the lawyers on issues in the case, an oral argument may be allowed.

The U.S. Supreme Court in *Anderson v. Liberty Lobby* (1986)⁷ articulated the standard for a trial court to grant summary judgment. Summary judgment will lie when, taking all factual inferences in the non-movant's favor, there exists no genuine issue as to a material fact such that the movant deserves judgment as a matter of law. As noted in *Adickes v. S.H. Kress & Co.* (1970),⁸ and in *Celotex*

⁷ 477 U.S. 242 (1986)

⁸ 398 U.S. 144, (1970)

Corp. v. Catrett (1986),⁹ the court must consider all materials in the light most favorable to the party opposing the motion for summary judgment.

In *Markwell v. Whinery's Real Estate, Inc.* (1994),¹⁰ the court stated that in a summary judgment the moving party is entitled to judgment **as a matter of law** upon establishing by pleadings, affidavits, depositions, admissions, or other evidentiary materials that there is no genuine issue as to any material fact. In many jurisdictions, however, a party moving for summary judgment takes the risk that the judge may find that it is the *non-moving* party who is entitled to judgment as a matter of law.

In *Hughey v. Grand River Dam Authority* (1995),¹¹ the court noted that once the moving party has met its burden, the adverse (responding) party within only fifteen days must assume the burden of demonstrating the existence of a material fact that would justify a trial of the issue.

The responding adverse party opposing the summary judgment is permitted wide latitude in meeting this burden. In *Hadnot v. Shaw* (1992),¹² for example, the court noted that the responding parties' failure to put on evidentiary materials of their own did not necessarily preclude them from demonstrating that an actual controversy exists, as they could show through the movant's own evidentiary materials the existence of controverted fact. And in *Davis v. Leitner* (1989),¹³ materials attached to a response to a motion for summary judgment are not to be held to the standard of competent, admissible evidence. "It is enough that these 'other materials' reasonably show the judge who is considering the motion that the party opposing the motion will be able at the time of trial to present competent, admissible evidence to support the allegations."¹⁴

⁹ 477 U.S. 317 (1986)

¹⁰ 1994 OK 24, ¶ 15, 869 P.2d 840.

¹¹ 1995 OK 56, ¶ 12, 897 P.2d 1138,1143.

¹² 1992 OK 21 ¶ 22, 826 P.2d 978, 984-85.

¹³ 1989 OK 146, 782 P.2d 924.

¹⁴ *Id.* at ¶¶ 15, 782 P.2d at 926.

In *Seitsinger v. Dockum Pontiac, Inc.* (1995),¹⁵ the court pointed out that a reply or some similar pleading **is required** by a moving party seeking summary judgment where there are objections to documentation or evidentiary materials presented by the responding party which contained inadmissible hearsay. But when a party fails to timely object to supporting documentation before the court rules on a motion for summary judgment, the objection is waived and the evidentiary material may be considered by the trial court. *Seitsinger* also reaffirms the wide scope of "other materials" on which a responding party may rely.

In *Union Oil Co. v. Board of Equalization* (1996),¹⁶ the court noted that (a) A motion for summary judgment is a request for an adjudication on the merits; (b) Summary Judgment pursuant to Rule 13 where no response is filed is not a default judgment; and (c) District Court Rule 4(e) deeming motions to be confessed in the absence of a response does not apply to a summary judgment motion pursuant to District Court Rule 13. Thus, summary judgment is based on the merits of the motion presented, while a motion for default judgment under Rule 4 is based on a failure to respond.¹⁷ In *Union Oil Co.*, the court reaffirmed the principles of summary judgment review set out in *Springs v. Circle K Stores, Inc.* (1987),¹⁸ that "[t]he granting of summary judgment ultimately depends upon a determination by the trial court of whether there is a substantial controversy as to any material fact. Even when no counter-statement has been filed, it is still incumbent upon the trial court to insure that the motion is meritorious."

Appeal of Summary Judgment Decision

A decision granting summary judgment can be appealed without delay. A decision denying summary judgment ordinarily cannot be immediately appealed; the case continues on its normal course.

¹⁵ 1995 OK 29, 894 P.2d 1077.

¹⁶ 1996 OK 40, 913 P.2d 1330.

¹⁷ *Id.* at ¶ 14, 913 P.2d at 1334.

¹⁸ 1987 OK CIV APP 45, 743 P.2d 682.

In U.S. federal courts, a denial of summary judgment cannot be appealed until final resolution of the whole case, because of the requirements of **Title 28 (Judiciary and Judicial Procedure)** 28 U.S.C. § 1291 and 28 U.S.C. § 1292 (the final judgment rule). Summary judgment practice in most states is similar to federal practice, though with minor differences.

Summary judgments of lower U.S. courts in complex cases are commonly overturned on appeal because a grant of summary judgment is reviewed *de novo* (meaning, without deference to the views of the trial judge) both as to the determination that there is no remaining genuine issue of material fact and that the prevailing party was entitled to judgment as a matter of law. In *Manley v. Brown*, (1999),¹⁹ the court discussed the burden of the appellate court when reviewing summary judgment cases and stated that *de novo* examination must occur, as appellate tribunals have an affirmative duty to test all evidentiary material tendered in summary process for its legal sufficiency to support the relief sought by the movant. In *Hadnot v. Shaw* (1992),²⁰ the court noted that "[a]fter summary judgment is granted, the objecting party cannot on appeal supplement the appellate record by injecting into it material that was not before the trial court at the judgment stage."

¹⁹ 1999 OK 79, 989 P.2d 448.

²⁰ 1992 OK at ¶ 13, 826 P.2d at 982-983.