OBA/CLE PRESENTS
OBA/CLE & OBA ESTATE PLANNING, PROBATE, AND TRUST SECTION PRESENT

BEFORE DEATH AND TAXES: NATALIE CHOATE ON ESTATE PLANNING FOR RETIREMENT BENEFITS

COSPONSORED BY TRUST COMPANY OF OKLAHOMA & HERITAGE TRUST CO.

FEATURED SPEAKER

NATALIE B. CHOATE, NUTTER MCCLennen & FISH, LLP, BOSTON

OKC: DEVON BOATHOUSE 616 SE 6TH ST. MAY 13 $175 $200 5 MCLE/0 ETHICS WWW.OKBAR.ORG/CLE

Natalie B. Choate is an Of Counsel in the Trusts and Estates Department of Nutter McClennen & Fish, LLP, Boston. Her practice is limited to estate planning for retirement benefits. Her two books, Life and Death Planning for Retirement Benefits and The QPR Manual, are leading resources for estate planning professionals.

Natalie is the founder and former chair of the Boston Bar Estate Planning Committee, a former chair of the Boston Bar Employee Benefits Committee, and a member and former officer of the Boston Probate and Estate Planning Forum. She is a fellow and former Regent of the American College of Trust and Estate Counsel and former chairman of its Employee Benefits Committee. Named “Estate Planner of the Year” by the Boston Estate Planning Council, Natalie is listed in The Best Lawyers in America. The National Association of Estate Planners and Councils has awarded Natalie the “Distinguished Accredited Estate Planner” designation.

Her articles on estate planning topics have been published in ACTEC Notes, Estate Planning, Trusts and Estates, Tax Practitioners Journal and Tax Management. She is an editorial advisor for Trusts and Estates magazine. She writes a web column and “podcast” for MorningstarAdvisor.com. Natalie has taught professional-level courses in estate planning in 49 states, and has spoken at the Heckerling, Notre Dame, Heart of America, New England, Southern California, Mississippi, Tennessee, Washington State, and Southern Federal Tax Institutes. Her comments on estate and retirement planning have been quoted in The Wall Street Journal, Money, Newsweek, Kiplinger’s Personal Finance, Forbes, Financial Planning, and The New York Times.

REGISTRATION AND CONTINENTAL BREAKFAST  
* NOTE EARLY START TIME

7:30 a.m.  \hline
8  \hline
9  \hline
9:10

MAKING RETIREMENT BENEFITS PAYABLE TO TRUSTS  

DEATH AND TAXES: THE INHERITED RETIREMENT PLAN

LUNCH  

SPONSORED BY:

THE UNIVERSITY OF OKLAHOMA FOUNDATION

THE FOUNDATION FOR OKLAHOMA STATE UNIVERSITY

10:10  11:10  12:00 p.m.

1
EVENTS CALENDAR

MAY 2011

10 OBA Bar Center Facilities Committee Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Judy Hamilton Morse (405) 235-7759

OBA Law-related Education Task Force Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Reta Strubhar (405) 354-8890

11 OBA Government and Administrative Law Practice Section Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bryan Neal (405) 522-0118

12 OBA Appellate Practice Section Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Rick Goraiewicz (405) 521-1302

OBA Women Helping Women Support Group; 5:30 p.m.; The Oil Center – West Building, 10th Floor; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033

13 OBA Board of Governors Meeting; Enid, Oklahoma; Contact: John Morris Williams (405) 416-7000

OBA Family Law Section Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800

17 OBA Civil Procedure and Evidence Code Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

18 Oklahoma Council of Administrative Hearing Officials; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

18 OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625

19 OBA Bench & Bar Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109

19 OBA Board Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601

For more events go to www.okbar.org/calendar
Register online at www.okbar.org/solo or return this form.

Full Name: ____________________________ OBA#: ____________________________

Address: _______________________________ City/State/Zip: _______________________

Phone: __________________ Fax: _______________ E-mail: _______________________

List name and city as it should appear on badge if different from above: ______________________

Registration Fees: Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals: Thursday evening, poolside buffet, breakfast buffet Friday & Saturday, buffet lunch Friday & Saturday, Friday evening buffet.

