IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT and BRENDA PERRY,	)	
	)	
Plaintiffs/Appellees/Counter-Appellants,	)	
	)	
v.	)	Case No. 109714 (consolidated w/
	)	Nos. 109715 and 109716)
GRAND RIVER DAM AUTHORITY,	)	
	)	
Defendant/Appellant/Counter-Appellee.	)	
DAVID and STACY PRYOR,	)	
	)	
Plaintiffs/Appellees/Counter-Appellants,	)	
	)	
v.	)	
	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant/Appellant/Counter-Appellee.	)	
JOHN and JANET SHAW,	)	
	)	
Plaintiffs/Appellees/Counter-Appellants,	)	
	)	
v.	)	
	)	
GRAND RIVER DAM AUTHORITY,	)	
	)	
Defendant/Appellant/Counter-Appellee.	)	

COMBINED REPLY AND ANSWER BRIEF OF APPELLANT/COUNTER-APPELLEE GRAND RIVER DAM AUTHORITY

Appeal from Ottawa County
Case No. CJ-2011-00381-A, B, and C
Judge Robert E. Reavis

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INTRODUCTION

Through its operation of the Pensacola Dam, the Grand River Dam Authority (GRDA) exercises its statutory authority to control, store, preserve, and distribute the waters of the Grand River and its tributaries for the purposes of irrigation, conservation, and the production of electricity. 82 O.S.2011 § 861. Because flooding from the dam can occur, GRDA is authorized to condemn land and to be subject to inverse condemnation and tort law. *Id.* at § 862(h) and (l).

In this inverse condemnation case, Plaintiffs have spent much of their Combined Answer Brief/Brief-in-Chief citing general principles of property law, and not very much on analyzing how the trial court applied those principles to the facts. In order to concentrate on the trial court's various decisions in these three consolidated appeals, GRDA will briefly summarize its arguments in its Brief-in-Chief, point by point, and focus on Plaintiffs' arguments.

The major theme of Plaintiffs' Brief is that they are entitled to be "made whole" for their damages due to flooding. But nowhere in their Brief do Plaintiffs explain why they waited until 2001 to file claims for damages that occurred as early as 1986 and in no case later than 1995. With any legal remedy comes the responsibility to act within the limits of the law. Here that means the responsibility to timely file a claim or lawsuit, which is the same responsibility required of any party. Plaintiffs failed to meet the law's requirements, and thus cannot recover damages for cleaning and repairing their property (which is one of the subjects of GRDA's appeal) and for damage to personal property (the subject of Plaintiffs' counter-appeal). Beyond that, Plaintiffs' property was either not taken by GRDA's operation of the dam, or was taken when the floods first caused substantial interference with their use of the property.

GRDA'S REPLY BRIEF'S ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS DAMAGES FOR DIMINISHED VALUE, BECAUSE NO TAKINGS BY GRDA OCCURRED.

Inverse condemnation requires a taking, and a taking occurs "where land is physically taken and occupied, where government action substantially interferes with the use and enjoyment of property, or where government overtly exercises dominion and control over property." *Material Serv. Corp. v. Rogers County Bd. of Comr's*, 2012 OK CIV APP 17, ¶ 5, 273 P.3d. 880, 883; *Calhoun v. City of Durant*, 1998 OK CIV APP 152, ¶ 15, 970 P.2d 608, 613. The Perry and Pryors' property cannot be said to have been taken through inverse condemnation by GRDA, because they continued to exercise dominion and control over their properties for years after the last flood, in 1995. The undisputed facts show that after every flood, the Perrys and the Pryors continued to exercise control over their property in the most basic way, by continuing to live there. Their property was not taken. It was damaged, but damages are subject to a shorter statute of limitations period. Where a taking occurs, a property owner has 15 years to file a lawsuit, but "[w]here the trier of fact determines that there has been no taking, the limitation period is the three-years as set out in *Daly*." *Drabeck v. City of Norman*, 1996 OK 126, ¶ 11, 946 P.2d 658, 661, citing *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129. Damages are discussed in Part III of this Brief. The trial court erred in finding GRDA had taken the Perry and Pryors' property.

