COMMENTS

Attorney Fees: Attorney Fees, Prevailing Parties, and Judicial Discretion in Oklahoma Practice: How It Is, How It Should Be*

I. Introduction

"Who won?" may seem like a simple question. In the labyrinth of attorney fee awards in Oklahoma, however, the answer is not always clear. The U.S. Court of Appeals for the Tenth Circuit once predicted that the Oklahoma Supreme Court would one day hold that trial courts have the discretion to determine the prevailing party in a lawsuit for purposes of attorney fee awards.[1] Since that forecast in 1991, the Tenth Circuit has changed its mind regarding the likely direction the Oklahoma Supreme Court will take on this issue.[2] The Tenth Circuit based its about-face on two opinions issued by the Oklahoma Court of Civil Appeals.[3] Neither of these rulings served to clarify the question of how attorney fees should be awarded and, as recently as June 2003, the Oklahoma Supreme Court has specifically declined to comment on this issue.[4] Thus, the confusion persists.

In Oklahoma, a litigant's right to recover attorney fees is governed by the American Rule, which requires a statutory or contractual basis for the allowance of an award.[5] Despite its pronouncement in *City National Bank & Trust Co. v. Owens*[6] that trial courts have the equitable power to award attorney fees, the Oklahoma Supreme Court has interpreted this decision narrowly, carving out only

---

* The author would like to thank Dino Viera for the topic idea, Professor Judith Maute for topic development, Natalie McNeil for superior editing, and Mom and Daddy for everything else.

1. *See* Adair State Bank v. Am. Cas. Co., 949 F.2d 1067 (10th Cir. 1991). The Tenth Circuit, in construing title 36, section 3629(B) of the Oklahoma Statutes, stated that "shall" means to mandate, while "allowable" indicates discretion. *Id.* at 1078. The court then opined that the Oklahoma legislature, in crafting the statute in question as "attorney fees shall be allowable to the prevailing party," intended to give the trial judge full discretion for the award. *Id.*

2. *See* Stauth v. Nat'l Union Fire Ins. Co., 236 F.3d 1260 (10th Cir. 2001).

3. *See* Williams v. Old Am. Ins. Co., 1995 OK CIV APP 128, 907 P.2d 1105; Shadoan v. Liberty Mut. Fire Ins. Co., 1994 OK CIV APP 182, 894 P.2d 1140.

4. *See* Spears v. Shelter Mut. Ins. Co., 2003 OK 66, ¶ 14 n.5, 73 P.3d 865, 870 n.5 ("We express no opinion as to whether the word 'allowable' . . . means fees to the prevailing party are mandatory or discretionary.").

5. Barnes v. Okla. Farm Bureau Mut. Ins. Co., 2000 OK 55, ¶ 46, 11 P.3d 162, 178-79.

6. 1977 OK 86, 565 P.2d 4.

limited exceptions to the American Rule.[7] Thus, a statutory or contractual provision must authorize attorney fees before Oklahoma courts can grant them.[8] Generally speaking, fee-shifting statutes mandate that courts award fees to the "prevailing party," which has been defined most often as either the party who (1) has an affirmative judgment in its favor; or (2) has secured a net recovery on its own claim.[9]

The day has come for the Oklahoma Supreme Court to grant trial judges full discretion to determine *if* attorney fees should be awarded, *to whom* they should be awarded, and *how much* that party should actually receive.[10] The goal of this comment is to provide meaningful guidelines for the award of attorney fees and to encourage the Oklahoma Supreme Court to make a definitive ruling in an area that causes practicing attorneys — plaintiff's bar and defense counsel alike — much frustration.

Part II of this comment discusses the American Rule. Part III then addresses the various fee-shifting statutes in Oklahoma, while Part IV examines the interpretation of those statutes to date. Part V of this comment contends that Oklahoma should abandon the mechanistic formula used to identify the prevailing party and trigger fee-shifting because it too often leads to unjust results. Instead, the Oklahoma Supreme Court should establish a rule of law giving trial courts the discretion to determine the prevailing party. Next, Part VI outlines support for this recommendation among extant Oklahoma jurisprudence and case law from other jurisdictions that have adopted a discretionary rule. Part VII of this comment elaborates on these sources by suggesting specific guidelines for trial courts to apply in determining the prevailing party for purposes of attorney fee awards. Finally, Part VIII concludes by recommending a course of action for the Oklahoma legislature.

II. The American Rule

A. Definition

"American attitudes . . . tend to regard litigation as everyone's right and to emphasize the importance of not excessively hindering access to justice."[11] Indeed,

---

7. *See infra* notes 73-77 and accompanying text.

8. *See, e.g., Barnes* ¶ 46, 11 P.3d at 179; Keel v. Covey, 1952 OK 86, ¶ 31, 241 P.2d 954, 958.

9. Smith v. Jenkins, 1994 OK 43, ¶ 11, 873 P.2d 1044, 1047.

10. Trial courts were granted the discretion to determine the "reasonable amount" of an attorney fee award in *State* ex rel. *Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.

11. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview,* 1982 DUKE L.J. 651, 656 (1982).

the American Rule is so named because the United States is unique among industrialized countries in its approach to attorney fee awards.[12] Under the American Rule, parties to a lawsuit are generally expected to pay their own costs.[13] Supporters of the American Rule argue that it preserves democratic access to the courts.[14] Because each party bears only its own expenses under the American Rule, less affluent litigants are not faced with the specter of paying more if they lose, and thus are not dissuaded from pursuing their actions via the judicial system.[15]

Oklahoma first adopted the American Rule in *Keel v. Covey*.[16] In *Keel*, the Oklahoma Supreme Court advanced the general proposition that "[t]he right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or of some agreement expressly authorizing the taxing of attorneys' fees . . . ."[17]

B. Exceptions to the American Rule

Despite its apparent rigidity, the American Rule has certain exceptions. Because the basic assumption of American jurisprudence is that the prevailing party, however such is defined, will *not* be awarded attorney fees, the threshold inquiry at the close of any case is two-fold: (1) whether the court is authorized to make any fee award; and (2) whether the fee applicant satisfies the principles upon which the award is based.[18] For example, courts may award attorney fees based on the equitable doctrines of quantum meruit and unjust enrichment in cases resulting in a common fund or common benefit.[19] Courts may also award attorney fees to

---

12. *Id.* at 651.

13. 1 ALBA CONTE, ATTORNEY FEE AWARDS § 1.3 (2d ed. 1993). Thus, under the American Rule, a "prevailing litigant is ordinarily *not* entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

14. *See, e.g.,* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure,* 67 N.C. L. REV. 1023, 1061 n.249 (1989); Rowe, *supra* note 11, at 656.

15. Louis, *supra* note 14, at 1061.

16. 1952 OK 86, 241 P.2d 954.

17. *Id.* ¶ 31, 241 P.2d at 958. The court ultimately ruled that because the Oklahoma legislature had authorized the allowance of attorney fees in some statutes, but not in the statute governing the claim, the prevailing party's request for fees could not be granted. *Id.* ¶ 33, 241 P.2d at 958-59.

18. 1 CONTE, *supra* note 13, § 1.03.

19. *Id.*

sanction parties who have acted in bad faith.[20] Finally, courts may award attorney fees if so authorized by a contractual or statutory grant.[21]

The authorizing statute generally sets forth the governing requirements for fee-shifting.[22] The party seeking an attorney fee award must demonstrate that it has satisfied these requirements to "prevail" and thus be eligible for an award.[23] The governing requirements generally promote the policies inherent in the exceptions to the American Rule,[24] such as deterrence of wrongdoing and victim compensation.[25] Other justifications for fee-shifting include: (1) being fair to the winner; (2) making the litigant financially whole; (3) deterring or punishing misconduct or both; (4) rewarding the "private attorney general" who advances an important public issue; (5) equalizing the relative strengths of the parties, especially when the government is a party; and (6) promoting judicial economy.[26]

C. Fee-Shifting Statutes as Applied

A common criticism of fee-shifting statutes is that they have "much greater impact on ordinary, risk-averse persons than on those with assets and familiarity with the litigation process."[27] Another view, however, is that the availability of fees may incentivize attorneys to bring suit on behalf of litigants who would otherwise be unable to pay, or whose suits involve injunctive relief or nominal damages only.[28] Litigation is expensive and most lawyers are unwilling and unable to work solely for "psychic gratification."[29] Without fee-shifting statutes, important civil rights claims, among others, could go unvindicated.[30]

In principle, these policy justifications should guide courts when applying fee-shifting statutes.[31] However, whether any of these common justifications actually apply to the Oklahoma fee-shifting statutes at issue in this comment is debatable.

---

20. *Id.* Oklahoma recognized the application of these exceptions to the American Rule in *City National Bank & Trust Co. v. Owens*, 1977 OK 86, ¶ 12, 565 P.2d 4, 7.

21. 1 CONTE, *supra* note 13, § 1.03. This comment focuses on statutory exceptions to the American Rule.

22. *Id.*

23. *Id.* § 1.02.

