LITIGATION

Residential Construction Defect Cases in Oklahoma

By Douglas J. Shelton and Brianna Tipton

It's moving day. You and your family are moving into a newly built home designed and constructed just for you. This home has been a dream of yours for years. You love that it smells so fresh and new. You can already imagine the family gatherings, barbeques and quiet nights watching the sunset on the porch.

But shortly after moving in, the roof begins to leak. You notice cracks developing in your walls; water has gotten into the air ducts; the windows drip when it rains and howl in the wind. You can't believe this is happening. This is a brand new home. You realize that your dream home has turned into your worst nightmare.

Because it is new, you know that the problem has to be the construction of the home so you contact your builder. He sympathizes with you, tells you that he is sure the problem is superficial and he sends over his subcontractors. They caulk a few areas, a "band-aid" repair. The problems persist. After multiple calls to the builder and the continuation of the "band-aid" repairs, you realize you are on your own. You hire a structural engineer and he tells you there are numerous building code violations. In the meantime, the builder will no longer return your calls, letters or emails. With every rain, the family is up in the middle of the night putting buckets in the attic and towels around windows. It's beyond stressful. Your spouse continues pressuring you to get something done, but what? It appears the only recourse you have is to hire an attorney to determine who are the responsible parties and get the problems properly repaired. You have now entered the realm of residential construction defect litigation.

POTENTIAL PARTIES

There are several potential parties in a case regarding construction defect. Most commonly, the buyer is the plaintiff. The builder/general contractor is generally the primary defendant. Because most contractors use several different subcontractors, there may be multiple defendants depending on the specific defects. Individual subcontractors may be solely responsible for the defects, but a general contractor has the obligation to oversee the work and therefore, they are almost always included in the suit.

THEORIES OF LIABILITY

There are several theories of liability in which a residential construction defect claim can be brought. These include: breach of contract; breach of express warranty; breach of implied warranty; and negligence, which may encompass common law negligence, negligence *per se*, and accepted work doctrine.

Breach of Contract

The purchase contract, as daunting as it is, must be read. Most, if not all, construction contracts are prepared by a builder or his counsel,

to completely protect and discharge a builder's liability, and often include asking the buyer to waive numerous rights they may otherwise have. Several Oklahoma cases have commented on how important it is for people to read the contracts they sign. "Generally, if a party to a contract can read and has the opportunity to read the contract but fails to do so, he cannot escape its liability."[1] "Regardless of whether [a party] remembers reading the [contract] prior to signing it, [he] cannot escape the conditions of the contract by claiming [he] failed to read it."[2]

What case law stresses is the importance of knowing what rights and obligations a contract confers on the parties. Understanding the contract before it is signed can save everyone a lot of time, effort, money and undue suffering.

Parameters of the Suit with Regard to the Contract

In the *Flint Ridge* case, the Oklahoma Supreme Court held "the purchaser of a home can seek to recover in contract for defects in the structure itself as such defects render the home less than the purchaser bargained for."[3] The court went on to state:

> ...where the plaintiff seeks to receive what the builder promised to deliver, or damages to compensate him for structural deficiencies in the final product, the action arises from the contract of sale between the parties and is basically contractual in nature. The purchaser can also seek to recover in tort for injuries sustained due to the contractor's failure to construct the home as a reasonable contractor would.[4]

What *Flint Ridge* tells us is that a homeowner can sue under breach of contract theory for defects in the structure that render the home less than what was bargained for. A recent example of this came about during a case that our firm successfully tried. In part, the plaintiff alleged that he bought the new home expecting it to be in a new and properly working condition. When the home was found to have multiple water intrusions from the sub-floor, windows, roof and walls, the claim was made that this was not what the homeowner believed he was purchasing. During the damages phase of the trial, the plaintiff argued he was entitled to what he had paid for and was expecting — a new, properly functioning home. The jury agreed, finding for the plaintiff.

Flint Ridge also tells us that if a homeowner is injured due to failure of the builder/general contractor to perform the contract as a reasonable contractor would, the homeowner can seek recovery in tort alongside the contractual claim,[5] *see* discussion of negligence theories of liability, *infra*. This gives homeowners two theories of liability under which to hold the builder/general contractor liable for damages to the home or injury to the individual.

