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ORIGINAL JURISDICTION ACTIONS AS A REMEDY FOR OKLAHOMA'S DECISION DEFICIT

BRADLEY W. WELSH*

I. Introduction

A federal decision, whether "published" or "unpublished," is almost always available to provide insight concerning issues confronting litigants in federal court. The abundance of useful, though frequently noncitable, "unpublished" decisions that federal courts produce has generated significant debate among federal judges, practitioners, and scholars concerning what status federal courts should afford unpublished appellate decisions, and whether federal courts should treat unpublished decisions as precedential. While this important discussion proceeds with respect to federal court authority, however, many state courts and state court litigants face a much more basic problem: the complete absence of authority, whether published or unpublished, concerning fundamental and recurring issues.

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1. As used here, "published" decisions are those selected for publication in official or regional reporters. "Unpublished" decisions include, but are not limited to, those that may be available through providers such as LexisNexis or Westlaw.

2. Compare, e.g., 10TH CIR. R. 36.3(B) (explaining that citation of unpublished opinions is "disfavored," but allowing citation if the opinion "has persuasive value with respect to a material issue that has not been addressed in a published opinion" and if citation "would assist the court in its disposition"), with 9TH CIR. R. 36-3 (authorizing citation of unpublished decisions only when "relevant under the doctrine of law of the case, res judicata, or collateral estoppel," when relevant to such matters as "double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case," or when necessary to "demonstrate the existence of a conflict among opinions, dispositions, or orders").

3. See, e.g., Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated as moot, 225 F.3d 1054 (8th Cir. 2000) (en banc); Richard B. Cappalli, The Common Law’s Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755, 757 (2003) (explaining that the original justifications for rules prohibiting citation to unpublished opinions “have been eliminated by technology, but the policy remains, having gathered new justifications, such as the energy and time saved by large appellate caseloads handled by insufficient numbers of judges”) (internal citations omitted); William T. Hangley, Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions, 208 F.R.D. 645, 646 (2002) (“To lawyers, the critical issue is . . . whether lawyers have the right, and sometimes the duty, to discuss a court’s past holdings and discussions when they believe that doing so is important to their clients’ causes.”).
A comparison of Oklahoma state court decisions with those from state courts in adjacent jurisdictions such as Missouri and Texas demonstrates that Oklahoma lacks an established body of law in many notable areas, with the "decision deficit" most prominently illustrated in both pretrial procedural and discovery issues. For example, a litigant seeking to protect an attorney-client communication from discovery has immediate recourse in either Missouri or Texas should a trial court erroneously determine that the privilege does not attach. The litigant can seek a writ of mandamus in the appellate courts of either state, and may rely upon existing decisions to argue that the appellate courts have an obligation to remedy the trial court's error before trial.

Oklahoma, by comparison, not only lacks any published decision in which its supreme court has assumed original jurisdiction to correct an error relating to the assertion of a privileged communication, but also lacks any decision concerning, for example, the extent of the attorney-client privilege within corporate entities. To the extent that litigants value settled rules of law — which not only promote certainty and predictability, but also facilitate settlement and reassure litigants that they will not be subjected to the whim of a capricious district court judge — Oklahoma's decision deficit is a problem that should not be ignored.

Part II of this Article examines systemic problems with the decision deficit in Oklahoma. Part III discusses the availability of extraordinary relief, particularly focusing on three recent Oklahoma Supreme Court cases. Finally, Part IV uses two recent unreported original jurisdiction actions concerning depositions of apex employees and inadvertent production of privileged

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5. See Polytech, Inc., 895 S.W.2d at 14.
6. Compare 12 OKLA. STAT. § 2502(A)(4) (Supp. 2002) (defining "representative of the client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"), with Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (holding that, when the client is a corporation, "it will frequently be employees beyond the control group as defined by the [lower] court — 'officers and agents . . . responsible for directing [the company's] actions in response to legal advice' — who will possess the information needed by the corporation's lawyers").
7. See, e.g., Michael P. Van Alstine, The Costs of Legal Change, 49 UCLA L. REV. 789, 813 (2002) ("Clear and stable legal norms . . . promote efficient decisionmaking by affected firms and individuals in the arrangement of their affairs. Bolstered by judicial adherence to precedent, settled rules of law provide the framework for less costly, more accurate and thus more effective planning for future activity.") (internal citations omitted).
8. Id. at 814 ("Derivatively, the certainty provided by a settled body of law leads to a reduction in dispute resolution costs, both by narrowing the universe of potential controversies and by facilitating settlement when controversies do arise.") (internal citations omitted).
documents to show why the absence of published supreme court authority is a loss to the Oklahoma legal community.