Alternatively, for the Shaws, and once again, the Pryors, if their property could be said to have been taken, then the takings occurred due to natural flooding, not due to GRDA's operation of the dam. That is because the trial court found that in 1986, 50 percent (for the Shaws) and 70 percent (for the Pryors) of the flooding was due to natural causes, not GRDA's operation of the

dam. (R. 607, Shaw Findings of Fact # 6; R. 626, Pryor Findings of Fact # 4). The property was "taken," if at all, by naturally-occurring flooding.

Plaintiffs assert in their Brief that because part of the flooding was caused by the dam, all of the taking must be caused by the dam. They cite no authority for this assertion, which is simply illogical and factually incorrect. The trial court did not make any such finding. It found that in 1986, both homes flooded due to both causes, and specifically found that the Pryors' property flooded "without the existence of the dam." (R. 626, Pryor Findings of Fact #4). It made a similar finding regarding the Shaws, by finding 50 cent of the water was due to "naturally-occurring flooding." (R. 607, Shaw Findings of Fact # 6). The point is, their homes would have been flooded even if the dam did not exist.

II. ALTERNATIVELY, IF TAKINGS OCCURRED, THE TRIAL COURT ERRED IN DETERMINING THE TIME AND THE NATURE OF THE TAKINGS.

As mentioned, a taking occurs "where land is physically taken and occupied, where government action substantially interferes with the use and enjoyment of property, or where government overtly exercises dominion and control over property." *Material Serv. Corp. v. Rogers County Bd. of Commr's*, 2012 OK CIV APP 17, ¶ 5, 273 P.3d 880, 883. The trial court found substantial interference first occurred due to the 1986 flood for the Shaws (R. 607, Shaw Findings of Fact # 7) and for the property later purchased by the Pryors. (R. 626, Pryor Findings of Fact # 4). It found substantial interference first occurred due to the 1993 flood for the Perrys (R. 617, Perry Findings of Fact # 7) and the Pryors. (R. 626, Pryor Findings of Fact # 7).

If GRDA did take the properties through inverse condemnation, those are the dates when the takings must have occurred: 1986 for the Shaws, 1986 for the property later purchased by the Pryors, and 1993 for the Perrys. Yet the trial court did not use any of those dates as the dates of

taking when it applied the rules of inverse condemnation to the facts it found. This was error, and these decisions are not subject to the deference given a trial court on questions of fact for two reasons. First, the court did not have authority to create new, contradictory law that a taking occurs when the last flood in a series of floods begins (as the trial court found in the Shaws' case), but also when the severest flood in a series of floods begins (as the trial court found in the Perrys' case). These are not factual findings, but legal rules. Second, the trial court's conclusions contradict its factual findings, simply because the court found that the takings occurred much later than it found substantial interference occurred. The law simply says, a taking occurs when substantial interference occurs. *Material Serv. Corp. v. Rogers County Bd. of Commr's*, 2012 OK CIV APP 17, ¶ 5, 273 P.3d 880, 883.

Plaintiffs assert, beginning on page 22 of their Brief, that the date of taking is really not that important. To the contrary, the date of taking is always important. "[T]he extent of the taking and the compensation for the taking are to be judged by the conditions existing at the time of the taking." *Graham v. City of Duncan*, 1960 OK 149, ¶ 21, 354 P.2d 458, 462. That is when rights are set and when statutes of limitations begin to run. At the risk of sounding harsh, the date of taking is only unimportant to someone who fails to timely file a lawsuit or who asserts he is entitled to extra damages because his property is never really taken.

GRDA appreciates the degree of deference afforded the trial court on questions of fact. Different properties will have different elevations and experience different amounts of flooding. GRDA is not challenging the trial court's factual findings, taken from the report of its referee, Dr. Forrest Holly, concerning how much water reached a certain point on a certain day. But these three cases involve the same floods, the same time periods, and the same type of damages. There is no justification for the trial court's disparate decisions that take the same facts and reach

different conclusions. And even if this Court concludes otherwise, the trial court erred in creating and then applying different rules regarding the date and form of the takings to the same essential facts. This is the equivalent of applying two different statutes of limitations to two different persons injured in car accidents on the same day.