Breach of Express Warranty

Generally, building contracts contain a written limited warranty that states the material and workmanship will conform to certain performance standards set out within the contract for a specified amount of time. This is the express warranty. The performance standards set a contractual bar for the workmanship and material and set out the repairs the builder/general contractor will be responsible for.

> Okla. Stat. tit. 12A, §2-313 addresses the creation of an express warranty.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The question of the existence of an express warranty is one for the trier of fact.[6]

"In order for an express warranty to exist, there must be an absolute assertion understood by the parties pertaining to the merchandise

sold."[7] "Comment 4 to section 2-313 of the UCC notes that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."[8] And "recovery under warranty provisions .... applies to losses flowing from the sales contract."[9]

To prove a breach of express warranty, a buyer must prove: 1) existence of the express warranty; 2) the home did not comply with the express warranty; and 3) failure to comply with the express warranty caused damages. A buyer will need to begin by proving the existence of the express warranty. This will often be titled something like "Builder's One Year Limited Home Warranty" in a home purchase contract. Once the existence of the express warranty is established, the next element is proof that the home did not comply with the terms set out in the express warranty. Failure of the builder/general contractor to satisfy the standards or make repairs set forth in the warranty fulfills this element. "It is sufficient if... the evidence shows, either directly or by permissible inference, that the goods were defective in their performance or function or that they otherwise failed to conform to the warranty."[10] The final element is to prove the failure to meet the standards set out in the warranty caused damage. Like any contract, a warranty is negotiable, depending on the willingness of the builder to negotiate off his "usual warranty."

Breach of Implied Warranty

Purchase contracts have implied warranties that operate as a theory of liability if the builder/general contractor fails to construct the home properly. These warranties are not in writing and are above and beyond any written warranty; they are warranties implied by law. In *Jeanguneat v. Jackie Hames Constr.*,[11] the Oklahoma Supreme Court found:

> When a builder-vendor sells a new home, he or she impliedly warrants that the new home is or will be completed in a workmanlike manner and is or will be reasonably fit for occupancy as a place of abode, in the absence of an agreement to the contrary, and that such an implied warranty exists as a matter of law, both when the new home being sold is completely constructed, and when, at the time of sale the house is being constructed or is to be constructed.[12]

This is often referred to as the implied warranty of habitability. The court goes on to define "builder-vendor" as:

> A person who is in the business of building or assembling homes designed for dwelling purposes upon land owned by him, and who then sells the houses, either after they are completed or during the course of their construction, together with the tracts of land upon which they are situated, to members of the buying public.[13]

The *Jeanguneat* line of thinking regarding the implied warranties was expanded in *Elden v. Simmons*.[14] The *Elden* court held:

> (1) the duration of the implied warranties of habitability and construction in a workmanlike manner does not necessarily terminate upon transfer of title to the home, and (2) that present owners of a home are not required to have privity of contract with the home builder or manufacturer of a particular component involved, in order to maintain an action for breach of warranty.[15]

The court noted "that requirement of vertical privity as a prerequisite to suit on an implied or express warranty, both under the Uniform Commercial Code and outside the code, is, given today's market structure, an antiquated notion."[16] Essentially, the court held that a subsequent purchaser need not be in privity with the builder-vendor to maintain an action for breach of implied warranties.

However, implied warranties may be disclaimed. Oklahoma courts have held that "to relieve a builder-vendor of its obligation under an implied warranty of habitability, there must be **clear and conspicuous** language evidencing builder's disclaimer of its obligations arising under an implied warranty of habitability."[17] (emphasis added). Many builders now routinely have disclaimers of any implied warranties in their form contracts. By these disclaimers, they attempt to limit any warranty to their already very limited express warranty.

In *Cox v. Curnutt*,[18] the Oklahoma Supreme Court held that privity of contract with the homeowner is required before a subcontractor (as compared to the builder) will be held liable for breach of implied warranties. *Cox* is the current law in Oklahoma and controls when a party will be liable under the theory of breach of implied warranties. So pursuant to *Cox*, there must be some privity of contract for the subcontractor to be liable under the breach of implied warranties theory of liability. But pursuant to *Elden*, the subcontractor may be held liable under implied warranties if it is shown

they are a manufacturer of certain components involved in building of the house. In *Elden*, the eventual homeowners brought a cause of action against the builder/general contractor and the manufacturer of the bricks used in the construction of the home. The bricks were crumbling and falling apart. The court found, as the manufacturer of a component involved in the construction of the home, the brick manufacturer was in the chain of distribution. Under the rationale used by the court in *Old Albany Estates v. Highland Carpet Mills*[19] the court in *Elden* found that since the manufacturer is in the chain of distribution, privity of contract between the ultimate purchaser of the home and the manufacturer of certain components used in construction of the home was not required.