24. *Id.*

25. *Id.* § 1.04.

26. Rowe, *supra* note 11, at 653.

27. Louis, *supra* note 14, at 1060.

28. MICHAEL G. COLLINS, SECTION 1983 LITIGATION 191 (1997).

29. *Id.* at 193.

30. *Id.* In a typical breach of contract suit, however, whether fee-shifting statutes work for good or ill depends largely upon the sophistication of the litigants and their counsel, the clarity of the fee-shifting statutes being interpreted, and the dexterity of the judges administering the awards, rather than on some underlying policy justification.

31. Rowe, *supra* note 11, at 666.

In reality, the rationales often overlap, with various justifications bolstering different aspects of the fee-shifting scheme.[32] Thus, a monolithic "if/then" rule based on the particular policy — if any — behind the statutes may not be easily discerned or applied. Allowing courts to exercise discretion in making attorney fee awards would better ensure that courts consider and apply a justifiable rationale in determining which party prevailed and whether its costs should be paid.

III. Fee-Shifting Statutes in Oklahoma

In interpreting the fee-shifting statutes in Oklahoma, courts have focused more on determining what is a "reasonable fee" than on determining who is a "prevailing party." Despite clear guidelines regarding the former, there is a dearth of guidance as to the latter. The Oklahoma legislature has not assisted courts in their endeavor to define the prevailing party; indeed, the linguistic variations in Oklahoma's fee-shifting statutes cry out for a more consistent approach.

When construing statutory language, courts routinely assign words in statutes their ordinary meaning unless the legislative history clearly establishes a contrary intention.[33] Thus, inconsistent statutory language necessarily affects judicial interpretation. The legislature has constructed certain fee-shifting statutes in such a way that discretion seems to be the legislative intent, even without the Oklahoma Supreme Court so holding.[34] Other fee-shifting statutes are more ambiguous. The resulting variations in judicial interpretation have made the statutes more ambiguous still. The Oklahoma legislature has employed no fewer than six different constructions in its fee-shifting statutes.

A. The Six Constructions of Oklahoma Fee-Shifting Statutes

1. The Court May, in Its Discretion, Award Reasonable Attorney Fees to the Prevailing Party[35]

This statutory construction provides courts with the most leeway in awarding attorney fees. The reference to discretion, however, seems to apply only to the initial decision to award fees and to the amount of the award rather than to the determination of the prevailing party. This construction exactly parallels that of the federal Civil Rights Attorney's Fees Award Act of 1976.[36] Although the legislative

---

32. *Id.* at 678.

33. Adair State Bank v. Am. Cas. Co., 949 F.2d 1067, 1078 (10th Cir. 1991).

34. *See, e.g., infra* Parts III.A.1-2.

35. *See, e.g.*, 78 OKLA. STAT. § 54(c) (2001) ("In any action instituted under the provisions of this act, the court may, in its discretion, award reasonable attorneys' fees to the prevailing party.").

36. 42 U.S.C. § 1988(b) (2000).

history of that Act explains at length the general purposes of fee-shifting, it fails to address in any significant way the definition of "prevailing party."[37] In the face of this lack of congressional guidance, federal courts have responded by exercising their discretion to determine which party "prevailed" in a given lawsuit.[38] Because the supreme court may look to other jurisdictions — including the federal courts — for guidance when Oklahoma courts have not addressed a particular issue,[39] the Oklahoma Supreme Court would be justified in interpreting this statutory construction according to the federal model.

2. The Prevailing Party May Be Awarded Reasonable Attorney Fees[40]

Again, this construction allows the courts some discretion to award a reasonable amount of fees by using "may" instead of "shall." This construction also fails, however, to afford the same discretion to courts determining the prevailing party.

3. Attorney Fees Shall Be Allowable to the Prevailing Party[41]

The use of the word "shall" denotes a compulsory award of fees.[42] The insertion of the term "allowable," however, somewhat softens the mandate to imply a measure of discretion.[43] The resulting construction is ambiguous and has been litigated many times, even though the statute using this construction actually defines the "prevailing party."[44] The courts' failure to reach consensus may indicate not

---

37. *Leading Cases*, 115 HARV. L. REV. 457, 457 n.4 (2001).

38. *Id.* at 457.

39. State *ex rel.* Burk v. City of Oklahoma City, 1979 OK 115, ¶ 4, 598 P.2d 659, 660.

40. *See, e.g.,* 10 OKLA. STAT. § 7003-5.6(f) (2001). This is the exact language used in the exemplar statute.

41. *See, e.g.,* 36 OKLA. STAT. § 3629(B) (2001). This statute governs fee-shifting in cases involving insurance claims. The statute reads:

> Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party.

Id. Note that this statute takes the unusual step of defining the prevailing party, a fact that has not prevented the issue from being litigated many times.

42. "It is clear that the term 'shall' denotes an affirmative mandate by the Oklahoma legislature. The term 'is a word of command or mandate, with a compulsory and peremptory meaning. It denotes exclusion of discretion and signifies an enforceable duty.'" Adair State Bank v. Am. Cas. Co., 949 F.2d 1067, 1077 (10th Cir. 1991) (quoting Davis v. Davis, 1985 OK 85, ¶ 11 n.23, 708 P.2d 1102, 1107 n.23).

43. "We believe that by using the term 'allowable,' the Oklahoma legislature intended to lodge discretion with the trial judge." *Id.* at 1077-78. Had the legislature intended for attorney fees to be mandatory, "it would have used the phrase 'shall be allowed.'" *Id.*

44. Title 36, section 3629(B) of the Oklahoma Statutes provides in pertinent part that "the prevailing party is the insurer in those cases where judgment does not exceed written offer of

only that the construction is ambiguous, but also that "constructing an adequate bright-line definition of 'prevailing party' is beyond legislative means."[45]

4. The Prevailing Party Shall Be Allowed a Fee, as Set by the Court[46]

Courts have interpreted this construction's use of the phrase "shall be allowed" to mean that the award of attorney fees is mandatory,[47] leaving the court to determine only the amount of the award. The guidelines established by *State* ex rel. *Burk v. City of Oklahoma City*[48] afford the courts wide discretion in determining the "reasonableness" of the amount. The courts' decision-making authority, however, does not extend to deciding which party is the winner in the first instance.

Oklahoma courts have interpreted the statute employing this construction many times since it was first adopted in 1961.[49] This statute is one of several that may be invoked in breach of contract cases. Courts must therefore decide entitlement under the claim before the prevailing party issue is reached,[50] and must give effect to the enumerated claims on a case-by-case basis.[51]

Given this contextual approach to defining the various civil actions for which courts grant attorney fee awards under this statute, a mechanistic definition of "prevailing party" seems incongruous. One definition of "prevailing party" cannot realistically or appropriately apply to every situation. The statute does not include any guidelines, however, for defining this critical term to assist the courts in making their determinations. The absence of such guidance from the Oklahoma legislature may be one reason why attorney fee awards are so frequently litigated.

---

settlement. In all other judgments the insured shall be the prevailing party." 36 OKLA. STAT. § 3629(B).

45. *Leading Cases*, *supra* note 37, at 466 n.88.

46. *See, e.g.,* 12 OKLA. STAT. §§ 936, 938-940 (2001). Title 12, section 936 is one of the most frequently invoked fee-shifting statutes in breach of contract cases. James R. Lieber & Stephanie L. Jones, *An Analysis of 12 O.S. § 936 (1981): An Attorney Fee to the Prevailing Party*, 59 OKLA. B.J. 3661, 3661 (1988). The statute provides in pertinent part that "in any civil action to recover for labor or services rendered, . . . unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." 12 OKLA. STAT. § 936. Much of the analysis in this comment applies directly to section 936 claims.

47. *See supra* notes 42-43 and accompanying text.

48. 1979 OK 115, 598 P.2d 659.

49. *See* Lieber & Jones, *supra* note 46, at 3661.

50. *Id.* at 3665.

51. *Id*. at 3662. In other words, what constitutes an "open account" or "labor or services" under the statute is a factual determination. If the court finds that the breach in question did not involve an open account on a service contract, then fee-shifting is not properly predicated on this statute.

5. The Prevailing Party Shall Be Entitled to Attorney Fees[52]

In this example of statutory construction, the prevailing party is, without question, "entitled" to attorney fees, and not merely "allowed" fees, as set by the court. The statutory language does not mention courts' discretion to award a particular amount, though presumably the prevailing party may request the amount to which it feels entitled — an amount courts ultimately determine under *Burk*.

6. Reasonable Attorney Fees Must Be Awarded to the Prevailing Party[53]

This is the most inflexible statutory language because it does not contemplate whether the prevailing party is actually "entitled" to fees. Rather, under a literal interpretation of this statute, fees shall be awarded as a matter of course. A mandatory award of attorney fees seems rather draconian given the mechanistic, inequitable definition of "prevailing party" currently used by Oklahoma courts.

