



FARRIS v. MASQUELIER

2022 OK 91

Case Number: 116555

Decided: 11/15/2022

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2022 OK 91, ___ P.3d ___

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

MARK FARRIS and JOLANA FARRIS, Husband and Wife, Plaintiffs/Appellants,

v.

PRESTON W. MASQUELIER and CANDY MASQUELIER, Husband and Wife, as Joint Tenants, Defendants/Appellees.

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III

¶0 Plaintiffs/Appellants filed suit in this water rights case claiming that Defendants/Appellees interfered with their rights by damming a stream that flows down to Plaintiffs/Appellants' property. After a jury verdict in favor of Defendants/Appellees, Plaintiffs/Appellants appealed, and the Court of Civil Appeals reversed finding error in the jury instructions and remanded the cause. This Court granted certiorari. Applying the proper fundamental error standard of review, we vacate the opinion of the Court of Civil Appeals and affirm the trial court's denial of the motion for new trial. We reverse the trial court's ruling on the denial of attorney fees to Defendants/Appellees and remand the matter for a determination of reasonable fees.

**CERTIORARI GRANTED PREVIOUSLY; THE OPINION OF THE
COURT OF CIVIL APPEALS IS VACATED; THE TRIAL COURT'S
JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART AND
REMANDED FOR FURTHER PROCEEDINGS.**

Jason B. Aamodt and Matthew D. Alison, Indian and Environmental Law Group, PLLC, Tulsa, Oklahoma; and Trae Gray, Coalgate, Oklahoma, for Mark and JoLana Farris.

Jon E. Brightmire, Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma; Kaylee Davis-Maddy and Michael J. English, Doerner, Saunders, Daniel & Anderson, L.L.P., Oklahoma City, Oklahoma; and Mark Walraven and Anthony Moore, Graft & Walraven, PLLC, Clinton, Oklahoma, for Preston and Candy Masquelier.

WINCHESTER, J.

¶1 At issue in this case is whether the Court of Civil Appeals, Division III, (COCA) correctly reversed the trial court's denial of a new trial after finding error in the jury instructions. We find COCA's reversal utilized an improper standard of review. Upon employing the correct standard, the trial court's ruling must be affirmed.

BACKGROUND AND PROCEDURAL HISTORY

¶2 Plaintiffs/Appellants, Mark and Jolana Farris (the Farris), own property in Custer County, Oklahoma, downstream from property owned by Defendants/Appellees, Preston and Candy Masquelier (the Masqueliers). Both properties abut an unnamed tributary of the South Canadian River, known to the parties as Crow Springs Creek (the "Creek"). The Creek begins from an underground source on the Masqueliers' property and flows through other properties before reaching the Farris and finally running into the Canadian River.

¶3 In January 2014, the Masqueliers constructed a dam on the Creek for the purposes of impounding some of the water from the Creek into a pond they also had constructed on their property. When the Farris discovered the construction of the dam, they filed an application for an appropriation permit from the Oklahoma Water Resources Board ("OWRB") seeking to appropriate a portion of the Creek to irrigate crops and trees.¹ Two other downstream neighbors of the Masqueliers, non-parties to the instant action, filed applications for appropriative permits of their own. Thereafter, the Masqueliers also filed an application for a permit from the OWRB seeking to appropriate some of the Creek water for irrigation as well as to sell to oil and gas companies for their drilling needs.²

¶4 The Farris protested the Masqueliers' application, citing interference by the Masqueliers with the Farris' use of the stream. The OWRB conducted a multi-day hearing within which the nine-member board received evidence and heard expert testimony from the parties. The OWRB made numerous findings of fact and conclusions of law relating to each application and ultimately issued permits, with conditions, to each applicant. The permits issued to the property owners downstream from the Masqueliers each received permits superior to the Masqueliers' permit by virtue of being first to file.

¶5 JoLana Farris's permit allowed for an appropriation of 68.75 acre-feet of stream water per year to irrigate fifty-five acres of trees and crops, as requested. The OWRB noted in their findings that the Farris would need to implement a plan to impound or store water as a condition of their permit.³ Likewise, in awarding the Masqueliers' permit, the OWRB imposed conditions upon the Masqueliers to agree to continually release at least 12.2 gallons per minute (gpm), an amount specifically requested by the Farris at the hearing, to the downstream property owners using a siphon pump.⁴ The OWRB further conditioned the permit on the Masqueliers' agreement to not interfere with then-existing domestic and appropriative uses of the downstream owners. The decision of the OWRB as to each of the permits was not appealed by either party.

¶6 In April 2016, the Farris filed suit against the Masqueliers in district court in Custer County claiming that, as a result of the dam's construction, they no longer received adequate water flow to meet their lawful riparian and appropriative rights to the Creek waters. The Farris further claimed they incurred damages for harm to their real property and a resulting inability to farm their land. The Farris sued the Masqueliers for nuisance, negligence, negligence per se, unjust enrichment and punitive damages. They additionally sought an injunction to have the dam removed from the stream.