Plaintiffs argue on page 23 of their Brief that the trial court was justified in choosing the Shaws' taking date as the date the Shaws left and never returned to their property. This fact cannot possibly be conclusive of a taking, because a taking is not based on what a property owner believes is substantial interference of the use and enjoyment of the property. What if the Shaws had left their home that day and never returned because of a fear that a flood was on its way, but then the flood never occurred? No one would seriously consider that as the date of taking.

In the Introduction to their Brief on page 2, Plaintiffs state the trial court determined that "the series of floods" resulted in a taking. This is a misstatement, repeated on page 17. It implies that some type of cumulative effect resulted in the takings. The trial court's orders actually specify a certain date for each taking. The trial court found several "substantial interferences" in each case, and referred once to the "cumulative effect" of flooding (R. 607, Shaw Findings of Fact #24), but never found that intermittent flooding caused a taking. Therefore, this Court does not need to consider the effect of intermittent flooding.

Both sides have cited the general rule that once substantial interference with the use and enjoyment of property occurs, then the taking occurs. *See* GRDA's Brief, p. 16; Plaintiffs' Brief, p. 14. Once taken, the property cannot be retaken, or taken back. The trial court erred by finding that takings did not occur until long after substantial interference occurred. Further, because compensation is to be measured by the property's value at the time of the taking, the Shaws'

damages must be based on what their property was worth in 1986, and the Perrys' damages for what their property was worth in 1993. These are not the dates used by the trial court.

The Pryors, on the other hand, are not entitled to any damages for the taking of the property they purchased in 1989. The trial court found the property flooded in 1986, three years before they purchased it. (R. 626, Pror Findings of Fact, ## 1 and 4). Even if GRDA can be said to have taken the property then (though 70 percent of the flooding was due to natural flood waters), the property was taken from whoever owned the property at that time, because the right to recover for a taking "belongs to the owner at the time of the taking." *Drabeck* at ¶ 17, 946 P.2d at 662. The property was taken in 1986, and subsequent owners such as the Pryors have no right to claim any damages for property that had already been taken.

Drabek states there are two exceptions to this rule: where the owner was unaware of the taking because the use of the property was not apparent, such as a buried pipeline, and where the owner specifically transfers the right to recover to the vendee. *Id.* Neither exception applies here. The owner in 1986 must have been aware of the flooding, because the property "flooded to five (5) feet." (R. 626, Pryor Findings of Fact # 4). Furthermore, there is no evidence in the record that the right to bring an inverse condemnation action was transferred to the Pryors. They are simply the wrong party to bring this action.

The trial court also erred in determining what was taken, because it reached conflicting conclusions for every property owner: for the Pryors, a temporary taking from 1993-95; for the Shaws, fee title; and for the Perrys, a flowage easement. Despite the good deal of discretion a trial court has to fashion an appropriate remedy, and the possibility that the same floods can do different amounts of damage to different properties, all but the trial court's conclusion that a flowage easement was taken are not in line with its factual findings.

Plaintiffs fail to cite any Oklahoma decision for their argument that a taking can be both permanent and for a temporary period of time. They never explain, if that kind of reasoning is adopted by the Court, what kind of damages they would be entitled to. They certainly would not be entitled to the diminished value of the property taken for a '"temporary" period (which is what the trial court awarded, R. 626, Pryor Conclusions of Law #11 (D)) because the usual measure of damages for a temporary taking is the property's rental value. *Material Serv. Corp. v. Rogers County Bd. of Commr's,* 2012 OK CIV APP 17, n. 5, 272 P.3d 880. And Plaintiffs never explain how the trial court's contradictory remedies of a full taking and the taking of a flowage easement can both be affirmed. Plaintiffs simply make the general argument that this Court should defer to the trial court on questions of fact. This misses the point that the trial court's findings were actually legal conclusions using the trial court's own contradictory rules. This Court affords no deference to the trial court on legal questions. *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, ¶ 5, 895 P.2d 731, 733 (approved for publication by the Oklahoma Supreme Court).