II. Systemic Problems with the Decision Deficit in Oklahoma

Because much of the decision deficit concerns the absence of authority governing pretrial issues, the obvious candidate for addressing those matters and providing published authority is the original jurisdiction action. Such actions are plainly contemplated by Oklahoma’s constitution and statutes, which provide express authority for inferior appellate courts to issue the writs to remedy trial court errors before the entry of an otherwise appealable order. Yet, as an initial hurdle both to aggrieved litigants and those in the legal community seeking published authority, the Oklahoma Supreme Court is apparently, or at least typically, the exclusive forum available to litigants seeking writs in civil cases.

Oklahoma statutes and case law create a second hurdle by imposing limitations on the availability of writs. A writ of mandamus, for example, is available only when (1) the petitioner has a clear legal right to the relief sought, (2) the respondent (typically, a district judge) has refused to perform a nondiscretionary legal duty, and (3) alternative relief, such as a post-trial remedy, is inadequate. Similarly, a writ of prohibition is available only when (1) a governmental officer is about to exercise judicial or quasi-judicial power, (2) the law does not authorize the exercise of that power, and (3) the exercise of that power will result in an injury for which no other remedy is

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9. The responsibilities and commitments of the Oklahoma Supreme Court may prevent the justices from devoting more time to pretrial issues, even if an agreement to do so would otherwise prevail. See Kitchens v. McGowan, 1972 OK 140, ¶¶ 1-8, 503 P.2d 218, 218-19 ("Should we assume original jurisdiction in the present case, and other similar cases to follow, we would have to delay the cases which are before us on appeal from the various courts, boards and commissions. This would be unfair to the litigants in those cases.").

10. OKLA. CONST. art. 7, § 4 (outlining the original jurisdiction of the Oklahoma Supreme Court); see also 20 OKLA. STAT. § 30.1 (2001) (granting the Oklahoma Court of Civil Appeals similar jurisdiction as necessary in any case assigned to it by the Oklahoma Supreme Court). For an account of appealable orders, see OKLA. SUP. CT. R. 1.20.

11. See, e.g., HARVEY D. ELLIS, JR. & CLYDE A. MUCHMORE, OKLAHOMA APPELLATE PRACTICE § 22.02 (2003) ("In practice, the Court of Civil Appeals does not issue extraordinary writs.").

12. See, e.g., Bd. of County Comm’rs of Muskogee County v. City of Muskogee, 1991 OK 115, ¶ 9, 820 P.2d 797, 803; 12 OKLA. STAT. § 1451 (2001) ("The writ of mandamus may be issued . . . to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but . . . it cannot control judicial discretion."); id. § 1452 ("This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.").
adequate. Accordingly, a petitioner seeking either writ must demonstrate a clear, legal entitlement to the relief sought, which is surely a curious and onerous requirement in a jurisdiction with so little reported authority on pretrial issues.

The final and most significant hurdle to the use of original jurisdiction actions is the Oklahoma Supreme Court’s discretion in deciding when to assume original jurisdiction. After litigants have incurred the necessary costs of preparing briefs and other required filings, and of presenting oral arguments to the supreme court, the court may entirely avoid reaching the merits by declining jurisdiction over the matter. In an original jurisdiction action involving a discovery dispute, for example, the supreme court explained its role as follows:

[T]he remedy of appeal from the final judgment might not constitute an adequate and effective remedy in the event one party to a lawsuit is wrongfully compelled to produce from his file certain material for inspection by his adversary. However, we are also mindful of the fact that the statute on discovery necessarily invests the trial court with a wide discretion in determining when and to what extent such act shall be applicable in a particular proceeding. . . . We are therefore in this cause, and will be in future cases, reluctant to interfere in the action of the trial courts and will not do so except in those instances when it may be shown that the trial court clearly exceeded its authority.

The problem with the supreme court’s explanation, however, is that in the absence of relevant, available, written authority for district courts to utilize, the supreme court’s exercise of discretion in reviewing the district court’s own “discretionary” decision essentially renders the “abuse of discretion” standard contentless.