¶7 After a five-day jury trial, the jury returned a verdict for the Masqueliers on all claims and the trial court subsequently denied the request for an injunction. The trial court awarded costs to the Masqueliers but denied their request for attorney fees. The Farris moved for a new trial and, after this request was denied, they appealed. The Masqueliers counter-appealed the denial of their attorney fees. On appeal, COCA found multiple errors in the jury instructions, reversed the trial court's decision, and remanded the case for further proceedings. The Masqueliers petitioned this Court for certiorari which we previously granted.

DISCUSSION

¶8 The Farris allege that errors in the jury instructions limited their ability to present their case. Specifically, they assert the trial court provided incorrect, confusing, and prejudicial instructions concerning their negligence per se, interference and natural flow claims. They further argue that the trial court failed to properly frame the role of the OWRB for the jury causing the jury to place too much importance on the OWRB's findings. They also took issue with the trial court's rulings on various motions in limine as well as a host of other miscellaneous issues.

¶9 COCA agreed with the Farris that the trial court failed to properly instruct the jury on the issues raised by the Farris and overturned the trial court's denial of the motion for new trial. First, COCA found that the trial court failed to give a proper negligence per se jury instruction. The court found Instruction No. 19 failed to correctly state the law because it did not include the title "Negligence Per Se" and it also failed to apprise the jury of the Farris' domestic riparian water rights claims. The court next determined that the trial court placed too much emphasis on the importance of the OWRB in the jury instructions

and failed to properly frame the OWRB's role to the detriment of the Farrises' claims. Additionally, COCA held that the district court's rulings in limine were improper regarding the OWRB's requirement for the Farrises to provide their own water storage system before claiming interference with their water rights from the Masqueliers' dam.

¶10 The Masqueliers argue that COCA overturned the jury verdict based on errors in the jury instructions for which the Farrises failed to properly object during trial and that the appellate court employed an erroneous standard of review. They further argue that COCA relied on jury instructions the Farrises attached to their brief in chief on appeal but were never filed of record in the underlying case. Additionally, the Masqueliers point out that COCA issued its opinion before their Answer Brief was filed despite an extension of the due date caused by the pandemic. Accordingly, the Masqueliers assert that the COCA opinion failed to address their waiver arguments regarding the timeliness of the Farrises' objections to the jury instructions.

I. Allegations of Error in the Jury Instructions

¶11 On appeal, the Farrises allege several errors in the instructions given to the jury. Prior to trial, both parties submitted proposed jury instructions to the trial court which were filed of record. At the close of all the evidence, the trial court rendered a final set of jury instructions and discussed these with counsel for both parties at a jury instruction conference before presenting the instructions to the jury. At this meeting, counsel for the Farrises made a few, limited objections on the record.

¶12 Specifically, the Farrises objected to a portion of Instruction No. 9 in which the Defendants' claims were set forth. The alleged offensive provisions were noted within the instruction to be the Defendants' (Masqueliers') contentions and not statements of law.⁵ The jury was free to accept or reject these contentions as warranted by the evidence presented at trial, just as they were free to accept or reject the claims set forth by the Farrises within the same Instruction. The Farrises next objected to Instruction No. 10 as it relates to Plaintiffs' (Farrises') allegations.⁶ They maintained that it didn't accurately reflect all of their allegations. And finally, as to Instruction No. 19, counsel for the Farrises stated that "the instruction should be submitted as we had provided it, with the specific references to the statutes that have been involved here -- that are being followed here." Trial Transcript, Vol. 8, pp 1658-1659. No further discussion or objections were made by the Farrises on the record with respect to the jury instructions.

¶13 Preservation of an objection is key to a party's claim of error in the jury instructions given at trial. Statutory law provides the framework for making a proper objection:

A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to make objection thereto by dictating into the record in open court, out of the hearing of the jury, after the reading of all instructions, the number of the particular instruction that was requested, refused and is excepted to, or the number of the particular instruction given by the court that is excepted to. Provided, further, that the court shall furnish copies of the instructions to the plaintiff and defendant prior to the time and instructions are given by the court.

12 O.S. 2011, § 578. Where a party makes no objection to a jury instruction prior to the giving of that instruction to the jury yet raises the issue on appeal, the authority of the appellate court to review the alleged error is "severely limited." *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶ 5, 961 P.2d 801, 802. Under such a review, the appellate court can only review for prejudicial error, e.g., an erroneous statement of fundamental law, appearing upon the face of the instructions. *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶ 9, 961 P.2d 801, 803. A case is reviewable for fundamental error even when no exception has been taken.

