2015 WL 3999215 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

THE MARGARET BLAIR TRUST, a Limited Partner of Blair Royalties, Ltd.; Margaret A. Blair, an individual and beneficiary of the Margaret Blair Trust; the Patricia Jane Bender Trust, a Limited Partner of Blair Royalties, Ltd.; Patricia Jane Bender; an individual and beneficiary of the Patricia Jane Bender Trust; the Mary Alice Blair Trust, a Limited Partner of Blair Royalties, Ltd.; and, Mary Alice Blair, an individual and beneficiary of the Mary Alice Blair Trust, Appellants,

v.

Robert G. BLAIR, individually, as beneficiary of the Robert G. Blair Trust, as Trustee under Last Will and Testament of W. W. Blair, Deceased, as Trustee of each Limited Partner of Blair Royalties, Ltd., as General Partner of Blair Royalties, Ltd., and as an officer, Director, and owner of Comanche Exploration Co. LLC, Comanche Resources Company; the Robert G. Blair Trust, a Limited Partner of Blair Royalties, Ltd.; Comanche Exploration Co. LLC; Comanche Resources Company; the John David Blair Trust, a Limited Partner of Blair Royalties, Ltd.; John David Blair, individually, as beneficiary of the John David Blair Trust, as Trustee under Last Will and Testament of W.W. Blair, Deceased, as Trustee of each Limited Partner of Blair Royalties, Ltd., and as an officer, Employee, and owner of Comanche Exploration Co. LLC, Comanche Resources Company; and Blair Royalties, Ltd., Appellees.

No. 112, 895.
April 20, 2015.

Appeal from District Court of Oklahoma County CJ-2001-8463
Judge Bernard Jones
Companion with Case No. 113,395

Appellant's Brief in Chief

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***1 I. INTRODUCTION**

This case involves the long-standing and persistently thwarted attempts by trust beneficiaries to obtain a complete and accurate accounting of trust assets from the Trustee, who happens to be their brother. The parties in this case are the surviving children of W.W. Blair, who died in 1977. At the time of Mr. Blair's death, he owned vast holdings in minerals, oil and gas leases and producing wells, as well as a half-interest in Rambler Oil Company. Mr. Blair left his assets to his wife and six children: Robert Blair, David Blair, Patricia Bender, Margaret Blair, Mary Blair and Elizabeth **Elder**. David and Elizabeth are now deceased. Mr. Blair's will provided for a separate trust to be established for each of his children. Essentially all of the assets of the Blair Estate were transferred to the six trusts, including the mineral interests. Whether and to what extent these assets were ever properly and equitably distributed is and was the beginning point of beneficiaries' quest for an accounting.

As of 1978, the Successor Trustees for all of the trusts were Robert and David Blair and their former brother-in-law, Mike **Elder**, who is also now deceased. Defendant Robert Blair was thus both a Trustee and a beneficiary of the trusts set up by his father, who intended that his son administer the Trusts for the benefit and protection of his daughters.

In 1982, the Trustees entered into Blair Royalties Limited Partnership Agreement (the “Partnership” or “BRL”) for tax purposes. The General Partner of the Partnership was Defendant Robert Blair, and the six individual trusts were the limited partners. Plaintiffs Patricia, Margaret and Mary individually were not parties to the Partnership Agreement. In 1983, the Final Decree was filed in the Blair probate in Oklahoma County, and provided for the transfer of all of the Blair Estate assets to the Partnership and the trusts. In 1997, the ***2** Plaintiffs were informed that the assets of the Partnership, including the fiduciary accounts, were going to be commingled for accounting purposes with the accounting of Comanche Exploration Co., LLC, an oil and gas exploration company owned by Defendant Robert Blair. Plaintiffs assert that this commingling has allowed, and continues to allow, Robert Blair to usurp assets rightfully belonging to their trusts for his own financial advantage.

Despite repeated requests by the Plaintiffs, there has never been a comprehensive accounting of the Blair Estate properties that were transferred to the Partnership and the trusts. The most Plaintiffs were ever provided were sporadic Partnership tax returns, which clearly do not allow Plaintiffs to determine the status of the Blair Estate properties in which they share an interest. Because Robert Blair persistently rebuffed Plaintiffs' accounting requests, this action was filed in 2001. Defendant Robert Blair (and David Blair before his death in 2014) fought the Plaintiffs at every turn by filing multiple motions to dismiss and for summary judgment, all of which were denied, and refusing to cooperate in discovery. Despite the Defendants' recalcitrance, Plaintiffs eventually learned that the Partnership has or had an interest in as many as 709 wells, most of which resulted in no benefit to the

Plaintiffs. Discovery has also revealed numerous other transgressions by Robert Blair, including the conveyance of Partnership assets to his other entities without any payment to Plaintiffs, and mortgaging partnership assets for his own benefit and without the knowledge and consent of the Plaintiffs.

A bench trial was finally held in Plaintiffs' accounting action in March 2014. After five days of testimony, much of it from Plaintiffs' respected accounting expert who submitted a very lengthy report detailing the estimated revenue and costs attributable to Plaintiffs' interests, the court inexplicably granted the Defendants' demurrer to the evidence. ***3** The court determined that Plaintiffs had been provided with an accounting, despite testimony and evidence directly to the contrary, and had not sustained their burden to show an amount due to them. The court was clearly incorrect in granting judgment in favor of Defendants and against Plaintiffs given the mountain of evidence presented, and that determination should be summarily reversed by this Court.

II. SUMMARY OF THE RECORD

This case has had a long and tortured history, much of which is not pertinent to the issues before this Court in the instant appeal. The issues presented to this Court are narrow, and focus exclusively on whether the Plaintiffs, as the beneficiaries of the trusts established by W.W. Blair, have received the accounting to which they are entitled. As a result, many of the extraneous facts will be omitted.

The Last Will and Testament of W.W. Blair (the "Will") was admitted to probate in the District Court of Oklahoma County on August 12, 1977. [Rec. at 3216, Ex. 2-C]. As previously stated, the Will provided for the creation of "as many equal trusts as may be necessary to set aside one of such trusts for the benefit of each of my children...." Id. at ¶ 4.06. The Will further provided that:

The Trustee shall not be required to account to any court for the administration of the trusts, ***but shall furnish periodic reports to those beneficiaries entitled to receive distribution of income from the trust for which such report is furnished regardless of whether such income distributions are absolute or in the discretion of the Trustee.***

Id. at ¶ 6.01 (emphasis added). In addition, even though it would have been otherwise implied by law, the Will provided that the Trustee shall exercise any powers delegated to him "at all times in a fiduciary capacity primarily in the best interest of the beneficiaries thereunder." Id. at ¶ 5.08.