Circle One

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<th>Registration Type</th>
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<td>Early-Bird Attorney Registration (on or before May 26, 2011)</td>
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<tr>
<td>Late Attorney Registration (May 27, 2011 or after)</td>
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<tr>
<td>Early-Bird Attorney &amp; Spouse/Guest Registration (on or before May 26, 2011)</td>
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<td>Late Attorney &amp; Spouse/Guest Registration (May 27, 2011 or after)</td>
<td>$325</td>
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Spouse/Guest Attendee Name: ____________________________________________

Early-Bird Family Registration (on or before May 26, 2011) | $325
Late Family Registration (May 27, 2011 or after) | $375

Spouse/Guest/Family Attendee Names: Please list ages of children.

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Thursday, June 9 - 18 Hole Golf ( ______ of entries @ $30 each) Total $: ______
Friday, June 10 - 9 Hole Golf ( ______ of entries @ $50 each) Total $: ______

Make check payable to the Oklahoma Bar Association. Mail Meeting Registration Form to:
CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. FAX Meeting Registration Form to (405) 416-7092

For payment using ______ VISA ______ Mastercard ______ Discover ______ AmEx

CC: ____________________________
Expiration Date: ________________ Authorized Signature: ____________________________

No discounts. Cancellations will be accepted at anytime on or before May 26, 2011 for a full refund; a $50 fee will be charged for cancellations made on or after May 27, 2011. No refunds after June 1, 2011. Call 1-(888) 396-7876 for hotel reservations. Ask for the special OBA rate.
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2011 OK CIV APP 44 RCB BANK, Plaintiff/Cross-Claimant/Appellant, vs. VILLAS DEVELOPMENT, L.L.C., an Oklahoma Limited Liability Company; HAROLD W. TOMPKINS; ROBERT M. COX; THE TOMPKINS FAMILY LLC, an Oklahoma Limited Liability Company; MARVIN Y. JIN and SOOHYUN JIN; BANK OF COMMERCE; TULSA ENERGY CONTROL, INC., a Florida Corporation; LIFESTYLES STORES, INC., an Oklahoma Corporation; MILL CREEK LUMBER & SUPPLY COMPANY, an Oklahoma Corporation; and DAVIS CUSTOM PAINTING, INC., an Oklahoma Corporation, Defendants, and BANK OF COMMERCE, Plaintiff/Cross-Claimant/Appellant, vs. VILLAS DEVELOPMENT, LLC., an Oklahoma Limited Liability Company; HAROLD W. TOMPKINS; ROBERT M. COX; THE TOMPKINS FAMILY LLC; MARVIN Y. JIN and SOOHYUN JIN; BANK OF COMMERCE; TULSA ENERGY CONTROL, INC., a Corporation; LIFESTYLES STORES, INC., a Corporation; MILL CREEK LUMBER & SUPPLY COMPANY, a Corporation; DAVIS CUSTOM PAINTING, INC., a Corporation; FULLER, CHLOUBER & FRIZZELL, L.L.P., an Oklahoma Limited Liability Partnership; and MARY JANE LAW, in her capacity as Treasurer of Delaware County, Oklahoma, Defendants. Case No. 108,370

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2011 OK CIV APP 50 K.W., A MINOR CHILD, BY AND THROUGH HER MOTHER AND NEXT FRIEND, M.W., Plaintiff/Appellant, vs. INDEPENDENT SCHOOL DISTRICT NO. 12, EDMOND, OKLAHOMA, a/k/a EDMOND PUBLIC SCHOOLS, Defendant/Appellee. Case No. 107,955

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2011 OK CIV APP 46 OKLAHOMA ATTORNEYS MUTUAL INSURANCE COMPANY, Plaintiff/Appellee, vs. STEPHEN CAPRON and CAPRON & EDWARDS, PLLC, Defendants/Appellants. Case No. 108,792
NOTICE OF JUDICIAL VACANCY