¶14 Fundamental error occurs when the trial court fails to accurately state the law and "compromises the integrity of the proceeding to such a degree that the error has a substantial effect on the rights of one or more of the parties." *Sullivan*, at ¶ 7, 784 P.2d at 802. While it is the trial court's duty to accurately state the law of the case, it is not the court's duty to frame the issues at trial. That responsibility lies with the parties to ensure that the jury instructions "accurately reflect the issues tendered by the evidence adduced at trial." *Sellers v. McCullough*, 1989 OK 155, ¶ 9, 784 P.2d 1060, 1062-1063.

¶15 The very purpose of an objection to jury instructions is "to inform the trial judge that it is error to give the same to the jury; and an exception to an instruction after the verdict has been returned comes too late." *Baker v. Shaw*, 1938 OK 628, ¶ 6, 86 P.2d 319. Indeed, this Court has found that the failure to timely provide an objection to a jury instruction amounts to a waiver

of the alleged error. *Capshaw v. Gulf Ins. Co.*, 2005 OK 5, ¶ 13, 107 P.3d 595, 602-603 (alleged defect in a blank verdict form must be lodged before the form is given to the jury and failure to do so constitutes waiver of the error).

¶16 In *Capshaw*, the appellee complained of error in a verdict form presented to the jury. Both parties had submitted their own verdict forms and the trial court then rendered its version. Neither party objected at trial to the form given by the trial court. For the first time in a motion for new trial, appellee raised the issue of error regarding giving the form to the jury. The Court held that an exception to the verdict form "may not be interposed for the first time in a motion for new trial. To preserve that error for review here, Capshaw must have excepted to the blank verdict form at the pre-submission stage of the case, i.e., simultaneously with exceptions to jury instructions." *Id.* See also *Anderson v. O'Donoghue*, 1983 OK 76, ¶ 12, 677 P.2d 648, 652 (Absent proper objections, review on appeal is limited to erroneous statements of fundamental law appearing on the face of the instructions given).

¶17 In this appeal, COCA utilized an erroneous standard of review in overturning the trial court's denial of the motion for new trial. Instead, citing *Smicklas v. Spitz*, 1992 OK 145, 846 P.2d 362, COCA examined the jury instructions on whether the jurors were misled and thereby would have reached a different result. This standard of review only applies when a party has properly preserved an error through objection "into the record in open court...after the reading of all instructions" and before the case has been given to the jury for deliberation. 12 O.S. 2011, § 578. COCA issued its opinion in the case before it ever received the Masqueliers' timely answer brief and, consequently, failed to acknowledge the argument that the Farrises waived their right to object to the jury instructions. We examine the allegations of error below.

A. Instruction No. 19, Negligence Per Se

¶18 With respect to Instruction No. 19, the negligence per se instruction, counsel for the Farrises stated on the record before the instructions were given to the jury:

"We also believe that the negligence, per se, instruction should be submitted as we had provided it, with the specific references to the statutes that have been involved here -- that are being followed here. I think that's it, Your Honor."

Trial Transcript, Vol. 8, page 1659, lines 17-22. As read by the trial court to the jury, Instruction No.19 provides:

In addition to the duty to exercise ordinary care there are also duties imposed by [statutes/ordinances]. If you find that a person violated any law and the violation was the direct cause of the injury, then such violation in and of itself would make such person negligent. There was in force and effect in Oklahoma at the time of the occurrence the following statutes: Title 82, chapter 14 creating the Oklahoma Water Resources Board. (including OAC 785:25-3-7 (A)(1) which states: All dams subject to the Oklahoma Water Resources Board's jurisdiction shall have at least one outlet conduit of sufficient capacity to prevent interference with natural streamflow and injury of downstream appropriators and domestic users.

An administrative agency such as the Oklahoma Water Resources Board, which has been empowered by the State of Oklahoma to administer certain of the laws of the State of Oklahoma, may enact rules and regulations to do so. You are instructed that such rules and regulations enacted by an administrative agency have the force and effect of law, just as if they were enacted by the Oklahoma State legislature.

The Farrises' proposed instruction regarding negligence per se, Instruction No. 22, filed of record on July 5, 2017, reads:

Negligence per se -- Violation of Statute, Regulation, or Ordinance

In addition to the duty to exercise ordinary care there are also duties imposed by law. If you find that any of the Defendants violated any one of the following statutes or regulations and the violation was the direct cause of an injury to any of the Plaintiffs, then such violation in and of itself makes the Defendant or Defendants violating any one of the following statutes or regulations negligent, *per se*. The following statutes and regulations have been in force and effect in Oklahoma since before 2014 to the present:

60 O.S. § 105.5: Any person having a right to the use of water from a stream as defined by this act or Section in Title 60 of the Oklahoma Statutes whose right is impaired by the act or acts of another, or others, may bring suit in the district court of any county in which any of the acts complained of occurred.