***4** Mr. Blair's Will also gave the Trustee the power "[t]o enter into a partnership agreement concerning any property which forms part of a trust created herein upon such terms and conditions as may be in the best interest of the trust and to transfer assets to a partnership pursuant to a partnership agreement." Id. at ¶ 5.15. After consultation with the Blair Estate's attorney, Robert Reece, the sibling beneficiaries decided that formation of a partnership would be beneficial for tax reasons, and entered into the Partnership Agreement. [Rec. at 2764, Ex. 1]. Just as the Will requires periodic accounting to the beneficiaries, so does the Partnership Agreement, which states in pertinent part that:

Books of Account. The Partnership's books and records and this Agreement shall be maintained at the principal office of the Partnership and each Partner shall have access thereto at all reasonable times. The books and records shall be kept on a cash basis applied in a consistent manner by the Partnership and reflect all Partnership transactions and be appropriate and adequate for the Partnership's business.

Accounting and Reports. A statement of cash receipts and disbursements shall be rendered monthly to each Partner. As soon as reasonably practicable after the end of each fiscal year, each Partner shall be furnished with a copy of the balance sheet of the Partnership as of the last day of such fiscal year and a statement of income or loss of the Partnership for such year, and a statement showing the allocated to or allocated against such Partner pursuant to Section 8 of this Agreement during or in respect of such year, and any items of income, deduction, credit or loss allocated to him for purposes of the United States Internal Revenue Code pursuant to Section 8 of this Agreement.

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Id. at ¶¶ 10.1 and 10.2. The Partnership Agreement thus contemplated full disclosure of the Partnership's financial condition.

Another provision of the Partnership Agreement has also become significant in this case, and provides as follows:

Independent Activities. The General Partner and the Limited Partners may, notwithstanding the existence of this Agreement, engage in whatever activities they choose, whether the same be competitive with the Partnership or otherwise, without having or incurring any obligation to offer any interest in such activities to the Partnership or any party hereto. Neither this Agreement ***5** nor any activity undertaken pursuant hereto shall prevent the General Partner or the Limited Partners from engaging in such activities, or require the General partner or the Limited Partners to permit the Partnership or any Partner to participate in any such activities, and, as a material part of consideration for the execution hereof by the General Partner and Limited Partners, each Partner hereby waives, relinquishes and renounces any such right or claims of participation.

Id. at ¶ 13.3. Importantly, none of the individual Plaintiffs were parties to the Partnership Agreement. The only signatories were the Plaintiffs' trusts, by Robert Blair, David Blair and Mike **Elder** as Trustees, each of whom clearly had fiduciary responsibilities to Plaintiffs. Id. Attorney Reece has testified unequivocally that ¶ 13.3 was not intended to abrogate those duties in any manner whatsoever.

Paragraph 13.3 was intended solely to acknowledge that the General Partner and the Limited Partners were entitled to engage in their own business interests, despite entering into the Partnership. The clause was never intended to override or otherwise eliminate any fiduciary duties owed by the General Partners to the Limited Partners, and would be ineffective to do so as a matter of law.

[Rec. at 3214, Ex. 17].

Subsequent to the formation of the Partnership, Plaintiffs, particularly Plaintiff Margaret Blair, repeatedly requested the fiduciary accounting to which she was entitled from Defendant Robert Blair. After being consistently rebuffed, Plaintiffs filed this accounting action in 2001. Plaintiffs were required to hire several attorneys to assist them, because of Defendants' persistent attempts to block the case and refusal to provide the necessary discovery for Plaintiffs to establish their claims. [Rec. at 1-3; 4-7]. Plaintiffs were thus unable to make significant progress in the prosecution of the action. Plaintiff Margaret Blair, who works in the land department of an oil company, decided to investigate the Partnership activities on her own, and discovered that her brother, Defendant Robert Blair, had conveyed ***6** Blair Estate properties directly to himself or his entities on more than one occasion without an accounting to his sisters as trust beneficiaries. [Rec. at 3206, pp. 24-65]. Because of those findings, Plaintiffs filed a fraud action against Defendants in 2006. The cases were consolidated in 2007. [Rec. at 236-239].

Defendants' attempt to prevent Plaintiffs from prosecuting the actions continued. Plaintiffs filed their First Amended Petition in December 2009, [Rec. at 387-405], after which Defendants filed both a Motion to Dismiss and a Motion for Summary Judgment, both of which were denied. [Rec. at 406-411; 437-476]. The Plaintiffs were granted leave to file a Second Amended Petition, which was filed in August 2012. [Rec. at 998-1017]. Defendants again filed a Motion to Dismiss, [Rec. at 1201-1248], which motion was denied by the trial court. [Rec. at 1915-1916]. In all, Defendants filed three motions to dismiss and a motion for summary judgment, none of which were successful.

In addition to the motion practice, Defendants have attempted to block Plaintiffs' discovery requests at every turn, as they have since the accounting case was filed in 2001. As but one example, the court previously ordered Defendants to provide Plaintiffs all tax returns filed with the IRS or the State Of Oklahoma from the year 1982 to the present. To this date, Defendant Robert Blair has not complied with this directive. [Rec. at 3203, Tr. Vol. 2 at 212:9-17]. As a result of Defendants' conduct, Plaintiffs were required to file six Motions to Compel Discovery, a Motion for Discovery Conference, and an Emergency Motion to Compel Production of Documents and Sanctions. [Rec. at 1933-1968]. In that Emergency Motion, Plaintiffs expert David Payne submitted an Affidavit stating in pertinent part that:

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***7** To date an unusually high portion of my time has been required to assist with discovery and production of data by Defendants. My discovery assistance time has caused the Plaintiffs to incur significant fees and experience significant delays in evaluating damages. Nevertheless, substantially all the data requested by Plaintiffs can be obtained by producing an electronic backup copy of certain databases, ledgers and/or reports or exporting such data to electronic spreadsheets from the defendants' software system.

I understand counsel is preparing another motion to compel which will request this division of interest data once more. However, there is no dispute about current division of interest in electronic format. As I have previously stated, until the **Defendants provide ALL data and allow sufficient time for analysis, it is not practical, and not fair, for Plaintiffs' experts to properly prepare their expert disclosures.**

[Rec. at 1947-1948, ¶¶ 6, 8] (emphasis in original).

In addition, Mr. Payne's expert report, while admittedly incomplete as a result of the lack of discovery provided to Plaintiffs, is undisputedly more than sufficient to meet Plaintiffs' burden of proof on the accounting issue and mandates that Defendants' demurrer should have been denied by the trial court. Mr. Payne prepared an excerpt of his extensive report for use at trial, and even the introduction of just that excerpt demonstrates the wealth of accounting information contained therein. The introduction states in part that:

Mr. Payne prepared a listing of over 700 properties owned by Plaintiffs and Defendants ("Master Property List") from documents produced by the Defendants through 1996 and from public records for properties developed after 1996. The Plaintiffs' experts identified 94 properties in Prospect Areas of Interest which removed either some or all of the economic rights beneficially held by Plaintiffs. The Plaintiffs' claims represent only 13% of the Master Property List but represent some of the more valuable properties.