14. The granting of a writ of mandamus or prohibition is frequently said to be “extraordinary relief.” See, e.g., Inhofe v. Wiseman, 1989 OK 41, ¶ 4, 772 P.2d 389, 391.
15. See Lowrance v. Patton, 1985 OK 95, ¶ 8, 710 P.2d 108, 110 (explaining that a decision by the Oklahoma Supreme Court not to accept jurisdiction “is not a decision on the merits of the issue raised in the writ”).
17. See, e.g., Rex R. Perschbacher & Debra Lyn Bassett, The End of Law, 84 B.U.L. REV. 1, 36-37 (2004) (“Most opinions of the appellate courts have indulged in a form of automated verbiage or knee-jerk terminology which has very little idea content. The prime example of this is the phrase ‘abuse of discretion,’ which is used to convey appellate court’s disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the
Such criticisms of the availability of relief in original jurisdiction actions are not offered to suggest that the supreme court should have to reach the merits of every original jurisdiction action filed. Courts have always been able to avoid decisions for prudential reasons, and the absence of transparent discretion in assuming jurisdiction would undoubtedly give rise to other doctrines of avoidance. The current exercise of discretion in electing to assume original jurisdiction, however, seems in part to be the product of the supreme court’s own limited resources and, in part, the result of the earlier-noted barrier to entry (whether tacit or otherwise) precluding participation by the Oklahoma Court of Civil Appeals. If the court of civil appeals participated in such decision-making, the volume of original jurisdiction actions in which the courts actually issued writs and completed written opinions would almost assuredly increase. For now, however, it appears that litigants in Oklahoma’s state courts have recourse only to the justices of the supreme court, and to their staff of referees, who typically act as the initial screeners of the justiciability and merits of such actions.

future. The phrase ‘abuse of discretion’ does not communicate meaning.”) (quoting Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 SYRACUSE L. REV. 635, 659 (1971)). Such observations explain why the absence of available decisions concerning pretrial issues is often unfair not only to litigants, but also to district judges.


19. See Perschbacher & Bassett, supra note 17, at 2 (“The political and judicial response to the so-called litigation ‘crisis’ has had a profound and little-noticed effect on the traditional place that legal norms occupy in law . . . . Law itself has been privatized, obscured and even erased, most often by its protectors and guardians: judges and the courts . . . . Doctrines that emphasize discretionary review, standards of review, and doctrines such as harmless error serve to obscure and distort the application of legal norms.”).

20. See supra note 9.


22. Regrettably, even this solution may pose an additional obstacle to litigants other than the parties themselves, inasmuch as OKLA. SUP. CT. R. 1.200(c) provides that, unless “[a]pproved for publication by the Supreme Court,” even “published” decisions of the court of civil appeals have only “persuasive” value. See, e.g., Perschbacher & Bassett, supra note 17, at 42-43 (characterizing the use of unpublished opinions in combination with rules precluding citation to them as “law elimination”).

23. See, e.g., 6 ELLIS & MUCHMORE, supra note 11, § 22.05 (“The Referee will be the first to review the application, petition, supporting brief, response, and appendices. The Referee will usually hear the argument in the matter, and prepare a memorandum to the Supreme Court expounding the essential facts, relevant law, the positions of the parties, and stating a reasoned
III. The Availability of Extraordinary Relief

The availability of relief in original jurisdiction actions apparently became a cause for renewed concern in 2003, as the Oklahoma Supreme Court issued repeated warnings about the availability of the "extraordinary relief" of mandamus and prohibition. First, there was Christian v. Gray,24 in which the court adopted federal standards concerning admissibility of expert testimony.25 Christian was followed by Heffron v. District Court of Oklahoma County,26 in which the court analyzed when courts must compensate nonparty witnesses compelled to provide testimony by subpoena at rates in excess of the standard statutory fee.27

In Christian, in which the Daubert issues were raised in the trial court as part of a motion in limine to exclude the testimony of an expert witness, the Oklahoma Supreme Court warned litigants who might otherwise cite the decision in an effort to seek review of trial court rulings on motions in limine that its "assumption of jurisdiction in this matter [was] tied to the importance of this first-impression issue for a procedure to be used by courts statewide," and "caution[ed] parties that this Court will not serve as a pretrial reviewing court" with respect to such motions.28 In Heffron, the court's admonition was both more general and more pronounced. The court explained that it will "entertain original jurisdiction to control a trial court's handling of pretrial discovery matters only in rare cases."29 After further emphasizing that it will not serve as a pretrial reviewing panel for trial court orders, the court assumed original jurisdiction in Heffron "because the questions involved [were]

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27. Id. ¶ 33, 77 P.3d at 1084.
28. Christian ¶ 3, 65 P.3d at 596. Given the atypical posture of a Daubert-based motion in limine — which is based on the "gatekeeper" responsibility imposed on trial courts, rather than a general mandate to exercise discretion in the "interests of justice" — the Oklahoma Supreme Court's decision to include such a disclaimer is perplexing. Surely the court did not intend to foreclose review of other matters sometimes addressed in limine in which a trial court's discretion is curtailed by statute or by case law — such as one litigant's attempt to cause another either to divulge the content of a communication shielded from discovery by 12 Okla. Stat. § 2502 (Supp. 2002), or to be forced to assert the privilege in a manner precluded by 12 Okla. Stat. § 2513(B) (2001).
29. Heffron ¶ 3-4, 77 P.3d at 1073-74 (internal citations omitted).
primarily ones of first impression . . . and the record show[ed] an unauthorized use of judicial force by the trial court . . . ."\(^{30}\)