B. The Resulting Confusion Caused by These Six Constructions

The variation in the language of Oklahoma's fee-shifting statutes, when combined with Oklahoma courts' inconsistent interpretations, has resulted in much confusion. Ironically, parties continue to litigate attorney fee awards long after their original disputes have been resolved and, in so doing, continue to generate even more attorney fees. The Oklahoma Supreme Court and the Oklahoma legislature, however, could mitigate this confusion. The supreme court could allow total discretion in determining *who*, if anyone, should receive attorney fees, while the legislature could redraft the fee-shifting statutes to be consistent and unambiguous. Under either approach, courts would not be forced to award attorney fees as a matter of course. Instead, they would have the discretion under established guidelines to determine which party truly "won" the case and earned the award. The continuing litigation of Oklahoma's fee-shifting statutes wastes limited judicial resources, litigants' money, and attorneys' time. Adopting a discretionary rule for the award of attorney fees under these statutes is the first step toward solving the problem.

IV. The Development of Fee-Shifting Case Law in Oklahoma

A. A Chronological Look at the Rise and Fall of the Discretionary Rule in Oklahoma Courts

Not only are Oklahoma's fee-shifting statutes inconsistent, the courts' interpretations of the statutes are also inconsistent. In the 1908 case of *Chicago,*

---

52. *See, e.g.,* 12 OKLA. STAT. § 1449(A) (2001).
53. *See, e.g.,* 12A OKLA. STAT. § 5-111(e) (2001).

Rhode Island & Pacific Railway Co. v. Mashore,[54] the Oklahoma Supreme Court held a fee-shifting statute to be unconstitutional for failing to provide equal protection of the law to all parties.[55] Under the statute, defendants had to satisfy a much higher burden to win attorney fees.[56] The *Mashore* decision called for a more equitable and flexible means of determining the prevailing party.[57] The current regime, however, again favors plaintiffs, despite the fact that the supreme court has never overruled *Mashore*.

In the 1979 case of *State* ex rel. *Burk v. City of Oklahoma City*, the Oklahoma Supreme Court adopted several factors for determining whether the amount of an attorney fee award was reasonable.[58] Courts have not, however, extended the logic of *Burk* to the determination of the prevailing party. Instead, the current rule in Oklahoma is that, in any case, there is only one prevailing party and one attorney fee.[59] Oklahoma courts most often cite the 1977 Oklahoma Court of Appeals decision in *Quapaw Co. v. Varnell*[60] to justify this mechanistic determination of the prevailing party, even though *Quapaw* is not truly precedential.

Oklahoma courts have carved out so many exceptions to *Quapaw* over the years that, in the 1991 case of *Adair State Bank v. American Casualty Co.*,[61] the Tenth Circuit predicted that the Oklahoma Supreme Court would rule that trial courts have full discretion to make attorney fee awards.[62] The Oklahoma Court of Civil Appeals responded to the Tenth Circuit's prediction a few years later by reinforcing the *Quapaw* rule in *Shadoan v. Liberty Mutual Fire Insurance Co.*[63] and in *Williams v. Old American Insurance Co.*[64] Subsequently, the Tenth Circuit withdrew its prediction regarding a discretionary rule in the 2001 case of *Stauth v. National Union Fire Insurance Co.*[65] by adopting — albeit reluctantly — the rule of law advanced in *Shadoan* and *Williams*.[66]

In the 2003 case of *Spears v. Shelter Mutual Insurance Co.*,[67] the Oklahoma Supreme Court specifically declined to comment on the issue of a discretionary rule

---

54. 1908 OK 95, 96 P. 630.
55. *Id.* ¶ 19, 96 P. at 633.
56. *Id.* ¶ 17, 96 P. at 633.
57. *Id.* ¶ 24, 96 P. at 634.
58. State *ex rel.* Burk v. City of Oklahoma City, 1979 OK 115, ¶ 8, 598 P.2d 659, 661-62.
59. Quapaw Co. v. Varnell, 1977 OK CIV APP 19, ¶ 21, 566 P.2d 164, 167.
60. 1977 OK CIV APP 19, 566 P.2d 164.
61. 949 F.2d 1067 (10th Cir. 1991).
62. *Id.* at 1078.
63. 1994 OK CIV APP 182, 894 P.2d 1140.
64. 1995 OK CIV APP 128, 907 P.2d 1105.
65. 236 F.3d 1260 (10th Cir. 2001).
66. *Id.* at 1267.
67. 2003 OK 66, 73 P.3d 865.

for making attorney fee awards.[68] Thus, the nonprecedential — and nonsensical — rule of *Quapaw* continues to dictate how Oklahoma courts decide who the prevailing party is for purposes of awarding attorney fees.

B. The Failures of Quapaw

Quapaw established the baseline rule in Oklahoma "that there can be only one prevailing party, and one attorneys' fee."[69] Courts have described the prevailing party fairly consistently as "one who has prevailed on the merits,"[70] "one that receives the greatest affirmative judgment,"[71] or "one in whose favor judgment was rendered."[72] Oklahoma courts have allowed so many exceptions, however, that these definitions ring hollow.

For example, Oklahoma courts have allowed both parties in a lawsuit to collect attorney fees, despite *Quapaw's* recognition of only one "prevailing party" in any given situation.[73] In a number of other cases, courts have deemed multiple parties entitled to attorney fees under different fee-shifting statutes.[74] The Oklahoma Supreme Court has also recognized a blanket exception to the single prevailing party rule in comparative negligence cases.[75] Cases with unique fact situations may

---

68. *Id.* ¶ 13, 73 P.3d at 870.

69. Quapaw Co. v. Varnell, 1977 OK CIV APP 19, ¶ 21, 566 P.2d 164, 167; *see also* Rambo v. Hicks, 1986 OK 86, ¶ 2, 733 P.2d 405, 405 ("We particularly note that the mere availability of more than one form of remedial relief upon a single cause of action, does not abrogate the rule that there can be only one prevailing party.").

70. Bullard's Oil Field Serv., Inc. v. Williford Energy Co., 1992 OK 128, ¶ 11 n.9, 839 P.2d 185, 189 n.9; Wieland v. Danner Auto Supply, 1984 OK 45, ¶ 18, 695 P.2d 1332, 1334.

71. Am. Superior Feeds, Inc. v. Mason Warehouse, Inc., 1997 OK CIV APP 43, ¶ 4, 943 P.2d 171, 173.

72. Goodwin v. Durant Bank & Trust Co., 1998 OK 3, ¶ 10 n.11, 952 P.2d 41, 44 n.11.

73. *See, e.g.,* The Co., Inc. v. Trion Energy, 1988 OK 82, 761 P.2d 470. Where the plaintiff sued the defendant to enforce a lien and collect overdue rent, the trial court found for the defendant on the lien claim, but granted judgment to the plaintiff for the overdue rent. The supreme court allowed both parties attorney fees, based on the "wins" on their respective claims.

74. *See, e.g.,* Livestock Sys., Inc. v. Lashley, 1998 OK 68, ¶ 9, 967 P.2d 1197, 1199; Welling v. Am. Roofing & Sheet Metal Co., 1980 OK 131, ¶ 17, 617 P.2d 206, 210; Sooner Pipe & Supply Corp., 1968 OK 164, ¶ 21, 447 P.2d 758, 762 (granting fees to the plaintiffs under title 12, section 936 and to the defendants under title 42, section 176 of the Oklahoma Statutes in all cases).

75. *See* Smith v. Jenkins, 1994 OK 43, ¶16, 873 P.2d 1044, 1049 ("The single-party-victory approach to an allowance of attorney's fee *in this case* would offend the comparative negligence regime . . . . Today's departure from our general counsel-fee regime under prevailing party statutes will apply *only* in comparative-negligence cases to claims and compulsory counterclaims for the same tortious event.").

also earn an exception.[76] In still other cases, courts have held that there may not be a prevailing party at all, contrary to the statutory mandate to award fees.[77]

These exceptions illustrate the failure of Oklahoma courts to adhere in practice to a strict definition of "prevailing party." The rule of *Quapaw* is simply too myopic to meet the demands of modern complex litigation. The Oklahoma Supreme Court itself has acknowledged the problem. In *Professional Credit Collections v. Smith*,[78] the court stated that "[t]he definition of a prevailing party cannot be narrowly confined to one who obtains *judgment* after a trial on the merits."[79] Instead, the court found that "[t]he operative factor [for making an attorney fee award] . . . is *success*."[80]

Indeed, if fee-shifting is primarily an equitable device, courts can better achieve justice by analyzing the particulars of each case, rather than by following a rigid formulaic approach.[81] Courts may need to consider many factors in determining what constitutes "success." Courts exercising their own discretion are "simply better equipped to advance congressional goals when determining whether a party has prevailed"[82] because they focus on the facts rather than on "procedural machinations . . . unrelated to the merits"[83] of the case.