Authority: Okla. Uniform Jury Inst. No. 9.10 (modified); 27A O.S. § 2-6- 105(A); 27A O.S. § 2-6-205(A); OAC 252:606-8-3(c)(17); OAC 252:606-8- 6(b)(7).

¶19 The Farrises admit to a scrivener's error in citing a non-existing statute, 60 O.S. § 105.5. On appeal, they assert the statute should have cited 60 O.S. § 60, yet the body of the statute cited in full was 82 O.S. § 105.5. The Farrises also assert that they submitted a later version of their proposed jury instructions which included both, 60 O.S. § 60 and 82 O.S. § 105.5, as well as a cite to the OAC ordinance the trial court cited; however, there is no such filing reflected in the record.⁷ Nevertheless, the Farrises attached those proposed instructions, for the first time, to their brief presented to COCA on appeal. Because the instructions were not filed in the case and do not appear to be supported by the record, we will not consider them for the first time on appeal. See Okla.Sup.Ct.R. 1.11(e), 1.26(a) and (b), and 1.33(d). See also, *Chamberlin v. Chamberlin*, 1986 OK 30, 4, 720 P.2d 721, 723-724 (any material or instrument not incorporated into the assembled record by a certificate of the clerk of the trial court may not supplement a deficient record by attaching it to a party's appellate brief); *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 5, 408 P.3d 183, 187 (Any material incorporated by reference in the trial court must appear in the appellate record when that material is used to support or attack a judgment or ruling that is the subject of the appeal.).

¶20 Instruction No. 19, as given to the jury, mirrors OUJI No. 9.10. It sets forth the correct definition of negligence per se⁸ and includes a specific OWRB ordinance, OAC, 785:25-3-7 (A)(1), pertaining to dam construction requirements and the prohibition of interference with the natural streamflow of downstream property owners for both domestic and appropriative rights. This alleged interference of domestic and appropriative right is the very heart of the Farrises' negligence per se claim. While the instruction does not contain a caption identifying itself as a "negligence per se" instruction, this omission is not a misstatement of the law. The Farrises assert the jury's query as to a definition of negligence per se constituted proof of the instruction's error. However, the trial court properly pointed the jury to Instruction No. 19 to find the answer as it was defined by Oklahoma's uniform jury instructions.

¶21 At no time before the instructions were submitted to the jury did the Farrises object to the lack of negligence per se in the title of the instruction as required by § 578 or claim that the instruction was misleading. Moreover, even if they had so objected, we do not find that failure to include the term "negligence per se" in the title would be grounds for overturning the trial court's decision or the jury's verdict. When appellate courts consider error in a jury instruction, the entire set of instructions is considered as a whole. *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86, 92. See also *ABC Coating Co., Inc. v. J. Harris & Sons, Ltd.*, 1986 OK 28, ¶ 24, 747 P.2d 266, 271 (jury instructions are meant to be read as a whole and when they fairly submit the issues to the jury, any harmless or immaterial error will not suffice to disturb the jury verdict.) The instructions need not be ideal, but they must reflect Oklahoma law regarding the subject at issue. *Id.* at ¶ 9, 45 P.3d at 90-91. Here, Instruction No. 19 fairly instructed the jury as to the negligence per se claim by providing the definition of the term and a specific reference to the law that the Masqueliers allegedly violated.

¶22 Next, the Farrises contend that the negligence per se instruction should have also included a citation to statutes, 60 O.S. § 60 and 82 O.S. § 105.5. It is not the duty of the trial court to frame the trial issues in the jury instructions but rather to state the law correctly. *Sellers v. McCullough*, 1989 OK 155, ¶ 9, 784 P.2d 1060, 1062. Once the court has done so it becomes the responsibility of the parties to request a more specific instruction. *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 26, 786 P.2d 1230, 1236. A party who fails to preserve an issue for appeal by objecting in a timely manner to an instruction or by neglecting to offer a proper instruction has waived review of that issue on appeal. *Id.* at ¶ 24, 786 P.2d at 1236.

¶23 After all the evidence was received at trial in the underlying matter, the trial court determined that OAC 785:25-3-7(A)(1) was the most pertinent ordinance supporting the Farrises' negligence per se claim as to the interference with the natural streamflow. The Farrises did not object to these instructions, aside from a statement that the instruction "should be submitted as we had provided it, with the specific references to the statutes that have been involved here..." However, the only difference between the trial court's negligence per se instruction and the Farrises' proposed instruction (the one filed of record) is the inclusion of an additional statute with an incorrect citation. As previously discussed, the statute cited in full by counsel for the Farrises was 82 O.S.2011 § 105.5, not 60 O.S.2011, § 60. Section 105.5 adds nothing to the substance of a negligence per se claim nor does it provide the requisite basis for such a claim. Indeed, this statute allows a party the procedural right to bring suit in the county district court where the allegations of impairment occurred. The alleged "impairment" is the interference with the natural streamflow referenced in OAC 285:25-3-7(A)(1) and appropriately included in the trial court's instruction.