Christian and Heffron leave litigants seeking guidance concerning pretrial issues with a meaningful measure of hope that the court understands that its delivery of published decisions is a public good.\(^{31}\) At least in cases involving issues of first impression, which may benefit other litigants, the court will disregard its oft-repeated abstention posture\(^{32}\) concerning original jurisdiction actions and issue not only one or more writs,\(^{33}\) but also a published opinion.

By late 2003, however, the court did not appear to take either the Christian/Heffron criteria or its traditional "extraordinary relief" mantra on original jurisdictions too seriously. The court published its "memorandum opinion"\(^{34}\) in Farmers Insurance Co. v. Peterson,\(^{35}\) a decision that involved "no new points of law" and no additional "value as precedent."\(^{36}\) Farmers held that a plaintiff cannot compel a defendant-insurer to comply with

30. Id. ("In our view, this opinion will promote the interest of judicial economy and act as a clarifying vehicle for courts statewide . . . .").

31. A "public good" is characterized by two traits: (1) one person's consumption of the good does not diminish the ability of any other person to consume the same good, and (2) nonpayers cannot be excluded. See, e.g., Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 28 (1982), reprinted in MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 134, 151 (1997). Published opinions that supply controlling authority plainly qualify as public goods. See, e.g., Perschbacher & Bassett, supra note 17, at 2 ("[P]ractices such as designating certain judicial decisions as 'unpublished opinions' and thus limiting the circumstances under which such an opinion may be used as precedent also limit the public nature of law. . . . The loss of substantive law from the public realm distorts the legal landscape, limits public testing and debate of legal norms, and devalues or destroys institutional competencies. Taken together, we refer to these developments as presaging 'the end of law.'").

32. This reference is not intended to suggest that the Oklahoma Supreme Court employs any formalized "abstention" doctrines like those associated in federal court with the decisions in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), Burford v. Sun Oil Co., 319 U.S. 315 (1943), Lehman Bros. v. Schein, 416 U.S. 386 (1974), or Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Rather, the overtly discretionary posture of the original jurisdiction action allows the court to exercise entirely unconstrained power (premised upon entirely unarticulated criteria) concerning when disputes are sufficiently presented for decision. What seems clear from the court's apparent deterrence of original jurisdiction actions, however, is that the court would prefer to exercise that discretion over a smaller body of writ petitions.

33. In Heffron, for example, the court issued both a writ of prohibition and a writ of mandamus, each with instructions to the trial court. Heffron ¶ 33, 77 P.3d at 1084.

34. See OKLA. SUP. CT. R. 1.200(a) (providing that opinions "shall be prepared in memorandum form" unless specific criteria apply, including the establishment of a new rule of law or the alteration or modification of an existing rule).


36. OKLA. SUP. CT. R. 1.200(b).
discovery requests that would have required manual examination of 600,000 closed files spanning three years.\(^37\) Such a decision was undoubtedly correct, both specifically as a resolution to the issue presented by the litigants, and more generally as an exemplar of the types of pretrial issues in which appellate courts should provide published guidance. The supreme court failed, however, to acknowledge the holdings of Christian and Heffron in Farmers, leaving the current status of original jurisdiction for pretrial issues uncertain.

One possible inference is that Farmers signals a departure from Christian and Heffron because the court recognized the importance of issuing published guidance concerning pretrial issues, even in the absence of an issue of first impression. Regrettably, however, such an inference appears to be without basis in fact, or, at least, belied by the resolution of two other original jurisdiction actions also before the Oklahoma Supreme Court in 2003.\(^38\) These other two cases involved issues that will invariably recur in civil litigation, making them ostensibly attractive candidates for resolution by "extraordinary" writ. Yet, in each instance, the court either declined to issue a published opinion or declined entirely to reach the merits of the issue presented, thereby leaving future litigants to pick the same battles again without any assistance from Oklahoma authority.\(^39\)

IV. Recent Unreported Original Jurisdiction Actions

A. Depositions of "Apex" Employees

In the first of the unreported original jurisdiction actions,\(^40\) the plaintiffs noticed the deposition of the chairman and chief executive officer of a corporate entity related to the defendants.\(^41\) Neither the designated deponent,

\(^{37}\) Farmers \& 2, 81 P.3d at 660, 662.