Mr. Payne quantified the working and revenue interests removed from the Plaintiffs by calculating pro rata beneficial working and revenue interest which should be owned by the Plaintiffs and deducting the actual nominal interests owned by the Plaintiffs....

Mr. Payne estimated revenue and deducted costs attributable to the beneficial interests claimed by Plaintiffs by utilizing state-wide average prices, average lease operating expenses and development costs estimated from Authorities for Expenditures. These estimates were necessary since *8 defendants have not: (i) provided an "Accounting"; (ii) provided year-by-year well profit and loss statements, listing net revenue, net lease operating costs and net development costs; (iii) provided inceptions-to-date net production and net revenue reports listing periodic average prices; and (iv) provided a historical Master Division of Interest. Therefore, Mr. Payne has utilized estimated prices based upon the "Best Available Data Principle" employed in damage calculations.... (emphasis added).

Finally, Mr. Payne has provided the Fact-Finder damages disaggregated as follows: (i) by individual property; (ii) by Prospect Area of Interest; (iii) by year; (iv) by section areas directly held or existing at the formation of BRL; and (v) by adjacent section areas involving fields and prospects in which BRL participated in at its formation.

[Rec. at 3215, Ex. 6 at 2-3]. From this analysis, which implicates a basic mathematical calculation of damages, Mr. Payne calculated conversion damages of $5,917,023.00 and together with statutory interest, a total damage sum of $6,883,936.00. Id. at DRPA 1.1.

Throughout the course of these proceedings, Plaintiffs have requested that they be granted an accounting from the fiduciary Defendants. Plaintiffs' initial Motion to Require Defendants to Account was filed on August 8, 2012. [Rec. at 800-996]. Plaintiffs filed their Second Motion for an Accounting and Request for Evidentiary Hearing to Determine the Manner and Scope of Accounting on December 7, 2012. [Rec. at 1340-1379]. A third Plaintiffs' Motion for the court to Enter an Order Requiring an

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Accounting was filed on August 19, 2013. [Rec. at 2633-2657]. The court ultimately entered an Order on February 12, 2014, finding that Plaintiffs were entitled to the requested accounting and setting forth the issues as follows:

[Plaintiffs'] elements and burden of proof are:

1. That a fiduciary duty existed or does exist between Plaintiffs and Defendants Robert and David Blair;

2. That Plaintiffs have a right to an accounting;

3. That an accounting has not been provided to Plaintiffs;

***9** 4. That Plaintiffs must present facts and evidence which reasonably tends to prove that there is a balance due and owing to Plaintiffs.

[Rec. at 2761-2763].

Pursuant to the above Order, a bench trial was held over five days in March 2014. As will be discussed in more detail, Plaintiffs presented the testimony of Plaintiff Margaret Blair, in which she testified that she had never received anything more than sporadic tax returns, not the full accounting required by the Defendants as fiduciaries. More importantly, Plaintiffs' expert David Payne testified at length regarding his comprehensive expert report demonstrating unequivocally that Plaintiffs had a balance due and owing to them, even given the limited nature of the information provided during discovery. Nonetheless, the trial court ruled that Plaintiffs had not met their burden with regard to certain of the above elements. The court held that Plaintiffs met their burden of proof that a fiduciary duty existed between Plaintiffs and Defendants - although none of the parties disputed this issue - and that Plaintiffs met their burden of proof that they had a right to an accounting. [Rec. at 3206, Tr. Vol. 5 at 74-76]. However, the court held that Plaintiffs failed to meet their burden of proof that an accounting has not been provided under the terms of the trust and the Partnership Agreement. Id. at ¶ 78-79. The court also found that Plaintiffs did not meet their burden that there is a balance due and owing to them. Id. at 79-82. The court made this finding despite Mr. Payne's voluminous expert report, which contained as much detail as could reasonably have been provided given Defendants' discovery **abuses**. The court stated in part that:

Although persuaded by Mr. Payne's analysis, this Court is not convinced that it achieves its stated end. By Mr. Payne's own admission, the report lacks several pieces of relevant information material to supporting his analysis and ultimate conclusion that a balance is due and owing to Plaintiffs.

***10** While understanding the existence of various discovery disputes, the Court finds it difficult to rely on a report that is neither comprehensive, nor certain as to the balance Plaintiffs believe they are owed....

From this Court's vantage point, the Payne report best resembles a foregone conclusion that is in need of and searching for facts to support it. This assumption just isn't workable in the Court's eyes.

Id. at 79:19-80:15. As will be discussed, neither of the trial court's conclusions was correct, and both fly in the face of the law and the evidence presented during the trial. There can be no serious question that the Defendants' demurrer was improperly granted and must be reversed.

After the trial court ruled in their favor, Defendants filed an Application to Assess Fees and Costs, which was opposed by Plaintiffs. [Supp. Rec. at 4-139; 140-173]. On October 16, 2014, the court entered its Order Granting Defendants' Application to Assess Fees and Costs, awarding Defendants $296,456.00 in attorneys' fees and $16,206.98 in costs. [Supp. Rec. at 174-175]. The court specifically determined that “justice and equity require that attorneys' fees and costs be assessed against Plaintiffs herein.” *Id.* This ruling was also incorrect under both the law and the facts of this case.

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Plaintiffs separately appealed both rulings to this Court, and the cases were consolidated by Order dated December 19, 2014. Additional facts will be discussed in connection with the propositions.

III. ARGUMENT AND AUTHORITIES

Standard of Review

The standard of review is particularly important in this case, and is in fact determinative of the outcome. The standard for the granting of a demurrer is rigorous, and rarely met.

> ***11** In order for a trial court to correctly sustain a demurrer to the evidence all evidence and reasonable inferences therefrom which favor the party opposing the motion (the plaintiff) ***must*** be taken as true. Any conflicting evidence which is favorable to the movant (the defendant) is disregarded. ***If there is any evidence which shows a right to recover, the demurrer is overruled and the case allowed to proceed.***

Byford v. Town of Asher, 1994 OK 46, ¶ 5, 874 P.2d 45, 47 (internal citations omitted) (emphasis added). The standard was also described by the Court of Civil Appeals in *Estrada v. Port City Properties, Inc.*, 2007 OK CIV APP 23, 158 P.3d 495.

> The same legal standard governs a ruling on a demurrer to the evidence, motion for directed verdict and motion for summary judgment. A demurrer to the evidence, motion for directed verdict or motion for summary judgment should not be granted unless there is *an entire absence of proof on a material* issue, and all should be denied when there are questions of material fact or reasonable persons could differ as to the choice of inferences to be drawn from the facts in evidence. To determine whether the evidence is sufficient to withstand a demurrer to the evidence, motion for directed verdict, or motion for summary judgment, the trial court must consider the evidence in the light most favorable to the plaintiff, and *only if all the inferences to be drawn from the evidence are in favor of the moving party will a demurrer, directed verdict or summary judgment withstand appellate scrutiny.*

Id. at ¶ 10 (internal citations and quotations omitted) (emphasis added). See also Jackson v. Jones, 1995 OK 131, ¶ 4, 907 P.2d 1067, 1071 (emphasizing that 'the demurrer must be denied if the opponent has made out a prima facie case").