¶24 Additionally, at no time before the jury instructions were submitted to the jury did the Farrises catch their citation error or request that 60 O.S.2011, § 60 be included within the instruction. They also failed to cite any authority in support of their argument the requested statute should have been referenced. In fact, in closing arguments to the jury, the Farrises' counsel specifically brought the entirety of Instruction No. 19 to the jury's attention, putting it up on the courtroom monitor and emphasizing that this instruction was their "negligence per se" claim and that it is "negligence, per se, to fail to allow the natural streamflow to go by."

¶25 Indeed, there is nothing at all in the Farrises' proposed jury instruction of record, Instruction No. 22, that even mentions this interference with the natural streamflow and their domestic or appropriative rights which is the crux of their claims. The trial court's instruction adequately covers this issue in its citation to the relevant ordinance, OAC 285:25-3-7(A)(1). The portion of 60 O.S. 2011, § 60 that would be relevant to the underlying case covers exactly what the court set forth in the OWRB ordinance, i.e., that interference with the natural streamflow of a definite stream is not permitted. Thus, even if the alleged error regarding the absence of pertinent statutory authority was properly preserved, there is nothing to indicate the trial court's refusal to give the Farrises' proposed instruction--either the one filed of record or the one referenced in their appellate brief--constituted error, fundamental or harmless. Accordingly, the trial court's decision, and the jury's verdict, must stand.

B. Jury Instructions regarding the Role of the OWRB

¶26 We now turn to the Farrises' blanket assertion that the trial court failed to properly instruct the jury regarding the role of the OWRB in this case or that the trial court erred in its "perceived import regarding OWRB involvement." Though required by our rules, the Farrises do not cite to specific allegations of error within the record or within the jury instructions as it relates to this alleged OWRB reference error. Okla.Sup.Ct.R. 1.11(e) ("Where a party complains of an instruction given or refused, the party shall cite to the place in the record on appeal where said instruction may be found, together with the objection thereto."). The Farrises are unable to comply with this rule because they failed to object to the OWRB's portrayal in the jury instructions at any time prior to the submission of those instructions to the jury, or at all during the trial. They also failed to raise this issue as a concern in their motion for new trial.

¶27 Our own review of the instructions as a whole and the record on appeal indicates that both parties, in fact, referenced the OWRB and the permit hearings often throughout trial through their own witnesses and with their exhibits. For example, Instruction No. 9 contains a section of "Stipulated Facts" which provide that the OWRB "is an agency of the State of Oklahoma that issues use permits for water in Oklahoma." The stipulations further acknowledge the hearing before the OWRB and the agency's findings of fact and conclusions of law, which were not appealed by either party. Instruction No. 9 also contains a section which highlights the Farrises' claims, one of which recognizes the importance of the OWRB findings by claiming that the "defendants have violated state law by holding water in excess of the amount allowed by the Oklahoma Water Resources Board and by not allowing sufficient water to flow downstream as required by the OWRB."

¶28 Additionally, the trial court gave Instruction No. 10 to the jury.⁹ This instruction specifically highlights that the law allows the Farrises to make their claims of injury despite a validly issued OWRB permit. There is nothing within these instructions, or the remaining instructions as a whole, that would indicate an undue emphasis on the role of the OWRB which constitutes reversible error. It is perplexing as to how the mention of the OWRB's involvement in this matter could be avoided. Both parties referenced it freely to no objections by either. The Farrises' failure to raise any objection to this alleged undue emphasis which would've allowed the trial court to rectify it is fatal. The trial court was prevented from correcting any

perceived error at trial on this issue. This constitutes a waiver of the argument and it is not one which we will address for the first time on appeal. *Oklahoma Dept. of Securities ex rel. Faught v. Wilcox*, 2011 OK 82, ¶ 17, 267 P.3d 106, 110 (errors not raised before the trial court will not be heard for the first time on appeal).

C. Remaining Contentions

¶29 COCA acknowledged additional claims of error by the Farrises with respect to rulings in limine by the trial court. For example, COCA held that the district court improperly found that the Farrises were required to provide their own water storage system before claiming any interference with their water rights as a result of the Masqueliers' dam. To the contrary, there is nothing in the record that would indicate the trial court made such a factual statement to the jury and the Farrises proffer no support thereof. This claimed error instead arises out of a motion in limine ruling wherein the trial court overruled the Farrises motion to exclude certain evidence pertaining to the OWRB's condition that the Farrises build a storage system before attempting to assert a claim of interference against the Masqueliers.