In a nutshell, some warranties are implied in a purchase contract as a matter of law. Since these warranties are implied as a matter of law, if a builder/general contractor does not wish be to be held liable for breach of such warranties, the disclaimer must be stated in clear and concise language. Also, the implied warranties do not necessarily terminate upon transfer of title to a subsequent purchaser. Manufacturers of particular components involved in the construction of the home are also liable under the implied warranties of the contract. Therefore, if a subcontractor qualifies as a manufacturer of certain components used they too will be liable under implied warranties.

Negligence

General Negligence — To establish a claim of negligence, a plaintiff must show that: 1) the defendant had a duty to protect the plaintiff from injury, 2) the defendant failed to properly exercise or perform that duty, and 3) the defendant's failure to properly exercise or perform that duty caused the plaintiff's injury.[20]

The cause of action for negligence does not arise out of any contractual relationship between the parties, therefore the breach of any "duty" is to be defined by common law. The general rule of duty is "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous."[21] *Debrel v. Doenges Bros. Ford Inc.*[22] holds that the most important consideration in the question of duty is foreseeability.[23] Clearly, it is "foreseeable" that a builder, or any homeowner, may and usually will, sell the home at some time.

In the area of negligence, the privity of contract requirement was abolished early in the 20th century in the landmark case of *MacPherson v. Buick Motor Co.*[24] and is clearly followed in Oklahoma.[25] In *MacPherson*, the court held that a manufacturer **has a duty** to those who may foreseeably be expected to use his products or to be in the vicinity of such usage to exercise reasonable care in the design and manufacture of those products[26] (emphasis added). In adopting the *MacPherson* approach, the Oklahoma Supreme Court has found that the absence of privity of contract will not bar an injured third party from recovering damages for injuries received as a result of negligent work.[27]

Industry customs exist in the construction industry and it may be appropriate to argue that deviation from such customs may be grounds for a negligence claim. The Oklahoma Supreme *Court, in Sanders v. C.P. Carter Constr. Co.*,[28] wrote:

> The omission of usual and customary precautions may be a matter proper for consideration in determining whether or not conduct was negligent, for, while ordinary prudence may require more precaution than is customary under similar circumstances or in a similar business or occupation, it can hardly require less, and hence a lack of such precaution may fairly be regarded as negligence. The mere fact that a particular thing is done in a manner different from that in which it is customarily done does not show negligence in the absence of any fact showing that the manner in which the act is done is dangerous, although it may be a matter for consideration in determining whether due care has been exercised.[29]

In determining negligence, the standard is due care and such standard is not fixed by custom. Although failure to observe custom may be evidence of negligence, adhering to a custom is never a substitution for due care.[30] A party cannot establish the existence of a custom simply by proving that the act is frequently done.[31] The custom must be "certain, general, uniform and recognized."[32] It must also be notorious and known to all persons involved in the trade or occupation at issue.[33] "It is important to note that in order for a breach of custom to be considered,

the plaintiff must plead and prove that the party to be charged had knowledge of the custom or that the custom is 'notorious, universal and well established.'"[34]

Negligence *Per Se* — "When courts adopt the statutory standard for a cause of action for negligence, the violation of the statute is said to be negligence *per se*."[35] "To establish negligence *per se* on the basis of a statutory violation the party must establish that: 1) the injury was caused by the violation; 2) the injury was of a type intended to be prevented by the statute; and 3) the injured party was of the class meant to be protected by the statute."[36]

Often, city or county adopted building codes will have been violated when you have a defective home and if such a violation causes damages, it may be considered negligence *per se*. "It is a well-settled principle of law in this state that the violation of a statute or city ordinance is negligence *per se* if the other elements of actionable negligence exist."[37] Oklahoma courts have stated in referring to municipal building codes, that a "violation...may, therefore, be negligence *per se*, but only if the violation proximately caused or contributed to the damages at issue."[38] In *Jones*, the court was considering negligence *per se* in the context of the Underground Facilities Damage Prevention Act. The court explained that the act "set standards dealing with the operation, maintenance, or repair of property in much the same way as the rules of the road in the Oklahoma Motor Vehicle Code, 47 O.S.1991, §§11-101, set standards relating to the operation of motor vehicles."[39] The court then compared the negligence *per se* doctrine to building codes, stating, "Municipal building codes perform the same purpose."[40] Therefore, a violation of the building codes may be negligence *per se*. The court continued by stating "the determination of what causal connection, if any, existed...and whether those violations were negligence *per se*, is for the jury."[41]