There can be no question that the demurrer was not properly granted in this case. The Plaintiffs presented extensive evidence concerning the interests that were taken from them by Robert Blair and the value thereof. And to the extent such evidence was incomplete, it was because the Plaintiffs had never been provided the necessary information in the first instance. If all of the evidence, and the inferences therefrom, had been taken as true by the trial court as required by Oklahoma law, the demurrer would have been overruled. The trial court's flagrant disregard of clearly established Oklahoma law mandates reversal in this case.

*12 PROPOSITION I

Plaintiffs Never Received the Full Accounting To Which They Are Entitled

As set forth above, the trial court found that Plaintiffs met their burden with regard to the first two trial issues: the existence of a fiduciary duty and the right to an accounting. In its oral ruling, the court stated that:

There is neither doubt nor dispute that a fiduciary duty existed between Plaintiffs and Defendants. Not only is there a general consensus among the parties, counsel and witnesses, but this area of the law, I believe, is so well established that any suggestion to the contrary is simply absurd.

Trustees owe a fiduciary duty to trust beneficiaries. And, arguendo, in the absence of law supporting this conclusion, the fact remains that the trust and partnership documents are wrought with specific and implicit references to fiduciary duties and standards expected of and imposed on Defendants. Accordingly, this Court properly finds that the Plaintiffs have met their burden with respect to the first of four prongs.

[Rec. at 3206, Tr. Vol. 5 at 74:5-16]. The court also determined that Plaintiffs easily satisfied the second prong.

[T]his Court also believes Plaintiffs have met their burden in establishing a right to an accounting....

In looking at the various provisions of the documents entered into evidence and at dispute in this matter, there is no doubt the decedent intended for there to be an accounting.

Indeed, although titled "No Accounting to the Court," Section 6.01 of the Blair Will imposes on the trustees, in part, the duty to "furnish periodic reports of the administration to those beneficiaries entitled to receive distribution of income" - and this duty to account is imposed whether the income distributions be absolute or discretionary.

In other words, the duty to account can neither be waived nor modified by the trustee or beneficiary.

Id. at 74:21-76:1.

***13** The question then became what kind of an accounting satisfies the trustees' duty in this regard. Oklahoma law is clear that the scope of a trustees' duty is broad, and the beneficiary is entitled to receive full and comprehensive information.

A trustee is a fiduciary of the highest order in whom the hope and confidence of the settler are placed with the expectation that the trustee will exercise the obligations of the office for the exclusive benefit of those holding beneficial interests. Without exception, a trustee owes its beneficiaries the most abundant good faith, absolute and perfect candor, openness and honesty.

[B]eneficiaries are entitled not only to accounting information but also to relevant information concerning the bases upon which the trustees discretionary judgments have been or will be made.

Smith v. Baptist oundation of Oaoma, 57, ¶¶, 29, 50 P.3d 132, 11441145 (emphasis added). *See also May v. Oklahoma Bank and Trust Co.*, 2011 OK 52, ¶15, 261 P.3d 1138, 1142 (quoting *United States v. Mitchell, 463* U.S. 206, 227 (1983) for the proposition that "[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by the trustee or else be precluded from recovery for mismanagement"); *Isle v. Brady*, 2012 OK CIV APP 99, ¶9, 288 P.3d 259, 263 (stating that the trustee's duties were to "collect, preserve, value, and if needed repair the Trus's assets, and to prepare an accounting") (internal quotations omitted).

While Oklahoma courts have not specifically delineated the scope of a fiduciary accounting, other courts have given guidance, including the Tenth Circuit. In Fletcher v. United States of America, 730 F.3d 1206 (10th Cir. 2013), the court held that "[t]he scope of a traditional equitable accounting includes, after all, some degree of information about both receipts and disbursements," and that "trust beneficiaries are entitled to information that is reasonably necessary to enable [them] to enforce [their] rights under the trust." Id. at 1215-1216. Courts from other jurisdictions have been much more specific. ***14** In Woolardv. Woolard, 547 F.3d 761 (7th Cir. 2008), the court described the elements of an accounting to a beneficiary as follows:

> In Illinois, a beneficiary is entitled to learn from his trustee what property came into his hands, what has passed out, and what remains therein, including all receipts and disbursements in cash, and the sources from which they came, to whom paid and for what purpose paid.

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Id. at 761. See also Zuch v. Connecticut Bank & Trust Co., 500 A.2d 565, 568 (Conn. App. 1985) (stating that "[a] proper accounting, at a minimum, should state in clear and concise terms the nature and the value of the corpus of the trust when received by the trustee, any realized increases or decreases on principal or income, any income generated by the trust, any disbursements or distributions to the beneficiaries, any commissions, charges, or fees paid, including those paid to the trustee in the management and distribution of the trust and the amount and location of any balance or remainder").

A report authored by the Committee on National Fiduciary Accounting Standards sets forth the elements of such an accounting. The fundamental objective of an account should be to provide essential and useful information in a meaningful form to the parties interested in the accounting process....

(I) Accounts should be stated in a manner that is understandable by persons who are not familiar with the practices and terminology peculiar to the administration of estates and trusts.

(2) A fiduciary account should begin with a concise summary of its purpose and content.

(3) A fiduciary account should contain sufficient information to put the interested parties on notice as to all significant transactions affecting administration during the accounting period.

(4) A fiduciary account should include both carrying values representing the value of assets at acquisition by the fiduciary and current values at the beginning and end of the accounting period.

***15** [Rec. at 3007, Tab 6].

Plaintiffs' expert David Payne testified unequivocally that no fiduciary accounting had been rendered to Plaintiffs as it should have been in light of their status as beneficiaries.
Q. Now, has there been a fiduciary accounting in this case, to your knowledge?

A. Based on my training and experience as a fiduciary, no.

Q. Has there been a periodic fiduciary accounting?

A. Not a fiduciary accounting. There have been some interim accountings. Filing a tax return is a form of accounting. It's not a fiduciary accounting, but it is an accounting. Providing an interim financial statement is an accounting, but it's not necessarily a fiduciary accounting, in my opinion. It's not the way fiduciaries meet their responsibilities in my experience for an accounting.

Q. Did you and Margaret Blair look at 36 boxes offered by the Defendants?

A. That was one of the things we did. There were books and records that were in 30-some boxes, and both Margaret Blair and I spent several days doing a detailed review of those documents.

Q. Was there a fiduciary accounting in there?

A. No.

Q. Periodic or final?

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A. There was some periodic tax accountings and there were periodic financial reports. There was not a comprehensive final report or fiduciary accounting as that would be termed.