Furthermore, the trial court's finding of a temporary taking in the Pryors' case is not in accord with other decisions. A temporary taking is an appropriate remedy where the taking is unlikely to be repeated, such as where the condemnor annexes property improperly, *Material Serv. Corp. v. Rogers County Bd. of Comm'rs,* 2012 OK CIV APP 17, 273 P.3d 880, or where the federal government commandeers property during wartime. *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 69 S. Ct. 1434 (1949). Flooding upstream of Pensacola Dam has been, and is likely to be, recurring.

The proper remedy for all three groups of Plaintiffs is the taking of a flowage easement, which the trial court awarded in the Perrys' case and which was the remedy approved in

Underwood v. State ex rel. Department of Transportation, 1993 OK CIV APP 40, 849 P.2d 1113. There the Court affirmed the trial court's finding of a flowage easement over and across property after what the landowners alleged was almost continual flooding due to construction of a culvert. *Id.* at ¶ 2, 849 P.2d at 1114. This remedy is in line with the facts of the case, and allows landowners to retain ownership of their property. Under *United States v. Cress*, 243 U.S. 316, 328, 37 S. Ct. 380, 385 (1917)), "[i]f any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property [interest] in the land." *Id.* That is precisely the situation here. It is also in line with a decision of this Court cited by Plaintiffs on page 25 of their brief, and with a principle expressed in *Nichols on Eminent Domain*, cited on pages 23-24, that the condemnor should take only the interest necessary and no more, meaning that "the condemnor is presumed to take no greater interest than an easement where an easement is sufficient to satisfy the purpose of the taking." *Carter v. Davis*, 1929 OK 528, ¶ 10, 284 P. 3, 4.

Plaintiffs made three statements on page 25 of their Brief that are simply incorrect. First, they argue, "There is no shield until payment has been made." There is no authority for the proposition that in inverse condemnation, no taking occurs until the landowner is paid. Plaintiffs may be referring to a rule in condemnation cases that the date of taking is established when the commissioners' award is paid. *See State ex rel. Dep't of Transp. v. Post*, 2005 OK 69, ¶ 9, 125 P.3d 1183, 1186. By contrast, inverse condemnation occurs when there is sufficient interference with the landowner's use and enjoyment so as to constitute a taking. *Mattoon v. City of Norman*, 1980 OK 137, ¶ 11, 617 P.2d 1347, 1349.

Second, Plaintiffs assert GRDA should have warned the Shaws of "its intent to take the entirety of their property" because then the Shaws would never have repaired their property.

This ignores the whole purpose of inverse condemnation law, which is to provide a remedy where the condemnor does not file a condemnation action. To suggest the Shaws are entitled to extra damages is in effect to punish GRDA for not condemning their property. Nothing in either condemnation or inverse condemnation law allows this.

Third, Plaintiffs state, "GRDA would have this Court decide that just compensation is never due so long as a citizen eventually is able to repair his or her property." To the contrary, just compensation is due as long as the law is complied with and a claim is made within the time established by the Oklahoma Legislature.

III. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS ADDITIONAL DAMAGES FOR CLEANING AND REPAIRING THEIR PROPERTY, BECAUSE ALL THOSE CLAIMS ARE TIME-BARRED.

The statutes of limitations involved are straight-forward: 15 years to bring a lawsuit for a taking of real property, *Drabek* at ¶ 16, 946 P.2d at 661-62; and three years for damages for property that is not taken. *Id.* at ¶ 11, 946 P.2d at 661, citing *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129.