Associate District Judge
First Judicial District
Beaver County, Oklahoma

This vacancy is created by the retirement of the Honorable Gerald H. Riffe effective July 1, 2011.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

This is the SECOND NOTICE OF JUDICIAL VACANCY for the position of Associate District Judge, First Judicial District, Beaver County, Oklahoma. The FIRST NOTICE OF JUDICIAL VACANCY resulted in only two applications being filed. A minimum of three (3) nominees for this judicial position is required by the Constitution to be sent to the Governor and Chief Justice of the Supreme Court for selection of the next Associate District Judge. (Okla. Const. Art. 7B, Sec. 4)

Application forms can be obtained online at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address no later than 5:00 p.m., Friday, May 13, 2011. If applications are mailed, they must be postmarked by midnight, May 13, 2011.

Allen M. Smallwood, Chairman
Oklahoma Judicial Nominating Commission
2011 OK 33
RE: REINSTATEMENT OF CERTIFICATES OF CERTIFIED SHORTHAND REPORTERS
No. SCAD-2011-29. April 25, 2011
ORDER
In the March 3, 2011 order numbered SCAD-2011-17, this Court suspended the certificates of the following certified shorthand reporters:

1. Frank L. Peterson, CSR #324
2. Glen R. Dorrough, CSR #171
3. Steve Meador, CSR #294
4. Laurie Catherine Johnson, CSR #1437
5. Debra Garver, CSR #1370
6. Larry Shalberg, CSR #366
7. Myrna Parrish, CSR #1709
8. Lisa D. Smith, CSR #1778
9. Dorothy Bayless, CSR #116
10. Christine T. Ballard, CSR #1329.

The State Board of Examiners of Certified Shorthand Reporters advises that the above-named shorthand reporters have satisfied all the continuing education requirements for calendar year 2010 and have paid the 2011 annual renewal fees in accordance with 20 O.S.2001, § 1506, 20 O.S.Supp.2010, § 1503.1, and Rules 20, 21, and 23 of the Rules of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S.Supp.2010, ch. 20, app. 1. Accordingly, the State Board of Examiners of Certified Shorthand Reporters recommends reinstatement of the certificates of the above-named certified shorthand reporters pursuant to Rules 20 and 23.

IT IS HEREBY ORDERED that the certificates authorizing the above-named shorthand reporters to engage in shorthand reporting in this state shall be and hereby are reinstated.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 25th day of April, 2011.

/s/ Steven W. Taylor
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2011 OK 34
RE: REVOCATION OF CERTIFICATES OF CERTIFIED SHORTHAND REPORTERS
No. SCAD-2011-30. April 25, 2011
ORDER
In the March 3, 2011 order numbered SCAD-2011-17, this Court suspended the certificates of the following certified shorthand reporters:

1. Mernell Larue Bell, CSR #387
2. Hugh J. Brasher, CSR #137
3. Mary Aliece Cantrell, CSR #1022
4. Kenneth Courtemanche, CSR #183
5. Michael Feuer, CSR #1933
6. Janelle Lenz Graham, CSR #947
7. Alison Jeffrey, CSR #1930
8. Sherry Irene McCray, CSR #1573
9. Phillip Dean Orr, CSR #1839
10. Wendy S. Ragan-Sugrue, CSR #1889
11. Kristy L. Ryan Grimmett, CSR #1489
12. William D. Smith, CSR #1315

The State Board of Examiners of Certified Shorthand Reporters advises that the above-named shorthand reporters have failed to satisfy the continuing education requirements for calendar year 2010 and/or to pay the 2011 annual renewal fees in accordance with 20 O.S.2001, § 1506, 20 O.S.Supp.2010, § 1503.1, and Rules 20, 21, and 23 of the Rules of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S.Supp.2010, ch. 20, app. 1. Accordingly, the State Board of Examiners of Certified Shorthand Reporters recommends the certificates of the above-named shorthand reporters be revoked pursuant to Rules 20 and 23.