Furthermore, applying a mechanistic test to determine the prevailing party is potentially at odds with the constitutional requirements of due process and equal protection.[84] *Quapaw* and other decisions imply that defendants must prevail on all of plaintiffs' claims to be successful, while plaintiffs need only obtain a partial recovery on one of several claims.[85] In *Professional Credit Collections*, the court rejected this interpretation and expressly stated that Oklahoma's fee-shifting statutes could not be interpreted in a way that would treat victorious plaintiffs differently than victorious defendants "[b]ecause equal protection demands like treatment."[86]

---

76. *See, e.g.,* Prof'l Credit Collections, Inc. v. Smith, 1997 OK 19, ¶ 16, 933 P.2d 307, 311 (finding that the defendant was the prevailing party because she successfully vacated a prior default judgment rendered against her).

77. *See, e.g.,* Arkla Energy Res. v. Roye Realty & Dev., Inc., 9 F.3d 855, 866 (10th Cir. 1993).

78. 1997 OK 19, 933 P.2d 307.

79. *Id.* ¶ 12, 933 P.2d at 311.

80. *Id.*

81. *See Leading Cases, supra* note 37, at 458.

82. *Id.* at 466.

83. *Id.* at 467.

84. *Prof'l Credit Collections* ¶ 14, 933 P.2d at 311.

85. *See, e.g.*, Roye Realty & Dev. Co. v. Arkla, Inc., 1996 U.S. App. LEXIS 3352, at **39-40 & n.23 (10th Cir. 1996).

86. *Prof'l Credit Collections* ¶ 14, 933 P.2d at 311.

Oklahoma courts have further criticized *Quapaw* as being out of step with the realities of complex modern litigation.[87] The Oklahoma courts' wide-ranging interpretations of *Quapaw* illustrate a steady retreat from the rigid application of the fee-shifting statutes. Certainly, the widespread criticism of *Quapaw* has eroded its persuasive value. Because the Oklahoma Supreme Court has not yet spoken, however, the current state of Oklahoma jurisprudence regarding the award of attorney fees is still officially in flux.

C. Recent Failures of Oklahoma Courts to Clarify the Prevailing Party Standard

Two recent Oklahoma Supreme Court cases have addressed, but not resolved, the prevailing party issue. In *Spears v. Shelter Mutual Insurance Co.*, the court acknowledged the competing viewpoints of the Tenth Circuit and the Oklahoma Court of Civil Appeals.[88] The court did not, however, create any precedent. Indeed, in the most recent case dealing with the prevailing party issue, *Tibbetts v. Sight 'n Sound Appliance Centers, Inc.*,[89] the court adhered to the more traditional view that a plaintiff who seeks only monetary damages but is, in fact, awarded none, is not a prevailing party. Thus, the supreme court seems to rely on the construction that discretion is not preferred, although it has not explicitly contradicted or adopted the reasoning of either the Tenth Circuit or the Oklahoma Court of Civil Appeals.

In 1994, *Shadoan* became the first Oklahoma case to disagree with the Tenth Circuit's original prediction that an award of attorney fees was discretionary with

---

87. Stites v. Duit Constr. Co., 1999 OK CIV APP 113, ¶ 15, 992 P.2d 913, 916-17. The *Stites* court noted several departures from *Quapaw*:

> This application of *Quapaw* . . . is inconsistent with *Welling v. American Roofing and Sheet Metal Co., Inc.,* 1980 OK 131, 617 P.2d 206 and *Midwest Livestock Systems, Inc. v. Lashley*, 1998 OK 68, 967 P.2d 1197. In both cases, the court concluded both parties who received affirmative judgments in their favor were entitled to attorney fees and costs. *Midwest Livestock Systems* specifically rejected the argument that the party with the greatest affirmative judgment was the only prevailing party.

Id.

88. Spears v. Shelter Mut. Ins. Co., 2003 OK 66, ¶ 13 n.5, 73 P.3d 865, 865 n.5 (referring to the Tenth Circuit's opinion in *Adair State Bank v. American Casualty Co.*, 949 F.2d 1067 (10th Cir. 1991), that the Oklahoma Supreme Court would likely grant trial courts full discretion to determine the prevailing party, and the Oklahoma Court of Civil Appeals opinions in *Shadoan v. Liberty Mutual Fire Insurance Co.*, 1994 OK CIV APP 182, 894 P.2d 1140, and *Williams v. Old American Insurance Co.*, 1995 OK CIV APP 128, 907 P.2d 1105, which rebutted the Tenth Circuit's prediction).

89. 2003 OK 72, 77 P.3d 1042 (interpreting title 15, section 751 of the Oklahoma Statutes).

the trial courts. In *Shadoan,* the Oklahoma Court of Civil Appeals held that the Tenth Circuit was wrong to designate the word "allowable" as the statute's operative word because it seemed "odd, to say the least, that [the legislature] chose to precede the supposedly operative word 'allowable' with one which possesses such a well-established *mandatory* meaning [i.e., "shall"]."[90] *Williams* acquiesced in this view.[91]

Relying on *Shadoan* and *Williams*, the Tenth Circuit in *Stauth* reversed its prediction regarding the determination of the prevailing party for purposes of attorney fees.[92] The current theory of Oklahoma jurisprudence regarding the award of attorney fees rests on this rather reluctant opinion. In *Stauth*, the Tenth Circuit held that awarding fees under title 36, section 3629(B) of the Oklahoma Statutes is mandatory.[93] The court noted, however, that the statutory language "presents an arguable question of interpretation"[94] and conceded merely that a mandatory award in the instant case was justifiable "under the circumstances."[95] The Tenth Circuit questioned the Oklahoma Court of Civil Appeals finding that "shall" was the operative word of the fee-shifting statute, focusing instead on the more flexible word "allowable."[96] The Tenth Circuit further recognized the irony that "the standard of review for a denial of attorneys' fees is an abuse of discretion standard,"[97] even though trial courts are not actually accorded any discretion under these opinions.

D. The Lack of True Precedent

Of course, neither the case law of the Oklahoma Court of Civil Appeals nor that of the Tenth Circuit is truly precedential.[98] To settle this question of state law, either the Oklahoma Supreme Court must issue a definitive ruling, or the Oklahoma legislature must redraft the fee-shifting statutes to provide clearer guidance. The supreme court's explicit refusal to address the issue in *Spears*

---

90. *Shadoan* ¶ 14, 894 P.2d at 1144.
91. *Williams* ¶ 16, 907 P.2d at 1107.
92. Stauth v. Nat'l Union Fire Ins. Co., 236 F.3d 1260 (10th Cir. 2001).
93. *Id.* at 1267.
94. *Id.*
95. *Id.* at 1262.
96. *Id.* at 1267.
97. *Id.* at 1263.
98. The duty of a federal court is to conform to the substantive law of the state. Erie R.R. v. Tompkins, 304 U.S. 64, 87 (1938). If the supreme court of the state has not provided direction on a particular question of law, the federal court must predict the course of action that body would take if it were deciding the issue. Fransen v. Conoco, Inc., 64 F.3d 1481, 1492 n.10 (10th Cir. 1995). The federal court is not bound by the decisions of a state's lower courts; those decisions are merely persuasive, not precedential. *Id*.

brings this need to the fore.[99] So long as the court and the legislature decline to address this issue, the confusion will persist.

V. Criticism of the Current Regime

A. Inherent Inequity in the Definition of Prevailing Party

The current method of defining "prevailing party" is inequitable. The interpretation of most of Oklahoma's fee-shifting statutes is that prevailing plaintiffs are presumptively entitled to attorney fees, while prevailing defendants usually receive awards only in special circumstances, despite having been involuntarily haled into court.[100] When the fee-shifting statutes are thus applied, they violate the federal equal protection clause[101] and the Oklahoma Constitution[102] because they are not neutral, as is required for the "administration of justice without prejudice."[103] If "equal access to the courts, and modes of procedure therein, constitute basic and fundamental rights,"[104] then any construction of Oklahoma's fee-shifting statutes that treats plaintiffs and defendants differently without any rational basis or legitimate state purpose is unconstitutional.[105]

Indeed, "a superior claim or defense on the merits does not automatically translate into superior equity on fees."[106] In close cases in which both sides have justifiable positions, it seems harsh and unfair to allocate the attorney fees of both parties to the "winner" who may have prevailed on a mere technicality.[107] Oklahoma's mechanistic method of defining the prevailing party often leads to unjust results, which may "cast the loser assessed for fees in the role of one unfairly and severely punished for proceeding entirely reasonably. Though he may have lost, he acted not only within his rights but with good foundation in contesting the case."[108]

1. Inequity Regarding Prevailing Plaintiffs

---

99. *See* Spears v. Shelter Mut. Ins. Co., 2003 OK 66, ¶ 13 n.5, 73 P.3d 865, 865 n.5.

100. *See, e.g.,* Roye Realty & Dev., Inc. v. Arkla, Inc., 1996 U.S. App. LEXIS 3352, at **39-40 & n.23 (10th Cir. 1996).

101. U.S. CONST. amend. XIV.

102. OKLA. CONST. art. II, § 6.

103. Thayer v. Phillips Petroleum Co., 1980 OK 95, ¶ 2, 613 P.2d 1041, 1042.

104. *Id.* ¶ 15, 613 P.2d at 1044.