Assuming Plaintiffs' properties were taken at some point by inverse condemnation, then any damage to the properties would have to occur either before or after the taking. For damages incurred before the taking, whether using the trial court's date or some other date, the 15-year statute of limitations for inverse condemnation can never apply, because it only applies for takings of an *interest* in real property. Thus, the trial court erred by applying the 15-year limitations period (R. 607, Shaw Conclusions of Law # 9; R. 617, Perry Conclusions of Law # 8; R. 626, Pryor Conclusions of Law # 9) for *damages* that occurred before it found a taking occurred.

That leaves damages to property that occurred after the taking. Here, there is no property that was "not taken." All of the damages awarded by the trial court for cleaning and restoring the property *after* it determined the property had been taken were incurred on the *same* property the trial court determined had been taken. Once a taking occurs, the Constitution does not allow damages for the property's value and, additionally, for damages to the property. Instead, it limits damages to "the value of the property taken, and in addition, any injury to any part of the property not taken." Okla Constr., Art 2, sec. 24. The trial court's award for damages to property after the taking is the equivalent of allowing a property owner to sell his house on a Monday, then witness a baseball breaking a window in the house on Tuesday, and suing for damages for the broken window on Wednesday. The owner has lost his property interest before the damage was done.

Plaintiffs never really address GRDA's arguments that they are seeking an additional type of damage not authorized by the Constitution. Instead, they assert in their brief the trial court's decision should be affirmed because (1) they are entitled to be made whole (page 11) and (2) because "[t]he burden of erroneous but reasonable assumptions must fall on the government, not the landowner" (page 12).

The first assertion ignores the concept that even the most deserving plaintiff must comply with the law. None of the cases cited by Plaintiffs involve a landowner who failed to comply with the statute of limitations. Statutes of limitations are "intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof." *Wing v. Lorton.* 2011 OK 42, ¶ 11, 261 P.3d 1122, 1125, quoting *Seitz v. Jones*, 1961 OK 283, ¶ 11, 370 P.2d 300, 302. Even the most deserving plaintiff entitled to be "made whole" must comply with the statute of limitations, or else the plaintiff is actually not so deserving,

because he has been negligent in pursuing his claim. *See id.*; *Daugherty v. Farmers Coop.*, 1984 OK 72, ¶ 12, 689 P.2d 947, 950–951.

Plaintiffs' second assertion -- that the burden of erroneous but reasonable assumptions must fall on the government, not the landowner -- contains no reference to any authority, because the statement is simply meaningless. Plaintiffs do not explain what assumptions they are referring to, or who made them, or why the assumptions were erroneous or reasonable. Mainly, Plaintiffs seem to assert that GRDA is blameworthy because it did not file a condemnation action. That argument is refuted by the very laws Plaintiffs seek to enforce, the constitutional and statutory authority for inverse condemnation found at Okla. Const., Art 2, sec. 24, and 66 O.S.2011 § 57. These laws acknowledge that a party with condemning authority does not have to use that authority in order for a condemnation to occur. Nowhere in the law does it state that a condemnor is to be punished or made responsible for more damages than the law allows because the matter is determined through inverse condemnation, rather than condemnation.

Plaintiffs erroneously rely, on page 13 of its Brief, on *State ex rel. Department of Transportation v. Little*, 2004 OK 74, 100 P. 3d 707. First of all, Plaintiffs are simply wrong in stating *Little* is a flood case. The property there was actually condemned for a highway project. Second, the principle that property owners can receive damages for moving expenses in a condemnation case simply has no relevance to the instant case. If the property owners in *Little* had not moved the items, but simply cleaned and repaired them after condemnation, no one would seriously conclude they were entitled to those damages. Yet that is what Plaintiffs seek here.

The other decision Plaintiffs rely on is *City of Tulsa v. Mingo School District. No. 16*, 1976 OK CIV APP 27, 559 P.2d 487, for the holding that restoration costs are recoverable. A

reading of the case reveals what was taken was a partial taking, and the costs were for property "not taken," which the Court recognized as the "remaining land." *Id.* at ¶ 2, 559 P.2d at 489. The point is, in the instant case, there is no remaining land.