Accepted Work Doctrine — The accepted work doctrine may limit a builder's responsibility and is relevant in the analysis of liability under the theory of negligence and was discussed by the Supreme Court of Oklahoma in *Pickens v. Tulsa Metro. Ministry*.[42] The court stated:

> The "accepted work doctrine" historically limit[ed] the liability of architects, engineers, contractors, and other members of the construction industry for injuries arising from design or construction defects. In its original form, the accepted work doctrine relieved an independent contractor of liability for injuries to third parties after the contractor had completed the work, and the owner or employer had accepted the work, regardless of the contractor's negligence in completing the project.[43]

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Pickens goes on to state: "In the area of negligence, the privity of contract requirement was abolished early in the twentieth century in the landmark case of *MacPherson v. Buick Motor Co.*,"[44] However, this case was a products liability case and the standard applied to manufacturers and was not immediately applied to negligence claims against builders and architects. As a response to the criticism that it should be applied to builders and architects, courts began to recognize exceptions to the rule and create modified accepted work doctrines.[45]

Several exceptions to the accepted work doctrine have been established around the country. One exception to the general rule is: if a contractor "willfully creates a condition which he knows to be immediately and certainly dangerous to third persons, who will necessarily be exposed to the danger."[46] Another "firmly established exception to the accepted work doctrine" is that: "liability is imposed after the work has been accepted where a defect is latent or hidden...."[47] For most buyers, the defects, which will cause them the greatest problems, will be hidden, as new homes are usually cosmetically beautiful upon sale.

Oklahoma is one of the states that still adhere to a modified accepted work doctrine and the abovementioned exceptions are recognized in this state. Therefore, the general rule in Oklahoma is that once a job is accepted by the owner, the contractor is not subject to liability

for injuries to a third party injured by a defective condition, unless the contractor willfully creates a condition he knows to be immediately and certainly dangerous to third persons who will be exposed to the danger, or the defect is latent or hidden. The modified accepted work doctrine may operate to shield some subcontractors from liability under a negligence theory of liability.

DEFENSES

There are a number of defenses the builder/general contractor and subcontractors may assert in this type of case. Several defenses come from common law while others come from statutes, or arise from the specific facts of each case. They include but are not limited to: general and specific denials of breaches of contract, warranty or negligence; comparative/contributory negligence on the part of the buyer; damages resulted from the responsibility of a third party over whom they had no direction or control; failure to mitigate damages; the accepted work doctrine; the right to repair act; and the express terms and provisions of the written warranty agreement bar the claim.

The Right to Repair Act

The Notice of Opportunity to Repair Act is found in Okla. Stat. tit.15, §765.5-765.6. This act allows, but does not mandate, the inclusion of a contractual provision that requires homeowners to notify a contractor about construction defects before filing a lawsuit. If such a provision is included in the contract the homeowner is required to: 1) provide the contractor a "written notice of construction defects" and 2) allow the contractor to inspect the defects and present a written response with an offer to repair or compensate for the defects within 30 days after receipt of the notice of defects. The homeowner shall not file suit until the conditions have been met. If the conditions have been satisfied the homeowner may then "seek remedies against the contractor as provided by law." This may serve as a defense for a builder/general contractor if the contract contains the clause and a buyer does not comply.

DAMAGES

Rescission

Rescission of contract restores the contracting parties to the positions they would have occupied if no contract had ever been formed. The process and reasons available for asking for contract rescission are found in title 15 of the Oklahoma statutes. Okla. Stat. tit. 15, §233 states the reasons rescission may be sought. And Okla. Stat. tit 15, §233A states: "Where the action....is timely brought for relief based on the theory of rescission....**service of a pleading on the adverse party shall be deemed sufficient notice** of rescission and of an offer to restore the benefits received under the contract" (emphasis added). And, Okla. Stat. tit. 15, §235 states that rescission, when not effected by consent, can be accomplished only by the use of reasonable diligence on the part of the party rescinding to rescind promptly, upon discovering the facts which entitle him to rescind and he must restore to the other party everything of value he has received under the contract or offer to restore the same.