105. *Id.*; *see also* Prof'l Credit Collections, Inc. v. Smith, 1997 OK 19, ¶ 14, 933 P.2d 307, 311.

106. Rowe, *supra* note 11, at 655.

107. *Id.* at 656.

108. *Id.* at 670.

Even a seemingly routine award of attorney fees can result in inequity. For example, plaintiffs may be awarded a nominal recovery entitling them to attorney fees under a given statute, only to have the fee reduced because it is not "reasonable" or "proportional" in relation to the award, even though the issue they advanced was of state-wide importance. Such a result is possible under the Oklahoma Supreme Court's holding in *Southwestern Bell Telephone Co. v. Parker Pest Control, Inc.*,[109] which stated that "the attorney fee should bear some reasonable relationship to the amount in controversy" and to the amount actually recovered.[110]

A case in point is the recently decided *Tibbetts v. Sight 'n Sound Appliance Centers, Inc.* The plaintiffs in *Tibbetts* brought a class action lawsuit against Sight 'n Sound seeking monetary damages for injuries suffered from reliance on "bait and switch" advertising.[111] Although the jury determined that the defendant had violated the Oklahoma Consumer Protection Act,[112] the plaintiffs were awarded zero damages.[113] Stating that "[a] more poignant example of a lack of success would be hard to imagine,"[114] the Oklahoma Supreme Court affirmed the appellate court's holding that no attorney fees could be awarded in the case because no damages were awarded.[115] Arguably, however, the plaintiffs had struck an important blow for consumer rights in Oklahoma, and the court should have rewarded their attorneys, who estimated their costs and fees in excess of $1 million and their total hours on the case at 7000,[116] for their efforts.[117]

2. Inequity Regarding Prevailing Defendants

The bar for prevailing defendants to recover attorney fees is very high. Generally, defendants must receive a completely favorable verdict to recover

---

109. 1987 OK 16, 737 P.2d 1186.

110. Arkoma Gas Co. v. Otis Eng'g Corp., 1993 OK 27, ¶ 6, 849 P.2d 392, 394 (citing *Southwestern Bell* ¶ 17, 737 P.2d at 1189).

111. Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc., 2003 OK 72, ¶ 0, 77 P.3d 1042, 1044.

112. 15 OKLA. STAT. § 751 (2001).

113. *Tibbetts* ¶ 1, 77 P.3d at 1045.

114. *Id.* ¶ 13, 77 P.3d at 1050.

115. *Id.* ¶ 25, 77 P.3d at 1054. The plaintiff's attorney in *Tibbetts* worked for a contingency fee. Had the attorney worked for an hourly rate, the court may have reached a different conclusion.

116. *Id.* ¶ 8, 77 P.3d at 1048.

117. Note that this comment asserts this interpretation for the sake of argument only. The *Tibbetts* court specifically rejected the "catalyst" theory of awarding attorney fees, as the defendants were not forced to alter their practices. Only when the defendant is required to take action pursuant to judicial sanction is the catalyst theory viable. *Id.* ¶ 23, 77 P.3d at 1053.

attorney fees. Moreover, courts frequently limit defendants' attorney fee awards to instances in which the plaintiffs have exhibited bad faith.[118] In civil rights cases, this differential treatment is explained by the potential chilling effect that regular defendant awards could have on litigation that arguably benefits society as a whole.[119] In cases not involving individuals' substantive rights, however, defendants might more rightly be considered the prevailing party where the courts award plaintiffs a nominal amount but do not render a new rule of law.

For example, in *Gamble, Simmons & Co. v. Kerr-McGee Corp.*,[120] the district court awarded the plaintiff less than 10% of the damages sought, and ordered the plaintiff to pay the defendant's attorney fees.[121] This percentage of the plaintiff's recovery failed to account, however, for the dismissal of two causes of action for which damages were never quantified.[122] The Tenth Circuit remanded these issues for further consideration and reversed the award of attorney fees because it recognized that the outcome on remand might inspire the trial court to "alter its decision regarding the amount of attorney fees to award or perhaps even change who qualifies as the 'prevailing party.'"[123]

Schwartz v. Farmers Insurance Co.[124] is an analogous case decided under Arizona's discretionary rule. In *Schwartz*, the plaintiffs argued that they were the prevailing party for purposes of the attorney fee award because they had obtained a money judgment but the defendant had not.[125] The defendant, however, successfully defended the plaintiffs' bad faith claim, thereby limiting the plaintiffs' overall recovery to much less than they had originally sought.[126] The trial court held, and the appellate court affirmed, that the defendant was the prevailing party, considering the totality of the circumstances, and awarded the defendant a portion of the fees and all of the costs it incurred in defending both claims.[127] Given the similarity of the facts of these cases, the court in *Gamble, Simmons* could have reached the same result as the court in *Schwartz*, but for Oklahoma's mechanistic and arguably unconstitutional interpretation of its fee-shifting statutes.

3. No Prevailing Party

---

118. *See, e.g.,* City Nat'l Bank & Trust Co. v. Owens, 1977 OK 86, ¶ 12, 565 P.2d 4, 7.
119. *See, e.g.,* EEOC v. Chandelle Club, 506 F. Supp. 75, 76 (W.D. Okla. 1980).
120. 175 F.3d 762 (10th Cir. 1999).
121. *Id.* at 773.
122. *Id.* at 765.
123. *Id.* at 774.
124. 800 P.2d 20 (Ariz. 1990).
125. *Id.* at 25.
126. *Id.*
127. *Id.*

In still other cases, courts may not designate a prevailing party at all because they find neither party deserving of attorney fees. This result occurred in *Tibbetts* when both sides moved for attorney fees and lost.[128] In *Tibbetts*, the Oklahoma Supreme Court recognized the plaintiffs were not obliged to pay their counsel unless they were awarded damages. Because nothing was recovered, the court could not justify the requested attorney fee of $375,000.[129] The court opined that "it would put form over substance to actually consider plaintiffs to be the prevailing or successful parties as they recovered nothing from defendant,"[130] nor could the court consider the defendant to be the prevailing party. In essence, then, the supreme court literally applied the American Rule, and each side paid its own costs.[131] The Oklahoma Supreme Court, however, unlike other courts,[132] has never explicitly stated that trial courts have the discretion to do what the *Tibbets* court did based on prevailing party status.

128. Tibbetts v. Sight 'n Sound Appliance Ctrs., 2003 OK 72, ¶ 7, 77 P.3d 1042, 1048.

129. *Id.* ¶¶ 10-11, 77 P.3d at 1049.

130. *Id.* ¶ 18, 77 P.3d at 1051-52.

131. *See* 1 CONTE, *supra* note 13, § 1.3.

132. *See, e.g.,* Owen Jones & Sons, Inc. v. C.R. Lewis Co., 497 P.2d 312, 314 (Alaska 1972) (holding that a court has the power to decide that neither party prevailed). *Owen Jones* also supports the proposition that the trial court has the general discretion to determine the prevailing party. *See, e.g.*, Sardam v. Morford, 756 P.2d 174, 175 (Wash. Ct. App. 1988) (applying *Owen Jones*); *see also* Arkla Energy Res. v. Roye Realty & Developing, Inc., 9 F.3d 855, 865-66 (10th Cir. 1993).

4. Multiple Prevailing Parties

In addition to courts finding no prevailing party, they may also designate multiple prevailing parties, all of whom are entitled to attorney fees. The Oklahoma comparative negligence regime already contemplates this possibility.[133] Several Oklahoma courts have found multiple prevailing parties outside of the comparative negligence realm, where "special circumstances" so warranted.[134] Oklahoma courts have also awarded attorney fees to multiple parties in the same case.[135] Because courts do not always follow *Quapaw*, the next logical step would be for the Oklahoma courts to retire *Quapaw* and other rigid fee-shifting rules altogether in favor of leaving the prevailing party inquiry to the trial courts' discretion in all instances.

B. Constitutional Infirmity in Oklahoma Courts' Application of Fee-Shifting Statutes

The anomaly of the results in Oklahoma's attorney fee award cases suggests a constitutional infirmity in the courts' application of fee-shifting statutes. The standards for plaintiffs to prevail on the issue of attorney fees are much less strict than those for defendants, resulting in potential equal protection violations.

Courts presume that statutes are constitutional and will strike them only if they are "clearly, palpably and plainly inconsistent" with constitutional dictates.[136] If a litigant challenges the constitutionality of a statute on the basis that it impedes equal access to the judicial system, the court must employ the strict scrutiny standard of review.[137]

In 1908, the Oklahoma Supreme Court held in *Chicago, Rhode Island & Pacific Railway Co. v. Mashore* that a fee-shifting statute was unconstitutional[138] because it authorized an award of attorney fees to a prevailing plaintiff but not to a prevailing defendant.[139] The Oklahoma Supreme Court cited a violation of the Fourteenth Amendment of the U.S. Constitution:

> The statute providing the assessment of attorney's fees in cases of this character is violative of the fourteenth amendment of the

133. *See, e.g.,* Lee v. Griffith, 1999 OK 32, ¶ 7, 990 P.2d 232, 233; Smith v. Jenkins, 1994 OK 43, ¶ 13, 873 P.2d 1044, 1048.

