NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

MARK FARRIS and JOLANA FARRIS,

Plaintiffs/Appellants,

vs.

PRESTON W. MASQUELIER and CANDY MASQUELIER,

Defendants/Appellees.

Case No. 121,463

APPEAL FROM THE DISTRICT COURT OF
CUSTER COUNTY, OKLAHOMA

HONORABLE JILL WEEDON, TRIAL JUDGE

AFFIRMED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Mark and JoLana Farris appeal the district court's award of $341,876.56 in attorney fees and costs to Preston and Candy Masquelier after the Masqueliers successfully defended a lawsuit brought by the Farrises. On review, we find no error in the court's fee decision and thus affirm.

BACKGROUND

The underlying facts are outlined in detail in *Farris v. Masquelier*, 2022 OK 91, ¶¶ 2-7, 524 P.3d 942, 944. The following synopsis is borrowed heavily from that opinion.

The Farrises own property in Custer County, Oklahoma, downstream from property owned by the Masqueliers. Both properties abut a tributary of the South Canadian River known to the parties as Crow Springs Creek. The creek begins from an underground source on the Masqueliers' property and flows through their property before reaching the Farrises' and finally running into the Canadian River.

In January 2014, the Masqueliers constructed a dam on their property for the purposes of impounding some of the water from the creek. When the Farrises discovered the construction of the dam, they filed an application for an appropriation permit from the Oklahoma Water Resources Board seeking to appropriate a portion of the creek water to irrigate their crops and trees. The Masqueliers then filed their own application for a permit from the OWRB also seeking to appropriate some of the creek water for irrigation and for sale to oil and gas companies.

The Farrises protested the Masqueliers' application, citing interference with the Farrises' prior use of the stream. The OWRB ultimately issued permits, with conditions, to each applicant. JoLana Farris's permit allowed for an appropriation of 68.75 acre-feet of stream water per year to irrigate fifty-five acres of trees and crops, as requested. The OWRB noted in its findings that the Farrises would need to implement a plan to impound or store water to reliably guarantee the 68.75 acre-feet per year at the time it was needed. Likewise, the OWRB imposed conditions upon the Masqueliers to continually release a certain flow to the downstream property owners. The OWRB further conditioned the permit on the Masqueliers' agreement to not interfere with then-existing domestic and appropriative uses of the downstream owners. The OWRB permit decision was not appealed by either party.

In April 2016, the Farrises filed suit against the Masqueliers in district court claiming that, as a result of the Masqueliers' dam, they no longer received adequate water flow to meet their riparian and appropriative rights. The Farrises further claimed injury to their real property and damages from a resulting inability to farm their land. They also sought an injunction to have the dam removed from the stream. After trial, the jury returned a verdict for the Masqueliers on all claims, and the court denied the injunction. The Masqueliers subsequently sought fees as the prevailing party, but the court initially found that the case was a non-fee-bearing water rights case. Both parties appealed to the Supreme Court in *Farris v. Masquelier*, 2022 OK 91, 524 P.3d 942, in which the Court affirmed the judgment below, but reversed the denial of fees, finding

that the Farrises had pled fee-bearing property damage claims pursuant to 12 O.S. § 940.

On remand, the primary question was one of apportionment of time among the various claims characterized as being fee-bearing and non-fee-bearing. The Masqueliers argued that all time spent on their defense was compensable under § 940 except for time spent defending the Farrises' unjust enrichment claim for the value of lost water, for which they deducted $7,565 from over $350,000 in claimed fees. In its fee order of June 20, 2023, the trial court essentially agreed, finding that all the litigated claims, with the exception of time spent defending the unjust enrichment claim, were fee-bearing pursuant to § 940, although the court did make an additional reduction of $4,398, for a total fee award of $341,876.56. The Farrises now appeal, arguing that the amount of time the Masqueliers spent defending claims that were fee-bearing pursuant to § 940 was substantially less than the court allowed.

STANDARD OF REVIEW

The reasonableness of the amount of an attorney fee award is reviewed for abuse of discretion. *State ex rel. Comm'rs of the Land Office v. Stephens & Johnson Operating Co., Inc.*, 2020 OK 84, ¶ 5, 474 P.3d 869. "[W]here the question of whether an attorney fee is authorized by law is presented, such a claim is reviewed *de novo*. Under this standard, this Court affords a 'non-deferential, plenary and independent review' of the trial court's legal ruling." *Id.*

ANALYSIS

The basic issue was already decided by the Supreme Court in the first case. Therein, the Court states:

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

Farris, 2022 OK 91, ¶ 36.

In the context of a § 940 fee inquiry, the Supreme Court expressly identified five pled allegations—"loss or injury to cattle; loss or injury to fruit trees and row crop vegetables; loss or injury to hunting operations; loss of irrigation capabilities; [and] the inability to water causing weeds to grow on their property damaging their cattle's ability to feed on necessary grasses"—that constituted property damages beyond a simple diminution in the property's market value caused by the reduced water flow. *Id.* ¶ 35. The question of whether these claims of property damage were at issue is *res judicata*. The Farrises argue, however, that this case was still *primarily* a non-fee-bearing water rights case. They also argue that their claimed economic damages were separate from any diminution in the market value of their property and were not fee-bearing claims. We will discuss each of their arguments in turn.