Actual Damages — Property: Cost of Repair/Diminished Value

By far the most common damages awarded in a construction defect case are actual damages. If the damages are repairable, actual damages awarded usually equal the reasonable cost of repairs. This allows the buyer to hire someone else to satisfactorily complete the work the builder/general contractor may have been negligent in executing.

Any damages specifically excluded by express limited warranties or the purchase contract are not available under the theories of breach of express warranty and breach of contract. If the purchase contract contains a section that specifically excludes a specific damage, the buyer waives their right to those damages when they sign the contract.

Diminished value is another form of damages available to the buyer. "Diminished value" means the difference between the market value of the property immediately before being damaged and its market value after repairs have been or would be made.[48]

A determination of the proper **measure** of damages is a question of law for the court. However, the **amount** of damages is a question of fact, usually for the jury or judge to determine. If the damages are repairable, the court should determine as a matter of law that the proper measure of damages is the reasonable costs of repair. *Smith v. Torr*[49] states that the measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby,

which, in the ordinary course of things, would likely result therefrom. In the cases of *Weibener v. Peoples*[50] and *Stewart v. Riddle*,[51] the court has clearly announced the ruling to be applied under this statute as to the measure of damages for defects in the construction of a building. It is clear that where the evidence supports a finding that the defects could be remedied by repair the measure of damages is the reasonable cost thereof.

That the measure of damages is a matter of law is well established by the courts.[52] Should the court make this determination prior to trial, it will streamline the trial, and save a substantial amount of court time, as well as attorney time for all parties.

Attorney Fees

In a construction defect involving a breach of express warranty the prevailing party is statutorily entitled to attorney's fees pursuant to Okla. Stat. tit.12, §939:

> In any civil action brought to recover damages for breach of an express warranty or to enforce the terms of an express warranty made under Section 2-313 of Title 12A of the Oklahoma Statutes, against the seller, retailer, manufacturer, manufacturer's representative or distributor, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, which shall be taxed and collected as costs.

The Legislature's use of the word "'shall' is a word of command or mandate, with a compulsory and peremptory meaning. It denotes exclusion of discretion and signifies an enforceable duty."[53]

CONCLUSION

A construction defect case is one that is so multifaceted it could actually be considered and tried as several different cases. To the jury, these cases are important, as most members have at one time bought or considered buying a home. Also, because it is often the most expensive purchase they will ever make, it is one of those issues they hope to never have to encounter. These cases, although in-depth and time consuming, are interesting and viable. While our state's population and therefore the need for new housing, has been growing, we are seeing more and more "builders" come on the scene.

General contractors are not licensed at the state level in Oklahoma. This further perpetuates the construction defect claims. In addition, more and more, contractors are becoming legally savvy. They know the loopholes which can reduce or release them from liability and they rely on the fact that their buyer will usually not read the fine print or even if they do, will not be willing to walk away from their dream home in order to initiate a change in contract. What contractors can't do, however, is slip by all the various laws set in place to protect homebuyers. Standardized building codes have gone a long way in giving consumers a foundation upon which to build their cases.

Because of all the noted issues, these cases will continue to appear on court dockets. The more the legal field familiarizes themselves with this type of litigation and in turn, successfully argues them, the safer our friends and neighbors will be.