Q. But is it normal for beneficiaries to, from the outset, do their own forensic accounting to find out what is happening?

A. That's why you have the fiduciary.

Q. What does he or she do instead of that?

A. Well, the fiduciary maintains sufficient relevant information and provides that information periodically and throughout - you know, at the end of the pendency of serving as the fiduciary--and tries to be responsive to the parties in interest or beneficiaries as--to disclose what has occurred over that fiduciary service.

Q. And that hasn't happened here?

A. No, it hasn‘t.

[Rec. at 3203, Tr. Vol. 2 at 215:17-216:4; 234:8-20; 277:12-24].

***16** Mr. Payne testified that the excerpt of his extensive expert report lists the “key elements of information that would be used for a fiduciary accounting. Id. at 229. Those elements include:
1. A definitive list of sections and areas of interest held by the Partnership;

2. A definitive list of sections and areas of interest held by Defendants and their related entities;

3. A definitive list of wells by area of interest listing competitive and non-competitive areas;

4. Overhead accounting with supporting vendor files;

5. Year-by-year sources and uses of cash;

6. Maintenance of historical division of interest ownership records;

7. Maintenance of historical life to date, well profit/loss and/or payout statements;

8. Maintenance of technical files (maps, geological drilling tests, engineering, title, land);

9. Accounting of draws, repayments, purpose and properties mortgaged; and

10. Documentation of all sharing arrangements for administration services.

[Rec. at 3215, Ex. 6 at DRPA-46]. There is no question that Plaintiffs received nowhere near this amount of information.

Plaintiff Margaret Blair also testified that Plaintiffs were never provided the complete information to which they were entitled. In 1991, a meeting of the Blair siblings was held at the office of Blair Estate attorney Robert Reece to discuss the need for an accounting. Margaret Blair testified that the siblings decided on the advice of Mr. Reece to hire a landman to perform an audit/ accounting of the Blair Estate properties. [Rec. at 3203, Tr. Vol. 2 at 27:8-28:15].

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Q. What was your understanding of what this landman would do?

A. He would come in and go through the books, both money and property-wise, and see what came into the estate and what went out of the estate and what should have come into the estate....

Q. Okay. And does this letter advise about how much they think--or was it understood what a landman would cost?

A. Yes. $7,500.

***17** Q. Okay. And after this meeting, do you know whether or not a landman was hired to conduct this investiation and research?

A. No, he was not.

Id. Ms. Blair stated that she received a few income and expense reports from the trustees in 1993. Id. at 31:14-17. Ms. Blair was not provided an accounting at any time from 1996 to 2000. Id. at 35:15-18; 44:23-45:7. The most information Ms. Blair received were the partnership tax returns, which sometimes included depreciation and depletion schedules, and a yearly K-1. Id. at 59:15-60:9; 62:14. Even the trial court acknowledged as much in his ruling. [Rec. at 3206, Tr. Vol. 5 at 78].

This is simply not the equivalent of the fiduciary accounting to which Plaintiffs were entitled, as Mr. Payne explained. The Oklahoma Supreme Court has also acknowledged that a tax return, which in reality was all that was ever provided to Plaintiffs by the trustees, does not satisfy a trustee's duties of disclosure. Smith v. Baptist Foundation of Oklahoma, 2002 OK 57, ¶ 21, 50 P.3d 1132, 1143 (holding that "[w]e are unconvinced that the bare information appearing on the 1984 tax return would have alerted Verbon that the Foundation was charging back a loss on the sale of minerals...."). Accepting all of this evidence and the inferences to be drawn therefrom in the light most favorable to the Plaintiffs, which the trial court was required to do, the only conclusion that could be drawn is that Plaintiffs never received the accounting which they were owed by the trustees in the exercise of their fiduciary obligations.

Despite this obvious result, the trial court nonetheless ruled that "this Court, given prior analysis and findings believes awarding Plaintiffs requested relief for a fiduciary accounting far exceeds that which is authorized and required in the trust and partnership documents." [Rec. at 3206, Tr. Vol. 5 at 76:23-77:1]. To the contrary, as set forth above, the ***18** Blair Will required periodic reports to the beneficiaries, while the Partnership Agreement in fact required monthly reports. This mandated reporting to the beneficiaries is consistent with fiduciary accounting principles, and the trial court's contention to the contrary is incorrect. Moreover, as the attorney for the Blair Estate unequivocally testified, nothing in the Partnership Agreement was intended to, or even could, supplant any fiduciary obligations owed by the Defendants to Plaintiffs. [Rec. at 3214, Ex. 17]. The trial courts ruling on this issue was thus clearly incorrect and cannot be allowed to stand.

PROPOSITION II

Plaintiffs Reasonably Established a Balance Due and Owing To Them From the Defendants

The trial court next determined, also incorrectly, that Plaintiffs did not reasonably establish that there was a balance due and owing them by the Defendants, the fourth prong of the analysis as ordered by the court.[1] As previously set forth, the trial court found that David Payne's report was insufficient to establish such damages, and was a foregone conclusion "searching for facts to support it." [Rec. at 3206, Tr. Vol. 5 at 80]. The court also stated that it was concerned that Mr. Payne's report was attempting to "recast" § 13.3 of the Partnership Agreement "so as to lend support to its proposition." Id. Once again, the court was incorrect on both points.

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As to Mr. Payne's report, there can be no dispute that any omissions were the result of the discovery **abuses** of the Defendants themselves. Mr. Payne testified with regard to the discovery problems in the case.

***19** Q. We hired you to assist us in this case as an expert. Correct?

A. Yes.

Q. Did you help us in discovery?

A. I did, yes.

Q. To what extent was discovery in this case, in your experience, typical or atypical?

A. In my experience, it's been more atypical

Q. Give me some examples in this case of why it's been atypical.

A. There has been a lot of difficulty between Plaintiff and Defendant in producing what I would call ordinary course documents that are normally maintained in the industry.

[Rec. at 3203, Tr. Vol. 2 at 229:19-230:7]. Mr. Payne also testified about certain very significant missing electronic data that Defendants' accountant indicated could not be produced.

Q. What did [Defendants' accountant] say about the existence of certain electronic data that we were seeking?

A. He testified--one of the key elements was he testified as to the ownership record between the Plaintiff and Defendant, which we call in the industry a Division of Interest or DOI only existed in a current state. He said there were owner digests that you could print out the ownership of Mr. Blair, Comanche Resources, or Blair Royalties currently, but you had no way to electronically produce or track that interest back in time over the course of the history of a property. That was the substance of his testimony and representations.

Q. Did it turn out, thereafter, that that was true or not true?

A. Well, based upon the production of the electronic data, a few days before I issued my expert report, that data contained electronic ownership history back to 1985.

Q. And was that data necessary for your expert report?

A. Yes. It would be a useful element to the expert report, yes.

Q. Were you able to utilize it?

A. No, I was not at the time of filing my expert report.

Q. Why not?

A. It was just too voluminous, too many records, too many fields. I received that approximately four days before filing my expert report.