IT IS HEREBY ORDERED that the certificates authorizing the above-named shorthand reporters to engage in shorthand reporting in this state shall be and hereby are revoked.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 25th day of April, 2011.

/s/ Steven W. Taylor
CHIEF JUSTICE
TAYLOR, C.J., COLBERT, V.C.J., and KAUGER, WATT, WINCHESTER, EDMONDSON, REIF, and GURICH, JJ., CONCUR.
COMBS, J., NOT PARTICIPATING.

2011 OK 35

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. GEORGE DAVID GORDON, JR. Respondent.

SCBD # 5702. May 3, 2011

RULE 7 BAR DISCIPLINARY PROCEEDING

¶0 Respondent George David Gordon, Jr. was convicted on twenty-three counts including conspiracy, wire fraud, securities fraud, money laundering, making false statements and obstruction of justice. The Oklahoma Bar Association, in compliance with Rule 7.3 of the Rules governing disciplinary proceedings, filed a copy of the indictment, and sentencing judgment in the Respondent’s criminal case. Respondent did not respond to this Court’s February 11, 2011, order directing him to show cause why a final order of discipline should not be imposed. Respondent’s conviction demonstrates his unfitness to practice law and warrants disbarment. Disbarment shall be effective from the date this opinion becomes final.

RESPONDENT DISBARRED AND HIS NAME STRICKEN FROM THE ROLL OF ATTORNEYS.

Gina Hendryx, General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for the Complainant

George David Gordon, Jr., Texarkana, Texas, Pro se.

WINCHESTER, J.

¶1 Complainant, the Oklahoma Bar Association (OBA) notified the Chief Justice by letter November 15, 2010 that Respondent, George David Gordon, Jr. had been convicted May 3, 2010. As stated in the United States District Court judgment, respondent was convicted on one count of violating 18 U.S.C. § 371 (conspiracy), ten counts of violating 18 U.S.C. § 1343 & 2(a) (aiding and abetting wire fraud), five counts of violating 15 U.S.C. § 78j(b), 78ff & 17 C.F.R. § 240.10b-5; 18 U.S.C. 2(a) (aiding and abetting securities fraud), five counts of violating 18 U.S.C. §§ 1957(a) & 2(a) (aiding and abetting money laundering), one count violating 18 U.S.C. § 1001 (making false statements) and one count violating 18 U.S.C. § 1512(c)(2) (obstruction of justice). On October 29, 2010, the Respondent was sentenced to 188 months in prison and ordered to pay restitution in the amount of $6,150,136.79.

¶2 The indictment indicates Respondent was engaged in a scheme to artificially manipulate the price and volume of particular stocks for personal financial benefit.

¶3 Rule 7.1 of the Rules Governing Disciplinary Proceedings states “A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to a deferred sentence plea agreement in any jurisdiction of a crime which demonstrates such lawyer’s unfitness to practice law, regardless of whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, shall be subject to discipline as herein provided, regardless of the pendency of an appeal.”

¶4 The certified copies of the indictment, judgment and sentence constitute the charge, are conclusive evidence of the commission of the crime upon which the judgment and sentence are based, and suffice as the basis for discipline in accordance with these rules,” Rule 7.2 RGDP. Pursuant to Rule 7.4 of the RGDP,

¶5 In State ex rel. Oklahoma Bar Association v. Brunson, 912 P.2d 876, 1996 OK 32, Brunson was also convicted in federal court on multiple counts of wire fraud and money laundering. This Court determined the appropriate discipline in that case was disbarment.

¶6 Respondent’s conviction for conspiracy, wire fraud, securities fraud, money laundering, false statements and obstruction of justice demonstrate that Respondent has acted contrary to the prescribed standards of conduct and his acts have brought discredit upon the legal profession, demonstrating his unfitness to practice law. Accordingly, we find the appropriate discipline to be disbarment, effective from the date this opinion becomes final.

RESPONDENT DISBARRED AND HIS NAME STRICKEN FROM THE ROLL OF ATTORNEYS.