\(^{39}\) The author's knowledge of these entirely unreported cases is the result of his participation as counsel. References to those cases in this work are not offered as an effort to relitigate the court's dispositions, but rather as an illustration of both the unpredictability of the court's original jurisdiction and the surprising absence of Oklahoma authority related to the issues presented. A second, though by no means secondary, purpose served by reference to these cases is to share with the community of lawyers — in a manner that cannot otherwise be accomplished in the absence of either a written opinion from the court or use of another publication — the results in those unreported cases.


\(^{41}\) In original jurisdiction actions seeking mandamus or prohibition, the party seeking the writ is referred to as the petitioner, while the party against whom the writ is sought — typically
who resided outside of Oklahoma, nor the corporate entity, which the designated deponent served as an officer, were parties to the underlying action.42

The defendants sought a protective order in the trial court, urging that the deponent was not a party, and therefore could not be compelled to appear by deposition notice alone.43 Instead, the defendants argued that the plaintiffs could only secure the deponent’s deposition through service of a subpoena44 and could not require his appearance in Oklahoma in any event.45 The defendants also argued that the deponent had no unique or superior personal knowledge of discoverable information relating to the plaintiffs’ claims, and that the plaintiffs had not sought to discover such information through less intrusive means, such as a corporate-representative deposition notice.46 The trial court nonetheless denied the protective order, ultimately issuing an order requiring the deponent to appear for deposition in Oklahoma.47 The defendants then commenced an original jurisdiction action, seeking a writ of mandamus to require the entry of a protective order, or a writ of prohibition to preclude enforcement of the trial court’s order requiring the deponent’s appearance in Oklahoma.48

The original jurisdiction action thus presented the Oklahoma Supreme Court with questions that cut across multiple aspects of previously undefined Oklahoma law. Under the Oklahoma Discovery Code, deponents are divided into two categories: parties and nonparty witnesses.49 While a witness may generally be deposed only in the county of his residence or a similarly

the district judge — is the respondent. The other party to the district court action, whose task is to defend the challenged action (or inaction) of the district court, is the real party in interest. See OKLA. SUP. CT. R. 1.301, form nos. 13 & 14.

42. The plaintiffs contested this point as a factual matter, contending that a press release established that the entity that employed the prospective deponent was the successor of one of the named corporate defendants. Appeal to Response of Real Parties in Interest, Lindley I, No. 99,563. The court did not purport to resolve that factual dispute. Lindley I, No. 99,563.

43. See, e.g., 12 OKLA. STAT. § 3230(A)(1) (Supp. 2002) (explaining that the attendance of nonparty “witnesses” may be compelled only by subpoena).

44. See id. § 2004.1.


46. See 12 OKLA. STAT. § 3230(C)(5) (authorizing the entity whose deposition is sought to designate one or more persons to testify concerning subjects specified by the party seeking the deposition).

47. Appeal to Brief of Petitioner, Lindley I, No. 99,563, at APP 43-44.


49. 12 OKLA. STAT. § 3230(B).
convenient location, a party may be deposed, among other places, "in the county where the action is pending." Within this statutory framework, the noticed deponent was certainly a nonparty witness, who the trial court could not compel to appear inside Oklahoma by either deposition notice or subpoena. That fact alone should have been sufficient to demonstrate that the trial court clearly exceeded its authority, thereby warranting the issuance of prohibition.

Even without this straightforward statutory argument, however, this case also presented the court with an opportunity to rule on an alternate ground that demonstrated an equally problematic abuse of discretion. Decisions by both state and federal courts have recognized that depositions of so-called "apex" personnel — that is, high-level employees of a corporate or other business entity — create a significant potential for harassment and abuse of discovery when a court permits the depositions before the exhaustion of less-intrusive discovery methods. Accordingly, while depositions of apex personnel are undoubtedly appropriate when the would-be deponent is a key figure having personal involvement in the events giving rise to the claim, such depositions are entirely improper when the would-be deponent is not involved in those events in any way and has no personal knowledge of facts related to the claim. Indeed, this discovery tactic presumably implicates the precise type of "annoyance, embarrassment, oppression or undue burden or expense"