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[Rec. at 3203, Tr. Vol. 2 at 230:20-231:25]. Mr. Payne further explained that the Plaintiffs only discovered the existence of this historical ownership information after hiring and paying ***20** information technology specialists trained in forensic procedures. Id. at 232:1-7. Plaintiffs thus obtained that information without any assistance whatsoever from the Defendants.

Mr. Payne also testified regarding the problems created by Defendant Robert Blair's refusal to produce his tax returns, despite being order to do so by the court.
Q. Mr. Payne, how are you going to determine anything from the tax data in the absence of Mr. Blair's tax returns?

A. You can determine what revenue and expense or what interest resides in Blair Royalties. But you can't determine what the interest is across the areas that the W.W. Blair Estate necessarily had at the time of death or at the time of the formation of Blair Royalties--some of which can reside in related entities, like Mr. Blair, individually; or Comanche Resources; or Clover Petroleum; or other affiliates controlled by Robert Blair.

Q. So you have told us that you did not have the fundamental electronic date to prepare your expert report. Correct?

A. Correct.

Q. And you did not have the tax data from Mr. Blair that Judge Davis ordered to be produced. Correct?

A. Correct.

Id at 237:15-238:8.

Despite the Defendants' refusal to produce court-ordered discovery, Mr. Payne received sufficient financial information to do an initial quantification of damages with respect to 66 wells in which Plaintiffs should have either had an interest, or should have had a larger interest than what was reflected in the ownership records. [Rec. at 3403, Tr. Vol.2 at 273:20-274:23]. Mr. Payne's preliminary estimate of the damages amount for these 66 wells was approximately $5.9 million. Id; [Rec. at 3215, Ex. 6 at DRPA 1.1]. Mr. Payne testified as to the process he employed to make these calculations without relevant data.
Q. Mr. Payne, in the absence of the data you just explained, how did you prepare Exhibit 5, your expert report?

A. Well, I prepared it like I do in a lot of cases when there are significant discovery disputes.

***21** I start with making an explanation of the status of discovery, that the report is being filed to meet a scheduling deadline; that my normal practice is to continue to supplement those reports to use the best available data through the time of trial - unless the Court prohibits any supplementation--but I try and supplement when additional discovery and relevant information occurs. And that's what I disclosed in the report.

Id. at 238:25-239:13. Mr. Payne explained that he had enough basic information to make the damage calculations as to the 66 wells.
Q. Tell me about Page DR - tell the Court about DRPA-45.... [Rec. at 3215, Ex. 6 at DRPA-45].

A. Okay. DRPA-45 is labeled: Types of Records and Documents maintained by a Fiduciary in the Oil and Gas Industry.

Q. And let's just do Number 1 in summary. Partnership Records.

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A. Yes. Partnership Records would have information regarding prospects, partnership agreements, internal monthly and periodic financial's, tax returns and depletion schedules, trial - what's called trial balances and general ledgers. They can have capital accounting information, acquisition divestiture agreements.

There are other documents. This is a sampling of what should be in partnership records
Q. I'm not going to have you go through 2, 3, and 4 on DRPA-45, but I want you to tell the Court what, of this data, was made available to us to prepare your expert report and damage calculation.

A. In Item 2, we did eventually reach production of a number of well files that were requested. The well files have a land component, Division of Interest, or Division Order Title Component. It has a drilling component. Those kind of things.

So wewereaetoobtain those on a number of thethe parties tried to narrow the production of that because it gets kind of voluminous, and we had narrowed that down to less than the number of files that relates to all of the Plaintiffs' claims in this case. But that was produced in the interest of not being too burdensome among the parties.

Id. at 243;22-245:9. Mr. Payne also testified that he was provided tax returns for the Partnership. Id. at 246:19-20. As a result, Mr. Payne had enough information to do the basic mathematical calculations as to Plaintiffs' interest in the 66 wells. That amount alone is almost 66 million without statutory interest.

***22** As a result, the trial court's determination that Plaintiffs did not produce evidence showing a balance reasonably due to them is simply astonishing in light of the evidence presented. This would be the case even if Mr. Payne's calculations at to the 66 wells were largely incorrect, as he so testified.
Q. Mr. Payne, if your evidence reasonably tending to show a balance is off by 90 percent, how much of a balance is left?

A. Roughly $600,000....

Q. Isit your understanding that damagecalculations in Oklahoma have to be perfect?

A. No - I mean, I don't really use the word perfect. I think they, you know, should be tied to the assertions and the facts and be reasonable estimates based upon the data and information that's available.

Q. Does your report rise to that level?

A. I believe so....

Q. Does it rise to the level of showing a balance due in an accounting perspective?

A. From an accounting perspective, a damage would be an obligation or, as you use it, a balance due. Yes.

[Rec. at 3205, Tr. Vol. 4 at 225:12-226:13].

This Court should note that Mr. Payne also found potentially significant amounts due to the Plaintiffs as a result of both excessive Partnership overhead charges and multiple mortgages of partnership properties by Defendants.
Q. And let's cut to the chase, Mr. Payne. For the years 1982 through 1996, there was--a million dollars in overhead was charges--Blair Royalties, Limited, that's a poor word. Blair Royalties, limited, for those years, was charges a million dollars in overhead. Correct?

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A. Yes.

Q. Without employees and without its own office. Correct?

A. Correct.

Q. You haven't concluded your analysis of overhead, have you?

A. I have not....

Q. Based on what you have reviewed so far, does not the overhead charges indicate there is a balance due?

***23** A. It would. Without the source documentation to support the reasonableness of the overhead, it does, by analytical procedures and benchmarking - in my experience with partnerships at this period of time-look excessive. And that would indicate a balance due unless it is properly accounted for and supported with source information.

[Rec. at 3203, Tr. Vol. 2 at 256:19-257:4; 260:11-20]. Mr. Payne also found over 20 mortgages of Partnership properties without the consent of the Defendants amounting to millions of dollars. Id. at 264:9-20. Mr. Payne was unable from the information presented to determine whether the Plaintiffs received any of the loan proceeds.

Q. Do you know today what Mr. Blair did with these millions of dollar-- hatever the sum total is - financed, in part, by my client's property?

A. There are some of the smaller transactions. Certain transactions, I can trace in to the partnership books and records, and you can see an inflow of money and certain changes, maybe, in a property acquisition or something. But there are borrowings on this--or mortgages on this sheet that I could not track in to the partnership books and records.

Q. Could you track in to my clients' records, how they benefitted from these mortgages? Directly or indirectly?

A. No, not for all of these borrowings. No.

Id. at 264:21-265:9]. If this evidence had been accepted by the trial court and viewed in the light most favorable to the Plaintiffs as the law dictates that it must, denial of Defendants' demurrer to the evidence would have been a foregone conclusion. The court's determination to the contrary must be reversed by this Court.