¶30 A ruling on a motion in limine is preliminary and advisory in nature. A party aggrieved by such a ruling must raise the issue when it arises during trial, "either by objecting when the challenged evidence is admitted or by making an offer of proof if the question involves excluded matter." *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86, 92-93, citing *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, ¶ 12, 713 P.2d 572, 579. Error is committed, if at all, when during trial the issue is raised and the court rules on the matter.

¶31 Here, the Farrises cite to no objection in the record or an offer proof regarding the subject of this limine ruling at trial. They further failed to raise it in their motion for new trial. The trial court's alleged error in the pretrial limine ruling is, accordingly, not preserved for appeal.

¶32 Finally, the record is devoid of any objections made on the record at trial by the Farrises with respect to any other rulings on motions in limine or any other allegations of error at trial. As such, any remaining claims of error are likewise waived for failure to preserve the alleged errors for appeal. *Johnson v. Ford Motor Co.*, *supra*, ¶ 16, 45 P.3d at 92-93.

II. Masqueliers' Counter-Appeal for Attorney Fees.

¶33 The Masqueliers counter-appealed for an award of attorney fees claiming their entitlement to such fees pursuant to 12 O.S.2011, § 940 (A). This statute provides: "In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action." 12 O.S.2011, § 940 (A). The trial court denied the Masqueliers' request ruling that 12 O.S.2011, § 940 was inapplicable "because Plaintiffs did not bring a claim for 'negligent or willful injury to property....'"

¶34 The Farrises argue that they never alleged that their real property was physically damaged but instead that the Masqueliers deprived the Farrises of their right to access water in the Creek. They claim that the lack of natural streamflow prohibited them from being able to adequately water their livestock or irrigate their crops. This, they allege, is insufficient to trigger an award of fees under § 940.

¶35 The Masqueliers point out numerous references within the Farrises' trial pleadings wherein they assert property damages caused by the alleged impairment of water from the Creek. Specifically, the Farrises claimed "loss or injury to cattle," "loss or injury to fruit trees and row crop vegetables," "loss or injury to hunting operations," and "loss of irrigation capabilities." They also alleged the inability to water caused weeds to grow on their property which led to their cattle's inability to feed on necessary grasses. Finally, the Farrises claimed a diminution in their property's value caused by the impairment of the Creek's natural streamflow.

¶36 The Farrises sought, and were granted, a jury instruction on the matter of their damages to real property.¹⁰ To argue after they were unsuccessful at trial that they weren't seeking damages for the alleged negligent injuries to their property is disingenuous. We find the Masqueliers are entitled to an award of their reasonable attorney fees and reverse the matter to the trial court for a determination of the proper amount of fees to award.

CONCLUSION

¶37 The trial court properly instructed the jury in this case and the jury verdict should not be overturned on appeal. There was no misstatement of the law by the trial court which would constitute fundamental error. We find the Farrises failed to properly preserve their objections to the alleged errors but, even if they had, we do not find under the lesser standard that the jurors were misled in any way nor would they have likely reached a different result than they would have reached had the Farrises' allegations of error been resolved in their favor. The jury evaluated the facts, evidence, and law in finding for the Masqueliers on all claims and their verdict should stand. Accordingly, we vacate the COCA opinion and affirm the trial court's judgment on the motion for new trial. We reverse the trial court's denial of attorney fees and remand for a determination of an award of reasonable fees. The jury's verdict is hereby reinstated.

**CERTIORARI GRANTED PREVIOUSLY; THE OPINION OF THE
COURT OF CIVIL APPEALS IS VACATED; THE TRIAL COURT'S
JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART AND
REMANDED FOR FURTHER PROCEEDINGS.**

CONCUR: DARBY, C.J., KANE, V.C.J., WINCHESTER, EDMONDSON, COMBS, GURICH, KUEHN, JJ.

CONCUR IN PART, DISSENT IN PART: ROWE, J. (by separate writing)

NOT PARTICIPATING: KAUGER, J.

ROWE, J., concurring in part, dissenting in part:

¶1 I concur in the Court's judgment vacating COCA's opinion and affirming the trial court's denial of Plaintiffs'/Appellants' motion for a new trial. I dissent, however, from the Court's finding that Defendants/Appellees are entitled to attorney fees.

FOOTNOTES

WINCHESTER, J.

¹ The Farris application with the OWRB was filed only by JoLana Farris as she is the sole owner of the land in question.

² The Farrises requested appropriation of 68.5 acre-feet of Creek water to irrigate their fruit trees and to grow crops and vegetables. The Masqueliers sought appropriation of 148 acre-feet per year, comprised of 45 acre-feet for irrigating pastures and crops and an additional 103 acre-feet for drilling and primary completion of oil and gas wells. The OWRB determined that 515 acre-feet of water per year was available for appropriation to downstream users from the Creek, an amount well in excess of that requested by the parties.