1. *First Nat'l Bank & Trust Co. of El Reno v. Stinchomb*, 1987 OK CIV APP 1, ¶9, 734 P.2d 852, 854 (Okl. App. 1987).
2. *Thompson v. Peters*, 1994 OK CIV APP 97, ¶4, 885 P.2d 686, 688 (Okl. App. 1994).
3. *Flint Ridge Dev. Co., v. Benham-Blair and Affiliates, Inc.*, 1989 OK 48, ¶11, 775 P.2d 797, 801 (Okla. 1989).
4. *Id.* at 797.
5. *Id.* at 800-801.
6. *Scheirman v. Coulter*, 1980 OK 156, 624 P.2d 70 (Okla. 1980).
7. *Id.* at 72.
8. *Waggoner v. Town* 1990 OK 139, ¶7, 808 P.2d 649, 652 (Okla. 1990).
9. *Id.* at 652, quoting *Moss v. Polyco, Inc.*, 1974 OK 53, 522 P.2d 622 at 625-26 (Okla. 1974).
10. *Osburn v. Bendix Home Sys.*, 1980 OK 86, ¶7 613 P.2d 445, 448 (Okla. 1980).
11. 1978 OK 31, 576 P.2d 761 (Okla. 1978).
12. *Id.* at 764.
13. *Id.* at 762 n.1.
14. 1981 OK 81, 631 P.2d 739 (Okla. 1981).
15. *Id.* at 742.
16. *Id.*
17. *Bridges v. Ferrell*, 1984 OK CIV APP 19, 685 P.2d 409 (Okl. App. 1984).
18. 1954 OK 150, 271 P.2d 342 (Okla. 1954).
19. 1979 OK 144, 604 P.2d 849 (Okla. 1979).
20. *Jones v. Mercy Health Ctr., Inc.*, 2006 OK 83, 155 P.3d 9, (Okla. 2006); *Akin v. Missouri Pac. R. Co.*, 1998 OK 102, 977 P.2d 1040, (Okla. 1998).
21. *Baine v. Oklahoma Gas & Elec. Co.*, 1992 OK CIV APP 140, ¶9, 850 P.2d 346, 348 (Okl. App. 1992).
22. 1996 OK 36, 913 P.2d 1318 (Okla. 1996).
23. *Id.* at 1321.
24. 11 N.E. 1050 (Ct. App. 1916).
25. *See: Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, 951 P.2d 1079 (Okla. 1997).
26. *Id.*
27. *Id.* at 1088.
28. 1952 OK 153, 244 P.2d 822 (Okla. 1952).
29. *Sanders* 244 P.2d at 825, quoting, 65 C.J.S., Negligence § 16(b) and (c).
30. *Sanders* at 825, quoting, *Owen v. Rheem Mfg. Co.*, 83 Cal. App. 2d 42, 187 P.2d 785 (4th Dist. 1947).
31. *Sanders* at 825-26.
32. *Id.* at 826.
33. *Id.*

34. *Id.* citing, *Long v. Rudd*, 1939 OK 338, 94 P.2d 249 (Okla. 1939), *Neal Gin Co. of Marietta v. Tradesmen's Nat. Bank of Oklahoma City*, 1925 OK 564, 239 P. 615 (Okla. 1925), *Talbot v. Mattox, Dawson & Posey Realty Co.*, 1910 OK 163, 109 P. 128 (Okla. 1910).

35. *Busby v. Quail Creek Golf and Country Club*, 1994 OK 63, 885 P.2d 1326 (Okla. 1994).

36. *Id.* at 1326.

37. *Spencer v. Holt*, 1921 OK 300, 200 P. 187 (Okla 1921).

38. *Jones v. Oklahoma Natural Gas Co.*, 1994 OK 89, ¶18, 894 P.2d 415, 420 (Okla. 1994).

39. *Id.* at 415.

40. *Id.*

41. *Id.*

42. 1997 OK 152, 951 P.2d 1079 (Okla. 1997).

43. *Id.* at 1087

44. *Id.*

45. *Id.* 1088.

46. *Id.* at 1088 n.47.

47. *Id.* at 1088.

48. *See Brennen v. Aston*, 2003 OK 91, 84 P.3d 99 (Okla. 2003); OUJI Instruction No. 4.14; *Ellison v. Walker*, 1955 OK 86, 281 P.2d 931 (Okla. 1955); and *Keck v.Bruster*, 1962 OK 35, 368 P.2d 1003 (Okla. 1962).

49. 1957 OK 73, 310 P.2d 378 (Okla. 1957), interpreting Okla. Stat. tit.23, §21.

50. 1914 OK 397, 142 P. 1036 (Okla. 1914).

51. 1919 OK 279, 184 P. 443 (Okla. 1919).

52. *See, Winemiller v. Lorton*, 1926 OK 600, 249 P. 406 (Okla. 1926), *Bowles v. Brown*, 1940 OK 255, 102 P.2d 837 (Okla. 1940), and *Commercial Drilling Co. v. Kennedy*, 1935 OK 232, 45 P.2d 534 (Okla. 1935).

53. *Shadoan v. Liberty Mut. Fire Ins. Co.*, 1994 OK CIV APP 182, ¶14, 849 P.2d 1140, 1144 (Okl. App. 1994).

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