50. See id. § 3230(B)(1).
51. Id. § 3230(B)(2).
52. A slight change in the facts could have made the issue somewhat more difficult. Had the deponent's corporate employer in fact been present in the underlying action as a defendant, the court would have been confronted with the question of whether corporate officers should be treated as "parties" pursuant to 12 OKLA. STAT. § 3230(B)(2), even if they are not named as parties in their individual capacities. Federal decisions have recognized that a party may direct a deposition notice to an officer, director, or managing agent of a corporate party and require his appearance without a subpoena. See, e.g., Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 502, 504 (D. Utah 1997); see also FED. R. CIV. P. 30(b)(6). Such decisions, however, should not be read to suggest the propriety of the same result under Oklahoma law because the federal decisions do not require the corporate officer's appearance for deposition in the jurisdiction in which the action is filed. Under 12 OKLA. STAT. § 3230(B)(2), however, the decision to characterize an officer or director as a "party" would yield the puzzling and unwarranted result that the deponent could be compelled to appear for deposition in Oklahoma, irrespective of his location or the tenuousness of his corporation's contacts with Oklahoma.
expressly contemplated by Oklahoma’s Discovery Code as proper bases for granting protective orders.\(^5\)

Instead of embracing either the statutory rationale demonstrating an absence of power in the district court, or the apex deposition rationale requiring the entry of a protective order, the Oklahoma Supreme Court issued only a brief order assuming original jurisdiction and issuing an unspecified writ\(^6\) to preclude the district judge from enforcing his order requiring the named deponent to appear for deposition in Oklahoma.\(^7\)

Although the defendants certainly appreciated the result of the court’s intervention, the court’s manner of disposition — through summary order without opinion of any kind — left the state of Oklahoma law less settled than it was before the action’s commencement. Moreover, the difference in rationales could have had a significant impact on future litigation. Had the court endorsed and adopted the apex deposition rationale, it would have clarified discovery procedures related to apex deponents located both inside

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55. 12 Okla. Stat. § 3226(C)(1). Such realizations led the Supreme Court of Texas, in the context of an original jurisdiction proceeding, to issue the following guidelines for “apex” depositions:

When a party seeks to depose a corporate president or other high level corporate official and the official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official’s affidavit denying any knowledge of relevant facts, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of the discoverable information. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods. . . . [T]hese methods could include the depositions of lower level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation. After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the trial court should modify or vacate the protective order as appropriate. As with any deponent, the trial court retains discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place.

Crown Central, 904 S.W.2d at 128.

56. The order did not indicate whether the supreme court had issued a writ of mandamus or a writ of prohibition. Texaco, Inc. v. Lindley, No. 99,563 (Okla. Sept. 8, 2003) (Lindley I).

and outside Oklahoma, while the statutory rationale would not have precluded the enforcement of subpoenas directed to apex personnel located within Oklahoma. Instead, the court's brief, result-oriented order effectively "internalized" any benefits that could otherwise have accrued to future litigants.  

B. Inadvertent Production of Privileged Documents

The facts from the second unreported original jurisdiction action are the same as the previous original jurisdiction action. In this unreported decision, the district court ordered the defendants to produce documents within a compressed, ten-day time period. To respond in a timely manner, the defendants employed over thirty lawyers, as well as paralegals and other assistants, and instructed the reviewers about identification of attorney-client communications and documents reflecting attorney work product. In the course of reviewing over eight hundred boxes of documents, some privileged documents were inadvertently produced. Among these documents was a legal analysis prepared by an in-house lawyer that was explicitly labeled privileged and confidential. Similarly, many of these documents sought or transmitted legal advice, and thus were plainly within the class of communications shielded from discovery by Oklahoma law.  

Upon discovery of the inadvertent production, the defendants immediately requested return of the documents from the plaintiffs. After the plaintiffs refused to return the documents, the defendants sought an order compelling the return of the privileged communications. The defendants argued that a

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58. Many private decisions create unintended benefits or "positive externalities" for third parties not directly involved in the activities. A published decision by the Oklahoma Supreme Court could have created positive externalities for future litigants, even if it addressed fewer than all of the issues and arguments offered by the parties. Instead, by issuing only a summary order and by declining to publish, the court effectively limited all of the benefits of its resolution to the parties themselves. The same basic issue recurred in American Finance Group v. Pearman, No. 100,232 (Okla. Feb. 27, 2004), but before the court could reach any resolution, the parties reached an agreement disposing of the underlying district court action.


60. Appeal to Brief of Petitioner, Lindley II, No. 99,706, at APP 42.

61. Id. at APP 18.

62. Id.

63. Id.

64. Id.

65. See 12 OKLA. STAT. § 2502(B) (Supp. 2002).


67. Id.

68. Id. at APP 1-2.
confidentiality agreement executed by the parties expressly contemplated the possibility that privileged documents might be inadvertently produced and expressly precluded claims of waiver by the opposing litigant. The trial court responded with a written order that prevented the plaintiffs from disseminating the documents to third parties, but did not restrict the plaintiffs’ use of the documents in the underlying action. Ultimately, the defendants petitioned for a writ of mandamus compelling the trial court to require the return of the original documents and any copies, and to preclude the plaintiffs from any additional use of the documents.