³ In the Masqueliers' permit Order, the OWRB noted that the evidence reflected that the Farrises would need to construct storage to make use of the stream water. The OWRB stated: "Until such time as protestants' [Farrises] plans are finalized, implemented and constructed...they are unable to demonstrate the need for applicant [Masqueliers] to release water for protestants' proposed irrigation needs. For that reason, protestants are unable to currently establish that the applicant's proposed use will interfere with any existing, or pending, appropriative use."

⁴ The OWRB Order, issued January 16, 2016, provides in pertinent part:

48. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Application No. 2014-007 in the name of Preston W. Masquelier and Candy Masquelier shall be and the same is hereby approved subject to the terms which follow. A regular permit shall be issued to authorize use of a total of 148 acre-feet of stream water per year at a maximum rate of withdrawal of 400 gpm from two points of diversion on a private pond located in the NE SW SW of Section 1, T15N, R14WIM, Custer County, which pond is located on an unnamed tributary of the upper Canadian River, referenced by the parties as "Crow Springs Creek", of which 45 acre-feet is for irrigation of pasture grass, wheat, soybeans, cotton, winter wheat, milo, peanuts, alfalfa, and Bermuda grass, and 103 acre-feet is for drilling and primary completion of oil and gas wells within Stream System 2-6-3. The area of use is 286.5 acres in the W/2 of Section 1, T15N, R14WIM, Custer County as more specifically described in the application.

49. IT IS FURTHER ORDERED that in addition to any other general stream water permit conditions which are applicable but not specifically identified herein, the permit shall state the following specific conditions:

a. The use of stream water under this permit shall not interfere with domestic or existing appropriative uses. If any such interference is proven after the permit is issued, then this permit may be modified, suspended or revoked as appropriate in order to abate and prevent such interference.

b. The applicants shall provide a continuous, minimum flow of stream water past the dam by means of a method certified by a professional engineer and documented and approved by Board staff prior to any diversion of water pursuant to this permit, which method provides a minimum flow rate of 12.2 gpm past the dam. The required minimum flow shall be continuously provided unless the Applicants demonstrate to the satisfaction of Board staff that the amount of water stored in the pond is below the applicants' two (2) year supply of domestic use recognized in 82 O.S. § 105.2(A).

c. Applicants shall install and at all times maintain in operable condition the Board required valve on the siphon.

d. Pursuant to OAC 785:20-7-2(12), within 30 days of the date of this Order, and prior to authorized diversion, the applicants shall provide to Board staff a Right of Access satisfactory to Board staff providing applicant the right to cross with applicant's water lines the NW/4 of Section 1, T15N, R14WIM, Custer County.

e. Under OAC 785:20-7-2(13), because applicants lease the NW/4 of Section 1, T15N, R14WIM, Custer County where the water is authorized to be used for irrigation, the permit shall expire upon termination of the lease or renewals thereof unless the permit is transferred to the owner of the land within thirty (30) days of the effective date of such renewal.

⁵ The pertinent part of Inst. No. 9 to which the Farrises objected is as follows:

Defendant claims:

(3) There is no merit or legal support for Plaintiffs' negligence, negligence per se, unjust enrichment, injunctive or nuisance claims. Masqueliers deny that they interfered with their water use and that the natural flow of that which enters the Masqueliers land is exiting it. Defendant claims that Plaintiffs have failed to ever produce any actual evidence that the water that enters Defendants' land is not exiting it, particularly since the stream itself begins on the Masqueliers' property. Defendant Masqueliers claim that Plaintiffs allege that the *mere* fact that the dam was built is evidence of interference with the natural flow.

(4) Likewise, Plaintiffs cannot prove any interference with or injury to their appropriative (permit) uses because they have never attempted to irrigate. Defendant Masqueliers allege that plaintiffs cannot prove injury unless plaintiff's actually have a need for it (to irrigate crops). Defendants Masqueliers allege that Plaintiffs have no evidence that their appropriative uses were actually interfered with, because they have never attempted to capture and use the water. Defendant Masqueliers allege that Plaintiffs should first show that they have stored the stream water and use it before any determination about interference can occur. Defendant Masqueliers [*sic*] allege that since Plaintiffs have not begun any of the works required by the OWRB Order granting their stream water permit, Plaintiffs have not proven a need for water required for their appropriative uses and that they have sustained no harm.

⁶ Instruction No. 10 as given provides:

A permit was granted by Oklahoma Water Resources Board (OWRB). Conditions were imposed by the OWRB. This case is a civil action by Plaintiff alleging nuisance, interference, negligence and unjust enrichment and the law allows this jury to decide if Plaintiff has been injured in these ways even though the Defendants, Masquelier, have a permit to build the dam and withdraw water for sale. The law allows the Plaintiff to make these claims and attempt to prove those claims even though the activity that Plaintiffs alleged caused the injury is done under a permit issued by the OWRB.