The Farrises appear to first argue that, when time is spent on elements common to both fee-bearing and non-fee-bearing claims, the court should subtract time that supports the non-fee-bearing claim from the fee, and only

time that exclusively supports a fee-bearing claim may be considered. This is opposite of the way apportionment has traditionally operated. Historically, this Court has found that time spent on proving elements common to both fee-bearing and non-fee-bearing claims is fully compensable. *See, e.g., Cline v. DaimlerChrysler Co.*, 2005 OK CIV APP 31, ¶¶ 22–23, 114 P.3d 468 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983)). Such time was sometimes referred to as being "inextricably intertwined" with the fee-bearing claim, although the phrase—now verboten—was something of a misnomer.[1]

The recent case of *U.S. Bank Nat'l Ass'n, supra,* note 1, makes clear that time spent litigating elements and issues required to prevail on, or against, a fee-bearing claim is completely compensable, and no principle in Oklahoma law requires that time properly spent proving facts and law necessary to defend a fee-bearing claim should be reduced because the same time might also support the defense of a non-fee-bearing claim. The choice to intermix a fee-bearing claim that has common elements with a non-fee-bearing claim lies with the plaintiff,

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[1] In *U.S. Bank Nat'l Ass'n as trustee for Sasco Mortgage Loan Tr. 2004-GEL2 Mortgage Backed Notes, Series 2004-GEL2 v. Hill,* 2023 OK 86, 540 P.3d 1, the Supreme Court held that "Oklahoma does not have an 'inextricably intertwined' theory upon which attorney fees do not have to be apportioned if the claims are closely related." *Id.* ¶ 12 (citing *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 1001-02 (10th Cir. 2008)). Examining this decision further, however, it does not appear to change existing case law because neither the Supreme Court nor this Court has historically approved of fees simply because a claim is "closely related" to a fee-bearing claim. Instead, *U.S. Bank Nat'l Ass'n* confirms the essential difference between claims that are merely "closely related" and claims that require litigation of the same elements. It holds that "[a]n attorney's fee award is recoverable to a prevailing party only for the work attributable to a claim for which fees are statutorily recoverable," as opposed to work attributable to a claim that is only "closely related" to the fee-bearing claim. *Id.* ¶ 12.

and the Farrises could have avoided fees to either party by seeking only the remedies provided in a water rights case.

The Farrises next argue that, even pursuant to this rule, most of the claimed attorney time was necessary *only* to defend the non-fee-bearing water rights claim. We find it clear, however, that defending the "water rights claim" was both necessary and central to defending the property damage claim. The property damage arose only through a purported breach of the Farrises' water rights. The Supreme Court was also entirely clear in *Farris* that the Farrises raised property damage claims of "loss or injury to cattle," "loss or injury to fruit trees and row crop vegetables," "loss or injury to hunting operations," "loss of irrigation capabilities," and a "diminution in their property's value caused by the impairment of the Creek's natural streamflow." *Farris*, ¶ 35.

The Farrises argue, however, that in addition to these claims identified by the Supreme Court, they brought other claims of purely economic damages not related to damage to land, and time spent defending these claims must be removed from any fee application. We note that the Farrises did not raise these apportionment arguments in their initial response to the Masqueliers' fee request in the trial court and, indeed, did not raise any apportionment arguments in the briefing of the fee question in the first appeal. Prior to remand, their argument was that this was not a fee-bearing case, *full stop*. It was only after remand, when they lost on that question, that the Farrises raised the apportionment question for the first time. While it is far from clear that they should be permitted to make

this new argument now, the question is somewhat academic given that we find the trial court's order of fees to be legally sound for the following reasons.

Most significantly, defending the claim of damage to land inherently required defending the flow impingement claim. The claimed damage to land arose *solely* from the alleged improper impingement of the flow of Crow Springs Creek. The Farrises chose to add a fee-bearing property damage claim to their non-fee-bearing riparian rights claim that was dependent on the same question: did the Masqueliers improperly restrict the stream flow? As we have previously noted, no principle in Oklahoma law requires that time properly spent proving facts and law necessary to defend a fee-bearing claim should be reduced because the same time might *also* support the defense of a non-fee-bearing claim.

Further, the claimed economic damages, such as diminished future income because of a diminished ability to support cattle over a fifty-year period due to a lack of water, were claims of consequential damages springing from the original injury to property by restricting the flow of the creek. They have no apparent independent cause outside that injury. Hence, time spent on the fee-bearing defense of the injury to property claim was necessary and central to defending these claims. If there was time spent on defense of non-injury-to-property claims outside that already deducted, we find no record sufficient to show error by the trial court.

The Farrises finally argue that the amount of fees was inherently unreasonable in light of the amount of claimed property damages. In doing so, the Farrises essentially resurrect their theory that their only fee-bearing claim

was the claimed diminution in the market value of their real property—approximately $41,000. We reiterate that the Supreme Court expressly identified five types of injury to property *in addition* to this diminution claim. *Farris,* 2022 OK 91, ¶ 35. These additional damages totaled some $277,985. This sums up to total damages in excess of $300,000. A fee of $ 341,876.56 is not inherently unreasonable in that context.

As we previously noted, the choice of whether to bring a mixture of fee-bearing and non-fee bearing-claims—and hence run the risk that time necessary to defend both fee-bearing and non-fee-bearing claims may become compensable as part of a fee request—is left entirely to the judgment of the parties. We find no error in the court's decision that the time claimed by the Masqueliers was necessary to the defense of the fee-bearing claims here. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

FISCHER, J., and WISEMAN, P.J. concur.

February 13, 2025