Before the Oklahoma Supreme Court, the defendants again argued that the parties’ confidentiality agreement precluded the result in the trial court and, hence, that the trial court had abused its discretion by refusing to enforce the parties’ agreement. The defendants also argued that the supreme court should find no waiver because the documents were inadvertently produced during a time-compressed, court-ordered production, and that similar circumstances had led federal courts to conclude that the producing party did not waive any privilege.

The plaintiffs resisted on three grounds. First, the plaintiffs contended that the documents were never privileged because they reflected only business communications that were never intended to be confidential. Second, the

69. Id. The trial court did not offer any explanation for its decision. Id. At a subsequent hearing, the trial judge explained orally that the basis for his decision was his belief that the defendants’ voluntary surrender of the documents in question — even if inadvertent — waived any claim of privilege within that action. Id. at APP 10-11.

70. Lindley II, No. 99,706.


72. See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) (rejecting the position that inadvertent production amounts to waiver, and holding that “the better-reasoned rule” is that “inadvertent production by the attorney does not waive the client’s privilege”); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (concluding that because the producing party established that production of twenty-two privileged documents among 16,000 pages produced and inspected was inadvertent, there was no “knowing waiver” of privilege). But see W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775-76 (W.D. Okla. 1976) (in reviewing a claim of waiver through inadvertent production of privileged documents in the context of a federal question (patent) claim, the court did not purport to determine the extent of waiver occasioned by an inadvertent production when Oklahoma law governs the underlying claim).
plaintiffs argued that the defendants circulated the documents outside the corporate "control group." 73 Finally, in the event the supreme court found the privilege to attach as an initial matter, the plaintiffs contended that the documents were subject to the crime/fraud exception to the attorney-client privilege, 74 and that any privilege had been waived through inadvertent production, irrespective of the parties' confidentiality agreement.

The Oklahoma Supreme Court had multiple opportunities to address a number of first impression issues that would have assisted future litigants, 75 including: (1) the enforceability and effectiveness of confidentiality agreements providing for nonwaiver of privilege as to inadvertently produced documents; (2) if such agreements will not be enforced, whether inadvertent production of attorney-client communications waives the privilege under Oklahoma law; and (3) whether Oklahoma's attorney-client privilege will follow the U.S. Supreme Court's decision in Upjohn Co. v. United States, 76 which concluded that the privilege afforded to attorney-client communications in the corporate context extends beyond any plausible "control group." 77 A decision concerning any of these issues would have provided significant assistance to (1) district courts, who now face such matters without meaningful guidance; (2) Oklahoma lawyers, who cannot rely upon factually similar federal decisions as predictors of the actions of Oklahoma district courts, despite the Oklahoma Supreme Court's often repeated indications of their persuasive value; 78 and (3) litigants themselves, especially corporate litigants, who must decide whether the costs of uncertain judicial outcomes are sufficiently high to cause them to conduct certain types of business only in forums having both more certain, and often more favorable, rules. 79

Instead, the supreme court elected not to reach the merits of any issue, issuing

73. See supra note 6 and accompanying text.
74. See 12 OKLA. STAT. § 2502(D)(1) (Supp. 2002).
75. That rationale — resolving issues of first impression to assist other litigants — was the precise explanation given by the Oklahoma Supreme Court for its decisions in Christian and Heffron. See supra note 31 and accompanying text.
77. Id. at 392.
79. To deny that such factors animate corporate actors is to indulge a persistent naiveté. See supra note 7. As an illustrative example concerning the impact of differing substantive legal rules related to the production of natural gas in various jurisdictions, see M. Benjamin Singletary, Royalty Litigation on Processed Gas: Valuation, Post-Production Activities and the Marketable Condition Rule, 55 INST. ON OIL & GAS L. & TAX’N 8-1 (2004).
a one-line termination of the matter in which it declined to assume original jurisdiction.\(^80\)

Such a (non)decision is a loss to the Oklahoma legal community not only because of the absence of published analysis concerning recurring issues — which in turn emboldens district courts to continue making entirely discretionary decisions concerning claims of privilege — but also because the set of published (and, apparently, unpublished) Oklahoma authority continues to lack any decision in which the supreme court has issued a writ to defend a claim of attorney-client privilege in a pretrial setting.\(^81\) This (non)decision is also problematic because of the widely acknowledged importance of attorney-client communications.\(^82\) Although the Oklahoma Supreme Court may have believed that any error could have been corrected on appeal following the entry of a final judgment,\(^83\) such a rationale is misplaced when applied to a claim of privilege. While Oklahoma law contemplates that a claim of privilege is not defeated by an erroneously compelled disclosure,\(^84\) such a principle is not useful to litigants if it only means that the case in which the document is disclosed may be reversed and retried without reference to the privileged communication.\(^85\) Rather, the attorney-client privilege protection

\(^{80}\) Such a decision is "not a decision on the merits . . . ." Lowrance v. Patton, 1985 OK 95, ¶ 8, 710 P.2d 108, 110.