The trial court also criticized Mr. Payne and his report for what the court describes as n improper finding of liability, and describes that so-called finding as “troubling.” The ourt stated that the report was ‘not an independent analysis of the facts which, I think, is robably more persuasive.” [Rec. at 3206, tr. Vol. 5 at 80:9-11]. With all due respect, an nitial finding or acceptance of liability is a threshold basis for the damage analysis, as Mr. ayne explained.

> ***24** Number one, any time I author a report prior to rulings as to liability of Defendants in a case, I disclose that in order to calculate damages, as a CPA, I have to have some basis in data. But to calculate damages at that stage of a case, I am not implying that that damages measurement or that claim that may be due is a liability. I'm not going to testify as to liability. So I make an assumption of liability at these stages in the case. So I disclose that.

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[Rec. at 3203, Tr. Vol. 2 at 240:9-18]. Mr. Payne's assumption of liability is thus merely a starting point for his damages calculation, and there is no justification whatsoever for the trial court's rejection of Mr. Payne's report on this basis.

Finally, the trial court stated that it was "also troubled that the report appears to recast what Section 13.3 of the Partnership Agreement and what the 1993 agreement deems permissible independent activity so as to lend support to its proposition." [Rec. at 3206, Tr. Vol. 5 at 80:16-20]. As has been stated, the court's concern has been completely refuted by the testimony of Robert Reece, the Blair Estate attorney who was intimately involved in the decision to form the partnership for tax reasons. Again, Mr. Reece stated that the clause was only intended to allow all the partners to engage in their own business activities, not to abrogate any fiduciary duties owed by the general partner to the limited partners. [Rec. at 3214, Ex. 17]. Mr. Payne testified similarly.
Q. Do you believe that the Partnership Agreement here is designed to allow the general partner and the limited partners to compete with the partnership?

A. Not to compete with the partnership, but to participate in the oil and gas industry. In other words, it would be inappropriate when you say to compete, to run out and try and get leases in the same area that--where the partnership is trying to get leases. That's--that's not approved in the oil and gas industry. You would have what is generally called an area of mutual interest, and other parties don't come in and take advantage of that, so...

But - but the general partner could go out to any of the areas where the partnership was not participating in, say, drilling a well or doing a workover or buying up leases or anything like that. It doesn't prohibit the general partner from being in the business. But it would not condone using your terminology, competing with them.

***25** [Rec. at 3204, Tr. Vol. 3 at 45:14-46:8]. Mr. Payne's construction of the Independent Activities clause is thus completely consistent with that of Mr. Reece; the clause allows the general partner to otherwise participate in the oil and gas business for its own purposes, but does not permit usurpation of opportunities that should properly benefit the Partnership itself, including the limited partners.

Furthermore, not only was all the evidence in favor of Plaintiffs on this issue, but the trial court improperly expanded the scope of the issues for trial by considering the Independent Activities clause in the first instance. Construction of the Section 13.3 of the partnership Agreement was not among the enumerated issues to be tried as set forth by the court, and should not have been included. If Plaintiffs had been previously informed that the court was going to do so, they would have provided additional testimony regarding the clause and the language therein. Plaintiffs submit they were extremely prejudiced by the inclusion of the Independent Activities clause issue without prior notice and an opportunity to fully respond. In any event, even if the Independent Activities clause was intended to negate Defendant Robert Blair's fiduciary duty to his sisters as the Trustee, Oklahoma law is clear that such is not permissible, as Robert Reece unequivocally testified. See Atwood v. Atwood, 2001 OK CIV APP 48, ¶ 19, 25 P.3d 936, 942 (acknowledging that there are "limits upon all trustees, regardless of the latitude and discretion vested in them," which limits include "fraud or malicious, intentional disregard for the rights of the Beneficiaries).

Accordingly, none of the reservations expressed by the trial court concerning Mr. Payne's report or testimony have any foundation in either fact or law. The court's determination to reject Mr. Payne's evidence as to damages reasonably owing the Plaintiffs was simply wrong, and should be reversed by this Court.

*26 PROPOSITION III

The Trial Court's Award of Attorneys' Fees To Defendants Was Improper and Incorrect

After the trial court denied Plaintiffs' request for a fiduciary accounting, Defendants filed an Application to Assess Fees and Costs. [Supp. Rec. at 4-16]. Defendants asserted that they were entitled to attorneys' fees pursuant to both 60 O.S. § 175.57(D) and I¶ 17.2 of the Partnership Agreement. Defendants requested in excess of $445,000.00 in attorneys' fees. Id. Defendants

also claimed they were entitled to an award of costs in the amount of $30,206.98 pursuant to 12 O.S. § 929, 930 and 942. Id. Plaintiffs opposed the Defendants' Application, asserting that Defendants' could not base their fee request on 60 O.S. § 175.57 because Plaintiffs' accounting action was not brought under that statute, but rather at common law. [Supp. Rec. at 140-150]. Plaintiffs also asserted that Defendants' fee request should be denied under principles of justice and equity, which the court is required to consider under the case law construing § 175.57. Id. At the very least, Plaintiffs maintained that the fee award should be stayed pending appeal of the underlying decision to this Court. Id.

By Order dated October 16, 2014, and after a hearing, the trial court granted Defendant's Application in large measure, awarding the Defendants $296,456.00 in attorneys' fees and $16,206.98 in costs. [Supp. Rec. at 174-175]. [2] In addition, the court summarily denied the Plaintiffs' requests for a stay of the attorney fee award pending the outcome of this appeal. [Supp. Rec. at 184, Tr. At 65:9-15; 147:13-25]. Just as with the ruling on the underlying claims, the trial court's determination on the fee issue is incorrect and mandates reversal by this Court.

***27** As a threshold matter, the Oklahoma statute relied on by Defendants and the trial court is contained in the Oklahoma Trust Act and is entitled "Breach of Trust". The statute provides in pertinent part that:

> "[i]n a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

60 O.S. § 175-57(D) (emphasis added). However, Plaintiffs did not invoke the protections of the Oklahoma Trust Act or the above statute in this litigation, and instead requested a common law accounting. Id. at 16:16-17:12. Defendants should not be permitted to invoke a statutory provision authorizing attorney's fees when such provision was not the basis for Plaintiffs' action. Accordingly, because there is no statutory basis for Defendants' fee request, the traditional American Rule prevails. That Rule provides that "courts are without authority to award attorney fees in the absence of a specific statute or contractual provision allowing the recovery of such fees, with certain exceptions. The Court has ruled that exceptions to the American Rule are narrowly defined." Atwood, 25 P.3d at 946. There are no such exceptions in this case, and the court's determination to award attorneys' fees must be reversed

Even if the statute relied in by Defendants was otherwise applicable, the Atwood case establishes that an award of attorneys' fees to Defendants would nonetheless be improper. In *Atwood*, the only case construing 60 O.S. §175.57(D), the court emphasized that, in light of the dictates of the American Rule, "[t]he Court strictly construes any authority for fees and expenses." *Id.* at ¶43. As set forth above, section 175.57(D) is not a mandatory fee shifting stature, and requires that the court exercise its discretion in awarding attorneys' fees. In construing the statute, the Court of Civil Appeals stated that:

***28** The statutory phrase "as justice and equity may require" contained in Section 175.57(D) serves two functions, first as a criterion for entitlement and second, as a measure of the size of the award....