Plaintiffs return to this argument on page 26 of their Brief to assert, "In this case, Plaintiffs' claims do not involve consequential damage due to State action on a nearby property; there was an actual physical appropriation of their properties." This is exactly the point GRDA makes. Plaintiffs can recover for the value of their interest in the property taken. Nowhere in any of the cases they cite, including *Rummage v. State ex rel. Department of Transportation*, 1993 OK CIV APP 45, 856 P.2d 275, is there authority for Plaintiffs to receive those damages and then also receive additional damages for cleaning and repairing the property that has been taken.

IV. IT WOULD BE BENEFICIAL FOR THIS COURT TO INSTRUCT TRIAL COURTS AS TO THE PROCEDURE TO BE FOLLOWED IN INVERSE CONDEMNATION CASES.

The eminent domain statute, 66 O.S.2011 § 57, states the following regarding inverse condemnation:

> in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.

The "manner" is the Oklahoma Constitution's streamlined condemnation procedure providing for, among other things, the appointment of commissioners to determine the value of damages. Okla. Const., Art, 2, sec. 24. Commissioners were not appointed in the instant case.

This Court should instruct the trial court, and courts across the state, concerning the proper procedure to be used in inverse condemnation cases.

Plaintiffs assert in their brief on page 30 that this issue has been waived. However, the trial court's authority here is based solely on the Oklahoma Constitution's Article 2, section 24. By not following the procedures for condemnation, the court exceeded its authority. The question of a court's authority, or jurisdiction, is a fundamental one and may not be waived by a party. *Cate v. Archon Oil Co., Inc.*, 1985 OK 15, n. 12, 695 P.2d 1352.

Furthermore, where the public interest and welfare is involved, this Court has discretion to consider a theory not presented to the trial tribunal. *Multiple Injury Trust Fund v. Pullum*, 2001 OK 115, ¶ 6, 37 P.3d 899, 903. Even where an issue is moot, this Court will consider the matter if (1) the appeal presents a question of broad public interest; and (2) the challenged event is "capable of repetition yet evading review." *Marquette v. Marquette*, 1984 OK CIV APP 25, ¶ 5, 686 P.2d 990, 993.

Both reasons apply here. This is a question of broad interest, because it affects many Oklahomans, and it is certainly capable of repetition. A review of the many decisions concerning inverse condemnation reveals a lack of uniformity in how the cases are tried. Giving guidance to the trial courts across the State would be in accord with the principles expressed above, and would be beneficial to the courts, the condemning authorities, and property owners.

GRDA'S ANSWER BRIEF ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFFS' ADDITIONAL DAMAGES FOR PERSONAL PROPERTY WERE TIME-BARRED.

The trial court properly concluded that because 12 O.S.2011 § 95's two-year limitations period applied to Plaintiffs' personal property damages, those claims were time-barred. (R. 301

& 596, Grant of Partial Summary Judgment Order later corrected in Nunc Pro Tunc Order; R. 607, Shaw Conclusions of Law ## 7-8; R. 617, Perry Conclusions of Law ## 6-7; R. 636, Pryor Conclusions of Law ## 7-8). Plaintiffs mistakenly assert that they are entitled to the 15-year statute of limitations for damages to personal property because the inverse condemnation constitutional provision refers to "private property," and personal property is private property.

First, as previously noted, the 15-year limitations period applies for "a taking of real property." *Drabek* at ¶ 16, 946 P.2d at 661-62. *Drabeck* could not be more specific in holding that the 15 year period is for *real* property. This language is reflected in the 15-year statute applicable to inverse condemnation cases, 12 O.S.2011 § 93(4), which applies to "An action for the recovery of *real* property not hereinbefore provided for, within fifteen (15) years." (Emphasis added). Personal property is not the same thing as real property. If Plaintiffs are correct, the statute would have to be disregarded and *Drabeck* would have to be overruled.

Second, Oklahoma has a specific statute applicable to damages for personal property. Title 12 O.S.2011 § 95 (3) specifies that:

> A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
> 3. Within two (2) years: . . . an action for taking, detaining, or injuring personal property. . . .