Plaintiffs allege two things: First, they alleged that defendants, Masquelier, have not complied with conditions imposed on the permit by the OWRB and they are injured by the failure. Second, Plaintiffs allege that the activity injures them in the stated ways even if Defendants, Masquelier, are complying with the conditions imposed on them.

The law allows the jury to decide if Plaintiffs have been injured in any of these ways under either theory of recovery.

⁷ As attached to their brief-in-chief before COCA, the Farrises' proposed Instruction No. 23 reads as follows:

Negligence per se -- Violation of Statute, Regulation, or Ordinance

In addition to the duty to exercise ordinary care there are also duties imposed by law. If you find that any of the Defendants violated any one of the following statutes or regulations and the violation was the direct cause of an injury to any of the Plaintiffs, then such violation in and of itself makes the Defendant or Defendants violating any one of the following statutes or regulations negligent, *per se*. The following statutes and regulations have been in force and effect in Oklahoma since before 2014 to the present:

82 O.S. § 105.5: Any person having a right to the use of water from a stream as defined by this act or Section in Title 60 of the Oklahoma Statutes whose right is impaired by the act or acts of another, or others, may bring suit in the district court of any county in which any of the acts complained of occurred.

60 O.S. § 60: Water running in a definite stream, formed by nature over or under the surface, may be used by the owner of the land riparian to the stream for domestic uses as defined in Section 105.1 of Title 82 of the Oklahoma Statutes, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law; Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land less the uses allowed for domestic uses and for valid appropriations made pursuant to Title 82 of the Oklahoma Statutes; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 of the Oklahoma Statutes to provide for the storage of additional water the use of which the landowner has or acquires by virtue of this act.

OAC 785:25-3-7 (A)(1) which states: All dams subject to the Oklahoma Water Resources Board's jurisdiction shall have at least one outlet conduit of sufficient capacity to prevent interference with natural streamflow and injury of downstream appropriators and domestic users.

⁸ Negligence per se requires a violation of a statute or an ordinance that was created to protect against the type of injury suffered by the plaintiff. *Boyles v. Okla. Nat. Gas Co.*, 1980 OK 163,

¶14, 619 P.2d 613, 618.

⁹ See, *supra*, footnote 6.

¹⁰ Instruction No. 42, as given to the jury stated:

Damages to Real Property

Real property consists of land. Damage to real property can be either temporary or permanent or both. If you find for Plaintiff JoLana Farris and/or Plaintiff Mark Farris on their claims of negligence or nuisance, you may award damages for all temporary and permanent injuries to the real property owned by Plaintiff Mark Farris and JoLana Farris. Temporary damages are those that can be remedied by a reasonable expenditure of money within a reasonable period of time. Damages are permanent if the injuries cannot be remedied by an expenditure of money or labor.

The measure of damages for permanent injury to real property is the difference between the reasonable market value of the land immediately before the injuries and the reasonable market value of the land immediately after the injuries- in other words, the amount of the lost value of the property resulting from the injurious conduct.

For temporary injuries to real property, damages are measured by the cost of restoring the land to its former condition, with compensation for the loss of use of it, if this altogether is less than the diminution in value with the injuries left standing. However, for temporary nuisances, damages are limited to those sustained at the time of the filing of the action. (Authority omitted)

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1989 OK 140 , 786 P.2d 1230 , 60 OBJ 2830 ,	Bane v. Anderson, Bryant & Co. Discussed
1989 OK 155 , 784 P.2d 1060 , 60 OBJ 3052 ,	Sellars v. McCullough Discussed at Length
1992 OK 145 , 846 P.2d 362 , 63 OBJ 3023 ,	Smicklas v. Spitz Discussed
1938 OK 628 , 86 P.2d 319 , 184 Okla. 194 ,	BAKER v. SHAW Discussed
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12 O.S. 578 ,	Exceptions to Instructions - Copies to Parties Discussed
12 O.S. 940 ,	Negligent or Willful Injury to Property - Attorney's Fees and Costs - Offer and Acceptance of Judgment Discussed at Length

Cite Name

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Title 60. Property

Cite	Name	Level
<u>60 O.S. 60.</u>	<u>Water Ownership - Rights to Use Water</u>	Discussed at Length

Title 82. Waters and Water Rights

Cite	Name	Level
<u>82 O.S. 105.2.</u>	<u>Right to Use Water - Domestic Use - Priorities</u>	Cited
<u>82 O.S. 105.5.</u>	<u>Impairment of Water Rights - Suits in District Court</u>	Discussed at Length