\(^{82}\) See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); see also EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 3 (4th ed. 2001).

\(^{83}\) See 12 OKLA. STAT. § 696.3 (2001).

\(^{84}\) See id. § 2512(1).

\(^{85}\) This appears to be the limited purpose of the statute, which is ostensibly concerned more with the problem of compelled disclosure during trial than during discovery. See, e.g., 3 LEO H. WHINERY, OKLAHOMA EVIDENCE: COMMENTARY ON THE LAW OF EVIDENCE § 35.15 (2000) ("The remedy afforded by the statute is the exclusion of the evidence when the earlier disclosure was compelled erroneously and affords an alternative to confrontation, contempt and the exhaustion of legal recourse to sustain the privilege."); see also STEVEN GOODE & OLIN GUY
has value only if an opposing litigant’s use of the document in the interim — irrespective of the scope of that use — can later be contained. In other words, the supreme court must preclude the opposing litigant from arguing that the district court’s determination that a document was not privileged necessarily means that the content of the communication is forever public and may be used in other actions, even if it cannot be used in the action remanded for a new trial. 86

In the absence of such an understanding, the supreme court’s (non)decision exemplifies the nightmare litigation scenario in which a trial court’s “abuse of discretion” will not be subject to prompt appellate correction — whether because of limited judicial resources, an entrenched (though now plainly outdated) view of the role of “extraordinary” writs, a preference for resolution of such issues only after trial, or otherwise. The costs of such outcomes are simply too high for the litigants whose disputes are at issue, future litigants, and Oklahoma law itself.

V. Conclusion

The exercise of discretion in pretrial procedure is both necessary and appropriate in the resolution of limitless possible issues unique to various combinations of litigants and claims. But neither that obligatory measure of discretion, nor the desirability of resolving some cases without publishing detailed legal analyses, can explain the scope of Oklahoma’s decision deficit or justify the consequences it imposes on litigants.

Other states, including Missouri and Texas, have not ignored the problems of unchecked discretion in pretrial procedure. In what appears to be increasingly routine practice, other jurisdictions recognize the importance of pretrial review of matters that are normally committed to the discretion of the trial courts. In 2003, the Oklahoma Supreme Court took significant steps in that direction and published the decisions in Christian, Heffron, and Farmers, correctly recognizing the public value that such published decisions create. At the same time, however, it declined to publish an opinion concerning its issuance of a writ to preclude the deposition in Oklahoma of an apex

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86. Such a result is not precluded by any known Oklahoma law, and would be entirely consistent with the U.S. Supreme Court’s prudential rejection of the “control group” test in Upjohn. Moreover, such a decision — which could easily be reversed by the state legislature’s adoption of a more precise statute — would surely not require the court to engage in any form of “judicial activism.” Any decision so holding, however, would still need to be both written and published in order to be useful to future litigants.
employee located outside of Oklahoma, and declined even to assume original jurisdiction in an action seeking review of a district court's resolution of inadvertently produced attorney-client communications. Given the importance of the privilege, the latter review opportunity, even more so than the former, presented multiple issues about which published Oklahoma authority would have been especially useful.

Accordingly, whether the examples of intercession set by Christian, Heffron, and Farmers will continue remains unclear. If the Oklahoma Supreme Court's announced reluctance to issue writs is the product of the sheer volume of work that acceptance of such a task would impose, it should not hesitate to involve the Oklahoma Court of Civil Appeals. If the court's reluctance is the product of its prior decisions encasing mandamus and prohibition in the rhetoric of the "extraordinary" and the "rare," the court should discard such traditions as immaterial to modern litigation, especially if the court is actually issuing significantly more writs than its reported opinions reflect. Irrespective of the court's motivation, however, when the court does decide to assume original jurisdiction, it should make its resolution of pretrial issues available to lawyers other than those representing the litigants involved in the action. In the long run, the increased certainty that results from publication may well assist the Oklahoma Supreme Court in making relief by mandamus and prohibition both extraordinary and rare.