The parties could argue over whether the floods amounted to a taking or a damaging of Plaintiffs' personal property, but § 95(3) covers both instances. A specific statute of limitations controls over the general statute. *In re Adoption of Lori Gay W.*, 1978 OK 140, ¶ 15, 589 P.2d 217, 221. Therefore, this specific statute covering injury to personal property (§ 95(3), two years) would control over the general statute for civil actions other than for the recovery of real

property (§95(12), five years), and would certainly control over the general statute for the recovery of real property in cases "not hereinbefore provided for" (§ 93(4), 15 years).

Plaintiffs' reliance on *State ex rel. Department of Transportation v. Kelly*, 2007 OK CIV APP 25, 156 P.2d 734, is completely misplaced. *Kelly* does indicate that property owners can receive compensation for damage to personal property. *But Kelly never says they have 15 years to file their lawsuit. Kelly never even mentions the statute of limitations.* Even if this Court desires to make the leap urged by Plaintiffs and equate personal property with moving expenses, a limitations period would still apply, and nothing indicates it would be 15 years.

Plaintiffs also assert that the trial court erred because it did not follow the general principle that it should construe the laws in their favor. The statute of limitations cannot be construed to mean something it does not say, and it says that the two-year period applies to personal property. None of the concepts Plaintiffs seeks to apply, including ejusdem generis, can alter the statute's plain language. Where the language of a statute is plain and unambiguous and the meaning clear and unmistakable, there is no room for construction, and no justification exists for interpretive devices to fabricate a different meaning. *Curtis v. Bd. of Educ. of Sayre Public Schools*, 1995 OK 119, ¶ 10, 914 P.2d 656, 659.

Plaintiffs' final assertion, on page 37 of their Brief, is a suggestion that this Court ignore Oklahoma's statutes and instead follow other jurisdictions' limitations periods. If Oklahoma did not have any statutes of limitations, or if its statutes were unclear, the Court could rely on other jurisdictions' decisions for guidance. But to do so here would be to ignore the Oklahoma Legislature's limitation period which governs, and bars, Plaintiffs' personal property claims.

A trial court's grant of summary judgment should be affirmed when it appears that there is no substantial controversy as to any material fact and that one of the parties is entitled to

judgment as a matter of law. *Jordan v. Jordan*, 2006 OK 88, ¶ 17, 151 P.3d 117, 121. The trial court correctly concluded as a matter of law that the statute of limitations ran out on Plaintiffs' personal property claims because, in seeking to recover for damages that occurred no later than 1995, Plaintiffs failed to file their lawsuit until 2001.

CONCLUSION

For these reasons, Defendant, Grand River Dam Authority, respectfully requests this Court reverse the trial court's awards of damages for the diminished value of Plaintiffs' properties and for the cleaning and restoring of the properties. This Court should also reverse the trial court's legal conclusions that GRDA took Plaintiffs' properties through inverse condemnation. Alternatively, if this Court determines the properties were taken, it should reverse and remand with instructions to the trial court to find, consistent with the trial court's factual findings, that GRDA has taken flowage easements in all three cases, and that such takings occurred in October 1986 for the Shaws and for the property later purchased by the Pryors, and September 1993 for the Perrys. Further, this Court should reverse the trial court's awards of damages for cleaning and repairing Plaintiffs' properties, because all those claims are time-barred. GRDA further requests this Court, on remand, to instruct the trial court as to the proper procedure to be followed in determining damages. Finally, the trial court's judgment in favor of GRDA on Plaintiffs' claims for damage to personal property should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the above and foregoing document was mailed this 10th day of May, 2012 to N. Larry Bork, Esq., 515 S. Kansas Ave., Topeka, KS 66603 and Scott R. Rowland, Esq., 1100 OneOk Plaza, 100 East Fifth Street, Tulsa, OK 74103, by depositing it in the U.S. Mails, postage prepaid

I further certify that the same was mailed to, or filed in, the Office of Ottawa County Court Clerk, 203 Courthouse, 102 E. Central Ave., Miami, OK 74354 on the 10th day of May, 2012.

Phil R. Richards