134. *See supra* notes 73-74, 76 and accompanying text.

135. *Id.*

136. Alford v. Garzone, 1998 OK CIV APP 105, ¶ 7, 964 P.2d 944, 946 (quoting Reherman v. Okla. Water Res. Bd., 1984 OK 12, ¶ 11, 679 P.2d 1296, 1300).

137. *Id.* ¶ 10, 964 P.2d at 947.

138. *See* Chicago, R.I. & Pac. Ry. v. Mashore, 1908 OK 95, ¶ 19, 96 P. 630, 633.

139. *Id.* ¶ 17, 96 P. at 633.

> Constitution of the United States, in that it does not give to all parties the same, equal protection of the law. The defendant, being sued for wages under this statute, is not on an equal footing with the plaintiff. If he makes an unsuccessful defense, he is mulcted in an attorney's fee, to be paid to the plaintiff, while if he is successful, the plaintiff is not required to pay any attorney's fee to him. In other words, justice is not dispensed, with an impartial and equal hand, to these litigants. A court is always loath to hold a statute, the solemn act of the Legislature, unconstitutional and void, and never does so, except where its provisions make this duty a plain and imperative one. In the present case we have examined a large number of authorities wherein the constitutionality of such statutes has been raised, and in every one of them the court of last resort has held it unconstitutional.[140]

Certain Oklahoma Supreme Court justices have advocated to continue the efficacy of *Mashore*.[141] Indeed, *Mashore* is still good precedent, although the court now acts as if it were constrained by the conflicting — but nonprecedential — decisions rendered by the Oklahoma Court of Civil Appeals and the Tenth Circuit since *Mashore*. The lurking constitutional questions behind Oklahoma's mechanistic approach to fee-shifting statutes provide fertile grounds for a discussion of judicial discretion and legislative reform in this area.

VI. The Case for a Discretionary Rule

The Tenth Circuit has stated that "[t]he determinations of which party prevailed in the litigation and the reasonableness of the attorney's fees award . . . fall within the discretion of the trial judge and are reviewed under an abuse of discretion standard."[142] If the trial court has discretion to determine prevailing party status, it follows that courts' rulings on attorney fees should be made on a case-by-case basis, depending on the overall litigation result. Indeed, "[t]here is no overarching organizing principle to determine when an attorney fee award is appropriate . . . . Awarding attorney fees depends on the totality of the circumstances involved in each particular case."[143] The Oklahoma Supreme Court should adopt the Tenth Circuit's reasoning to rectify the confusion and inequities caused by the current rule of law regarding prevailing party status.

---

140. *Id.* ¶ 19, 96 P. at 633.

141. *See, e.g.*, *Alford* ¶ 12 n.5, 964 P.2d at 948 n.5 (discussing Justice Opala's concurrence in *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, 613 P.2d 1041).

142. Strickland Tower Maint., Inc. v. AT&T Communications, Inc., 128 F.3d 1422, 1428 (10th Cir. 1997) (internal citation omitted).

143. *In re* Meridian Reserve, Inc., 87 F.3d 406, 410 (10th Cir. 1996).

A. The Burk Reasonableness Standard and the Policy Behind Fee-Shifting

Under current Oklahoma jurisprudence, trial courts enjoy wide discretion under *State* ex rel. *Burk v. City of Oklahoma City* in determining whether the amount of the attorney fees is "reasonable," but not in determining which party should receive the award. To assess the reasonableness of attorney fee awards under *Burk*, trial courts must first determine the number of hours that the attorneys spent on the case and multiply that number by their hourly rate.[144] Courts must then assess certain variables that may also affect the attorneys' compensation, including, but not limited to: (1) the time and labor involved; (2) the novelty and complexity of the issues; (3) the desired recovery; (4) the results actually obtained; and (5) the nature of the case.[145] These criteria are also obviously relevant to the question of *who* deserves to recover at all.

The general justifications for fee-shifting may also affect how courts calculate fees.[146] Because the goals of awarding fees include such divergent aims as making the injured party whole and punishing the wrongdoer, the "reasonable" amount to award may rest on grounds well beyond the prevailing party's actual costs.[147] This is particularly true when the attorney fee award is discretionary. Under a mandatory fee-shifting statute, an award to the prevailing party in a close case might not serve any particular goal of equity, incentive, or public policy, but will be made nonetheless. Under a discretionary rule, however, these concerns will be paramount, resulting in an attorney fee award only in truly deserving cases.

B. Interpretation of Burk Throughout Oklahoma Jurisprudence

Oklahoma courts have construed *Burk* as requiring judges to consider the totality of the circumstances in making their decisions regarding the reasonableness of the amount of the attorney fee award. In *Arkoma Gas Co. v. Otis Engineering Corp.*,[148] the Oklahoma Supreme Court upheld the trial court's award of attorney fees, finding that the judge had not abused his discretion in determining the amount of the award or the prevailing party.[149] Having recited the *Burk* factors, the trial judge stated that he "felt he was required to consider the entire circumstances to

144. State *ex rel*. Burk v. City of Oklahoma City, 1979 OK 115, ¶¶ 9, 11, 598 P.2d 659, 661-62.

145. *Id.* ¶ 8, 598 P.2d at 661 (quoting Evans v. Sheraton Park Hotel, 503 F.2d 177, 187 (D.C. Cir. 1974)).

146. Rowe, *supra* note 11, at 673.

147. *Id.* at 677.

148. 1993 OK 27, 849 P.2d 392.

149. *Id.* ¶ 8, 849 P.2d at 394-95.

ensure that such award was fair and reasonable under the circumstances."[150] In affirming the trial court's award, the supreme court noted that "[w]hat is reasonable in each case must be considered in light of the extent to which the plaintiff prevailed."[151]

Although the *Arkoma Gas* court confined its review to the amount of the attorney fee award, "the extent to which the plaintiff prevailed" obviously involves a value judgment on the trial court's part. In certain cases, the degree to which plaintiffs prevail may, in fact, justify an award to the defendants. Thus, the reasoning in *Arkoma Gas* may be extended to justify a future Oklahoma Supreme Court decision granting trial courts full discretion to determine the prevailing party.[152] Indeed, the "extent to which the parties prevailed" is often listed as an important factor for courts to consider in the fee-shifting statutes of most jurisdictions with a discretionary rule.[153]

C. The Discretionary Rule in Other States

Other states have employed variations of the rule suggested by this comment, although the construction of the fee-shifting statutes and the judicial interpretation thereof may differ considerably. For example, Arkansas has a generally permissive rule on attorney fees, but employs a mechanistic approach in determining the prevailing party,[154] while Idaho has a mandatory rule, identical to Oklahoma's, and a discretionary approach.[155] Oklahoma can learn from each model, with the correct result ultimately being that the trial court's discretion should extend to deciding whether to allow fees at all, and if so, to whom and in what amount.

---

150. *Id.* ¶ 4, 849 P.2d at 393.

151. *Id.* ¶ 8, 849 P.2d at 395.

152. At the very least, a ruling to this effect would make the appellate review for "abuse of discretion" less ironic and more convincing, to paraphrase *Strauth v. National Union Fire Insurance Co.*, 236 F.3d 1260, 1263 (10th Cir. 2001).

153. *See, e.g.*, Sanders v. Lankford, 1 P.3d 823, 826 (Idaho Ct. App. 2000); Shurtliff v. Northwest Pools, Inc., 815 P.2d 461, 464 (Idaho Ct. App. 1991).

154. *See, e.g.,* Marcum v. Wengert, 40 S.W.3d 230 (Ark. 2001) (discussing, *passim*, the statutory and judicial interpretations of fee-shifting statutes).

155. *See, e.g., Sanders*, 1 P.3d at 826.

1. The Arkansas Model

Arkansas courts enjoy full discretion to decide whether to award attorney fees in any given case.[156] The Arkansas statute employs an explicitly permissive construction: "In any civil action to recover on an open account, . . . unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party *may be allowed* a reasonable attorney's fee to be assessed by the court and collected as costs."[157] If, however, the Arkansas court finds that an attorney fee award is warranted, the court is constrained by the same "one prevailing party" rule as that set forth in *Quapaw*.[158] Nonetheless, Arkansas courts are afforded a bit more leeway because the underlying rule is permissive rather than mandatory.