The highly subjective phrase "justice and equity" does not state specific guidelines or criteria for use by a trial court or for use by a reviewing court. ***The phrase connotes fairness and invites flexibility in order to arrive at what is fair on a case by case basis.*** Hence, general criteria drawn from other types of cases provide nonexclusive guides. These include (a) reasonableness of the parties' claims, contentions or defenses; (b) unnecessarily prolonging litigation; (c) relative ability to bear the financial burden; (d) result obtained by the litigation and prevailing party concepts; and (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.

Id. at ¶¶ 45, 47 (emphasis added). When these factors are applied to the case at bar, it is apparent that only one - prevailing in the litigation - favored the Defendants.

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There can be no serious question that Plaintiffs' claims and contentions in this case were more than reasonable. Plaintiffs were trust beneficiaries who had every right to request an accounting from the Trustees of that trust at any time, but particularly when they suspected that the Trustees were usurping property rightfully belonging to them by virtue of their father's bequest. Plaintiffs submit the fact that Defendants have resisted their reasonable request since before this case was filed in 2001 demonstrates the need, and the justification, for their claims. Had Plaintiffs' claims been devoid of merit, as the Defendants have repeatedly contended, there is no rational basis why the requested accounting would not have been provided in the first instance. Instead, Defendants have fought Plaintiffs and the counsel at every turn and over virtually every issue. In addition, until the trial court ruled against Plaintiffs on the accounting issue, Plaintiffs prevailed on all of Defendants' dispositive motions, including two motions implicating the Independent Activities clause in the Partnership Agreement, [Rec. at 2764, Ex. 1 at ¶ 13.3], on which Defendants continue to rely in support of their position. Plaintiffs also prevailed on their request for an accounting ***29** before Judge Davis, [Rec. at 2761-2763], and on the first two prongs of the accounting trial that is the subject of this appeal. Plaintiffs' claims thus are clearly reasonable in any sense of the word, and this factor weighs against an award of attorneys' fees.

The next factor - unnecessarily prolonging litigation - is similarly in favor of Plaintiffs under the facts set forth above. Plaintiffs have tried mightily to push this case forward, but have been unable to do so. Because of Defendants' resistance, Plaintiffs have been required to change lawyers several times, and expend money they could not easily obtain to continue the litigation, including opposing Defendants' dispositive motions. The Court should note that the very substantial fee for Plaintiffs' expert David Payne was paid by Plaintiffs themselves, refuting Defendants' argument that Plaintiffs were insulated from financial risk. Counsel for Defendants argued at the attorneys' fee hearing that:

> [The Plaintiffs] have nothing to lose. They didn't have to lose anything out of their trust. They had nothing in their trust at issue. They had nothing in the partnership at issue any longer. They could just go out there and put all their money on red and spin the wheel and hope they got rich, and that's what they were doing.

[Supp. Rec. at 184, Tr. at 47]. This could not be further from the truth. Plaintiffs have assumed significant financial obligations to continue this litigation, despite Defendants' assertions to the contrary. As a result, the fact that Plaintiffs have persistently pursued the litigation to this juncture in face of Defendants' litigation strategies should weigh in their favor as to the award of attorneys' fees.

The next Atwood factor is possibly the most important in this case - the parties' relative ability to bear the financial burden. There is no dispute that Defendant Robert Blair is very wealthy, while Plaintiffs, his sisters, are not. Plaintiffs are all living paycheck-to-paycheck, and clearly cannot afford the attorneys' fee assessed by the trial court. Given the ***30** financial disparity between the parties, and particularly considering the merits of the Plaintiffs' claims, the trial court should have required Defendants to pay their own fees and declined to impose those fees on the Plaintiffs. If this determination is not reversed by this Court, Plaintiffs' financial security will be forever impacted, while Defendant Robert Blair is easily able to pay his own counsel. The trial court's decision must be reversed for this reason alone.

The final Atwood factor implicates the parties' conduct - whether that party has acted in bad faith or otherwise oppressively in bringing the action. Again, as set forth above, Plaintiffs have only pursued what they have always been entitled to: an accounting from the Defendants in their capacity as Trustees for the benefit of the Plaintiffs. The fact that Plaintiffs did not ultimately prevail in accordance with the relief requested is of no moment. Plaintiffs brought and pursued this action in the utmost good faith, and should not be required to pay Defendants' attorneys' fees on this basis. *Critically, Defendant put on no evidence whatsoever to satisfy the Atwood elements other than they "prevailed" at the hearing.*

In any event, the trial court has absolutely no authority to award fees and costs related to the Fraud Action that was consolidated with this request for accounting. At the hearing on fees and costs, the Court heard and accepted ALL the Defendants charged amounts dating back to 2001. No delineation was made in any sense as to what was even remotely attributable to the Accounting Hearing and what was attributable to the Fraud Action. Thus the Court was without authority to make any award at all as the

Fraud Action has never been tried, and yet the Court accepted all billings of Defendants' counsel as proper. [Supp. Record 4-139]. No attempt was made to determine any fees or costs that were actually incurred in the hearing of March 2014.

***31** Finally, Plaintiffs submit that the trial court's determination to deny Plaintiffs' request for a stay of the fee judgment pending appeal is an **abuse** of discretion under the circumstances of this case. Defendants are currently garnishing Plaintiffs' limited income, which is causing them severe financial distress. Given Defendant Robert Blair's wealth, he would not have been at all adversely affected by a stay, and Plaintiffs' current financial plight could have been avoided until a ruling from this Court. There was simply no reason for the trial court to decline Plaintiffs' request for a stay, and Plaintiffs urge this Court to so hold.

IV. CONCLUSION

This protracted and bitter family battle has cost Plaintiffs dearly, both financially and emotionally. Their request for an accounting to determine the status of their inheritance from their father is straight-forward and clearly mandated by Oklahoma law. After pursuing this action since 2001, the trial court should have finally granted Plaintiffs the fiduciary accounting they sought and deserved. The court's determination not to do so was shocking under the facts and evidence presented by the Plaintiffs, and demands correction by this Court. Plaintiffs request that the Court reverse the trial court's ruling with instructions to grant Plaintiffs the fiduciary accounting they requested and to which they are entitled.

Footnotes

1 Plaintiffs do not agree that reasonable proof of a balance due is a proper element of a fiduciary accounting. Rather, as beneficiaries, Plaintiffs should be entitled to the requested accounting regardless of the damages.

2 The court's ruling was based solely on the statute, not the Partnership Agreement provision also relied on by the Defendants.

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