For example, the Arkansas Supreme Court has held that attorney fees should be denied altogether when all of the attorneys did an excellent job under the constraints of state law on a difficult case.[159] The court has also held that a party need not recover all of the damages it had sought to be the prevailing party.[160] Arkansas courts are therefore limited to using their discretion to determine whether to award attorney fees and in what amount.[161] Arkansas's appellate courts, however, give attorney fee awards deferential review because they routinely recognize that "the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel" give the trial judge superior insight into the propriety of the attorney fee award.[162]

The U.S. Supreme Court expressed this same sentiment in *Hensley v. Eckerhart*.[163] The Court reasoned that because the trial court has superior understanding of the litigation, a discretionary rule prevents frequent appellate review of what are mostly factual matters.[164]

The Oklahoma Supreme Court has yet to adopt this reasoning. On this point, Oklahoma should follow Arkansas's lead — and then some.

---

156. Gill v. Transcriptions, Inc., 892 S.W.2d 258, 261 (Ark. 1995).
157. ARK. CODE ANN. § 16-22-308 (1999) (emphasis added).
158. *See Marcum*, 40 S.W.3d at 236.
159. Jones v. Abraham, 15 S.W.3d 310, 318-19 (Ark. 2000).
160. *Marcum*, 40 S.W.3d at 236.
161. *Id.* at 235.
162. *Id.* at 234-35.
163. 461 U.S. 424, 437 (1983).
164. *Id.*

2. The Arizona Model

Arizona fee-shifting statutes use permissive language similar to that of Arkansas.[165] Arizona courts construe their fee-shifting statutes, however, as a permissive grant of authority that affords trial courts broad discretion, completely free of any *Quapaw*-like rule.[166] The trial judge need only have a "reasonable basis" for deciding to award attorney fees, to whom, and in what amount.[167]

Under the Arizona statute, both plaintiffs and defendants may qualify as the prevailing party, with no disparate treatment, because the attorney fee award is "remedial in nature and such relief is equally available to those who successfully defend an action as to those who successfully seek affirmative relief."[168] The courts may consider the totality of the circumstances in making their decisions.[169] Even where the Arizona legislature has constructed a fee-shifting statute in mandatory terms,[170] the courts have the discretion to determine the prevailing party from the totality of the circumstances.[171]

3. The Texas Model

Oklahoma may also look to Texas statutes for a "close, but not quite" model of interpretation for fee-shifting statutes. Despite permissive language in the Texas statute stating that attorney fees "may" be awarded,[172] the Texas Supreme Court has held, similarly to Oklahoma, that an award under the statute is mandatory,[173] at least to the degree that the trial court "does not have the discretion to completely deny attorneys' fees if they are proper under [the statute]."[174]

---

165. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-341.01(A) (2003) ("In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.").

166. Associated Indem. Corp. v. Warner, 694 P.2d 1181, 1184 (Ariz. 1985).

167. *Id.*

168. Schwartz v. Farmers Ins. Co., 800 P.2d 20, 25 (Ariz. Ct. App. 1990); Moses v. Phelps Dodge Corp., 826 F. Supp. 1234, 1236 (D. Ariz. 1983).

169. *Schwartz*, 800 P.2d at 25.

170. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 12-341 (2003) ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law.").

171. Hooper v. Truly Nolen of Am., Inc., 832 P.2d 709, 712 (Ariz. Ct. App. 1992).

172. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (1986) ("A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs . . . .").

173. Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 236 (Tex. App. 1993).

174. Ralph I. Miller & Angela C. Wennihan, *Resolving Attorneys' Fees in Texas Business Litigation*, 56 SMU L. REV. 1115, 1117 (2003) (citing World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662, 683 (Tex. App. 1998)).

Texas defines the prevailing party inquiry as a factual issue uniquely within the province of the trial court.[175] Furthermore, Texas courts recognize a more generous base definition of "prevailing party." Indeed, in Texas, a party can prevail without maximizing its recovery or even receiving any damages at all.[176] Courts may grant attorney fees to plaintiffs and defendants alike.[177] Some Texas statutes are fully discretionary — even a nonprevailing party can recover fees in some instances.[178] Finally, Texas courts retain full discretion to determine the reasonableness of the amount of the award.[179]

4. The Alaska Model

Under Alaska law, courts "shall" award attorney fees to the prevailing party in a civil lawsuit.[180] Although the language is mandatory, Alaska courts construe the statute very liberally. Courts usually define the prevailing party as the one who successfully prosecutes the action or successfully defends against it by prevailing on the main issue, even if not to the extent of the original claim, or as the one in whose favor the decision or verdict is rendered and the judgment entered.[181] Recognizing the complexity of the prevailing party determination, however, the Alaska statutes also provide for exceptional cases.[182] Indeed, the Supreme Court of Alaska has held that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party . . . . We are of the opinion that the determination of which party prevails . . . is, like the award of attorney's fees, within the discretion of the trial judge."[183]

Alaska courts thus recognize that trial courts have broad discretion in designating the prevailing party in a lawsuit.[184] The Alaska statutes provide ample guidance to the courts for the exercise of this discretion. For example, the legislature has instructed the courts to consider the financial situation of all parties before making or enforcing an attorney fee award.[185] The legislature has also explicitly contemplated issues of inequity:

---

175. *Babcock & Wilcox Co.,* 863 S.W.2d at 235.
176. Miller & Wennihan, *supra* note 174, at 1116 n.6.
177. *Id.*
178. *Id*. at 1119-20.
179. *Id.* at 1118.
180. *See, e.g.,* ALASKA R. CIV. P. 82(a).
181. De Witt v. Liberty Leasing Co., 499 P.2d 599, 601 (Alaska 1972).
182. ALASKA R. CIV. P. 82(b)(2).
183. Owen Jones & Sons, Inc. v. C. R. Lewis Co., 497 P.2d 312, 313-14 (Alaska 1972). The *Owen Jones* court went on to declare the defendant the prevailing party even though the plaintiffs had received a judgment in the amount of $7000. *Id.* at 314.
184. Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321, 1326 (Alaska 1993).
185. ALASKA STAT. § 09.60.010(d)(2)-(e) (2002 & Supp. 2003).

> Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.[186]

On the whole, the Alaska model provides a good interpretation of the discretionary rule for Oklahoma to follow.

5. The Idaho Model

The Idaho model is perhaps the best interpretation of the discretionary rule for Oklahoma to follow. Idaho employs the identical construction in its fee-shifting statutes as Oklahoma.[187] Furthermore, Idaho courts have held that an award of attorney fees under the statute is mandatory.[188] Unlike Oklahoma, however, Idaho courts also recognize that trial courts have full discretion to determine whether a litigant is the prevailing party.[189] The Idaho legislature provides courts with the following guidelines to determine which party prevails:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.[190]

---

186. *Id.* § 09.60.010(b).

187. *See* IDAHO CODE § 12-120(3) (1990 & Supp. 1997).

188. Sanders v. Lankford, 1 P.3d 823, 826 (Idaho Ct. App. 2000) ("Idaho Code Section 12-120(3) provides that an award of attorney fees to the prevailing party is mandatory in various types of civil actions . . . .").

189. *Id.*

190. IDAHO R. CIV. P. 54(d)(1)(B).

Thus, the Idaho legislature requires courts to conduct three principal inquiries when determining the prevailing party. Courts must consider: (1) the result obtained by judgment or settlement in relation to the requested relief; (2) the existence of multiple claims or issues; and (3) the extent to which the parties prevailed on their respective issues or claims.[191] The Idaho legislature, however, also clearly permits the courts to consider the totality of the circumstances in making the prevailing party decision, so long as their decisions are within the purview of the governing legal standards.[192]

D. The Discretionary Rule in Federal Jurisprudence

The discretionary rule is not limited to state law. Indeed, certain federal statutes are premised on the discretionary model. For example, the federal environmental fee-shifting statutes authorize attorney fee awards to any requesting party who has significantly contributed to the goals of the statute as determined by the court.[193] Under this statutory construct, courts have the discretion to award attorney fees to the *losing* party if appropriate.[194] Such awards may provide valuable incentives for socially beneficial litigation.[195] The possibility of attorney fee awards influences the willingness of public interest groups to pursue litigation even when they are uncertain of their likelihood of success.[196] While this rationale does not directly pertain to the fee-shifting statutes at issue in this comment, it does, however, support "limiting eligibility for fee awards by means less drastic than the automatic exclusion of all losing parties"[197] — namely, by allowing courts the discretion to determine which party has prevailed and how much it deserves.

VII. Guidelines for the Exercise of Judicial Discretion

The Oklahoma Supreme Court should adopt a discretionary rule as well as guidelines for applying this rule to cope with the inconsistent interpretations of the fee-shifting statutes in Oklahoma. "[C]ourts have long exercised discretion not only in determining whether parties have prevailed, but also in deciding whether particular prevailing parties should be awarded fees."[198] As previously

---

191. Shurtliff v. Northwest Pools, Inc., 815 P.2d 461, 464 (Idaho Ct. App. 1991).

192. *Sanders*, 1 P.3d at 826; Evans v. Sawtooth Partners, 723 P.2d 925, 931 (Idaho Ct. App. 1986) (noting that the court's discretion is "circumscribed by legal limits").

193. *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 680-82 (1983) [hereinafter *Environmental Litigants*].

194. *Id.* at 681-82.

195. *Id.* at 685.

196. *Id.* at 685-86.

197. *Id.* at 687.

198. *Id.* at 694.

demonstrated, legislatures often use permissive language to draft fee-shifting statutes, granting courts the explicit authority to exercise their discretion.[199] Even when the attorney fee award is mandatory, however, state courts have exercised full discretion to determine the prevailing party.[200] The U.S. Supreme Court has recognized that, when Congress or state legislatures have authorized fee-shifting to encourage enforcement of some statutory scheme, the implementing courts are properly granted "wide latitude in determining when to grant such awards," despite the American Rule.[201] Courts may consider a variety of factors along with certain guidelines suggested by the authorizing statute or in case law. Evidence of each possible factor is not necessary; however, the award should be justified on some standard beyond simply the market value of the services rendered.[202]

When interpreting discretionary fee-shifting statutes, courts may examine whether the party requesting attorney fees has made a "substantial contribution" to the goals outlined in the authorizing statute and whether the controversy was of the nature fairly contemplated by the statute.[203] Applying these tests, federal courts have awarded attorney fees to mostly unsuccessful parties who have nonetheless demonstrated good faith and "prudent effort" toward advancing the goals of the underlying legislation.[204] This policy is applicable to state courts as well.

To evaluate whether parties have made a "prudent effort," courts may judge the effectiveness of the representation in addition to general notions of fairness.[205] By considering whether a party has presented its case effectively, courts can avoid subsidizing poorly litigated suits without significantly deterring groups capable of pursuing complex litigation.[206] Certain *Burk* factors also reflect this desire to reward competence.[207]

---

199. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-341.01(A) (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (1986).

200. *See, e.g.,* Sanders v. Lankford, 1 P.3d 823 (Idaho Ct. App. 2000) (interpreting IDAHO CODE § 12-120(3) (1990 & Supp. 1997)).

201. *See Environmental Litigants, supra* note 193, at 695.

202. Miller & Wennihan, *supra* note 174, at 1127-28.

203. *See Environmental Litigants, supra* note 193, at 688-89.

204. *See, e.g.,* Metro. Wash. Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981) (interpreting the Clean Air Act); Natural Res. Def. Counsel, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973) (same).

205. *See Environmental Litigants, supra* note 193, at 692-93.

206. *Id.* at 692.

207. Courts must consider, among other things: (1) the time and labor involved; (2) the novelty and complexity of the issues; (3) the level of competence required for the attorney to provide effective legal service; (4) the attorney's skill and reputation; (5) the desired recovery; (6) the results actually obtained; and (7) the nature of the case. State *ex rel.* Burk v. City of Oklahoma City, 1979 OK 115, ¶ 8, 598 P.2d 659, 661.

In another test for determining the prevailing party for purposes of attorney fee awards, courts may consider the reasonableness and necessity of such award under the given set of facts.[208] Factors which inform "reasonableness" and "necessity" include, but are not limited to: (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled; (3) whether the successful party's efforts were superfluous to the result; (4) the potential hardship suffered by the unsuccessful party in the event fees are assessed; (5) the extent to which each party prevailed on its respective claims in relation to the relief sought; (6) the novelty of the legal question presented; (7) whether such claim or defense had previously been adjudicated in the jurisdiction; and (8) whether the award might discourage other parties with tenable claims or defenses from litigating or defending legitimate issues for fear of incurring liability for substantial amounts of attorney fees.[209]

VIII. The Legislative Response

The Oklahoma legislature may need to redraft the fee-shifting statutes to achieve the result suggested by this comment. On the other hand, given the dearth of Oklahoma legislative history, strict construction of these statutes as mandatory may not be a faithful interpretation. Indeed, "[t]o construe a statute strictly is to limit its scope and its life span . . . . The letter killeth but the spirit giveth life."[210] If, however, a new statute or judicial rule is necessary to coax a discretionary rule from these statutes, the framers must expressly convey their intent to grant trial courts the discretion to determine the prevailing party for the purposes of attorney fee awards so as to achieve equity most efficiently. The legislature must integrate the various constructions in an unambiguous way. It must also provide the courts with clear guidelines regarding how this discretion should be exercised.

The most liberal construction employed by the Oklahoma legislature in the fee-shifting statutes provides that "the Court may, in its discretion, award reasonable attorney fees to the prevailing party."[211] On its face, this statutory language is sufficient to imply that trial courts have full discretion to determine both the prevailing party and the amount of the award. Idaho's statute employs this exact construction yet is interpreted as giving trial courts full discretion.[212] Because

---

208. Miller & Wennihan, *supra* note 174, at 1120.

209. Associated Indem. Corp. v. Warner, 694 P.2d 1181, 1184 (Ariz. 1985).

210. Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 821 (1983).

211. *See, e.g.,* 78 OKLA. STAT. § 54(c) (2001).

212. *See, e.g.,* Sanders v. Lankford, 1 P.3d 823, 826 (Idaho Ct. App. 2000); Shurtliff v. Northwest Pools, Inc., 815 P.2d 461, 464 (Idaho Ct. App. 1991); Evans v. Sawtooth Partners, 723 P.2d 925, 931 (Idaho Ct. App. 1986).

Oklahoma courts have not interpreted the fee-shifting statutes in this way, the legislature should make this rule more explicit.

Some of the existing Oklahoma fee-shifting statutes include guidelines for the prevailing party determination.[213] For example, title 36, section 3629(B) provides in pertinent part that "the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party."[214] The fact that section 3629(B) is frequently litigated illustrates the inefficacy of this static definition. The Arizona case of *Schwartz v. Farmers Insurance Co.* illustrates how courts can still retain full discretion to consider the totality of the circumstances in each case to determine the prevailing party in cases involving insurance companies and their insureds.[215] The outcome in *Schwartz* is a classic application of the discretionary rule: although the plaintiff insured obtained a money judgment, the defendant insurance company successfully defended against the plaintiff's bad faith claim.[216] Given the totality of the circumstances, the Arizona court designated the defendant as the prevailing party because it limited the plaintiff's potential recovery so substantially.[217]

A purely discretionary rule should not exist in a vacuum; judicial discretion does not equate to unmitigated judicial power. Several states have incorporated factors into their statutory scheme to provide guidance to the courts in making the prevailing party designation.[218] For example, certain *Burk* factors support rewarding competence in much the same way as a discretionary rule would, such as (1) the time and labor involved; (2) the novelty and complexity of the issues; (3) the level of competence required for the attorney to provide effective legal service; (4) the attorney's skill and reputation; (5) the desired recovery; (6) the results actually obtained; and (7) the nature of the case.[219] In addition to the *Burk* criteria, the laws of other jurisdictions suggest helpful guidelines, such as (1) whether the litigation could have been avoided or settled; (2) the extent to which each party prevailed on its respective claims in relation to the relief sought; and (3) whether an award of attorney fees might discourage other parties from bringing legitimate claims.[220]

---

213. *See, e.g.*, 78 OKLA. STAT. § 54(c); 36 OKLA. STAT. § 3629(B) (2001).

214. 36 OKLA. STAT. § 3629(B).

215. Schwartz v. Farmers Ins. Co., 800 P.2d 20, 25 (Ariz. Ct. App. 1990).

216. *Id.*

217. *Id.* at 25-26.

218. *See supra* notes 186-87, 191-92, and accompanying text; *infra* note 221 and accompanying text.

219. State *ex rel.* Burk v. City of Oklahoma City, 1979 OK 115, ¶ 8, 598 P.2d 659, 661 (quoting Evans v. Sheraton Park Hotel, 503 F.2d 177, 187 (D.C. Cir. 1974)).

220. Associated Indem. Corp. v. Warner, 694 P.2d 1181, 1184 (Ariz. 1985).

The Oklahoma legislature should adopt similar guidelines for the exercise of judicial discretion to prevent a judge from using "the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties."[221] By adopting a discretionary rule and providing workable guidelines for its application, Oklahoma lawmakers can better ensure that the prevailing party in a lawsuit is determined with the fundamental principles behind the attorney fee award firmly in mind.

IX. Conclusion

This comment urges either the Oklahoma Supreme Court or the Oklahoma legislature to adopt the rule of law that trial courts have the discretion to determine the prevailing party in a lawsuit for purposes of attorney fee awards. In so doing, these bodies would not be making a radical departure from current practice, but would merely be sanctioning the steady and deliberate retreat over the last twenty years from the rigid, illogical, and often inequitable fee-shifting rules first adopted in *Quapaw*. In the face of modern complex litigation, the *Quapaw* rule is no longer workable. "[C]omplex litigation creates complex prevailing party issues,"[222] and trial courts need the flexibility to adapt to the changing demands of litigation in the twenty-first century. While some attorneys may balk at the idea of giving judges even more power, others will welcome a resolution of the prevailing party issue once and for all.

Jami Rhoades Antonisse

---

221. Evans v. Sawtooth Partners, 723 P.2d 925, 931 (Idaho Ct. App. 1986).
222. Lieber & Jones, *supra* note 46, at 3667.