ALL JUSTICES CONCUR

2011 OK 37

DEBRA A. BAILEY, ELIZABETH L. BALLARD, PATTIPEG S. HARJO, DANIEL
If funds are available, the Education Leadership Oklahoma Act provides that a bonus be awarded to eligible teachers who attain national certification. Although in the past, the State Board of Education provided the full amount of the bonuses, as well as providing the additional amounts necessary for the payment of the employer withholding taxes, it did not do so in 2010. As a result, the employer withholding tax was deducted by local school districts from the amount which was sent. The teachers filed suit seeking declaratory relief because employer taxes were withheld from their bonus payments. The district court dismissed the action for failure to state a claim upon which relief can be granted. We hold that because the State was responsible for paying employer withholding taxes for the bonuses, the School District had to pay the employer’s tax from the bonus allocations.

AFFIRMED.

Richard B. Wilkinson, Oklahoma City, Oklahoma, for Plaintiffs/Appellants.

Robert L. Pendarvis, Mary Robertson, Oklahoma City, Oklahoma, for Defendant/Appellee.

KAUGER, J.:

We must decide whether a school district may deduct employer withholding taxes from teacher bonuses paid pursuant to the Education Leadership Oklahoma Act when the state lacks sufficient funds to pay the bonuses and the taxes. We hold that it may.

FACTS

Subject to the availability of funds, the State Department of Education (SDE) is authorized to provide an annual $5,000 bonus to teachers who attain National Board certifica-
send the School District the amount necessary to cover the State employer withholding taxes, the amount would be subtracted from their bonuses.6

¶6 On September 1, 2010, nine teachers, Debra A. Bailey, Elizabeth, L. Ballard, Pattipeg S. Harjo, Daniel T. Harris, Deborah A. Hill, Gariann Jacobs, Barbara Sue Madole, Teresa McIntyre, Victoria R. Wood, and PEN (teachers) filed a petition for declaratory relief in the District Court of Cleveland County asserting that the employer contributions had been wrongfully deducted from the teachers’ bonuses. They asked the court to enter a declaratory judgment declaring that the manner in which the School District paid the bonuses was contrary to the Oklahoma statutes and SDE directives. The School District filed a Motion to Dismiss on September 27, 2010, arguing that the School District could not be liable for the payment of bonuses pursuant to ELOA and that because the School District was required to discharge the SDE’s tax obligations, declaratory judgment could not be rendered. On December 2, 2010, the trial court issued an order granting the School District’s motion to dismiss for failure to state a claim upon which relief could be granted.

¶7 The trial court found that because the School District could not be liable for bonus payments pursuant to statute, payment of the $5,000 bonuses was conditioned on the availability of funds. The court determined that the School District was required to use some of the allocated bonus money to fund the SDE’s tax obligations. It also found that the School District was not a proper party and that there was no justiciable controversy. The teachers filed an appeal on December 21, 2010, and we retained the cause on January 24, 2011.

Pursuant to 70 O.S. Supp 2007 §6-204.2, the Federal Insurance Contributions Act (FICA). These tax rates are the same as the employee’s tax rate and employers and employees are responsible for their respective portions.7

¶9 Prior to 2007, the SDE classified teachers as independent contractors for the purpose of awarding the bonuses. In 2007, the IRS disputed the classification and eventually determined that: 1) the bonuses were wages; 2) the teachers were employees of the SDE for bonus purposes, not independent contractors;10 and 3) the SDE and the teachers would have to pay employee and employer withholding taxes. The IRS also determined that the teachers were employees of the State for purposes of the bonuses.11 In order to avoid placing every teacher into the State’s payroll system, in 2008 and 2009, the SDE sent the bonus payments, as well as the necessary employer withholding taxes, to the school districts. Since the IRS determination, the school districts have acted as intermediaries to send the funds to eligible teachers.

¶10 Intermediaries or third parties can be held responsible for an employer’s failure to pay employer withholding taxes. This liability arises from 26 U.S.C. §6672(a)12 which provides that persons other than the employer can be liable for an employer’s tax contribution if they are responsible for collecting and accounting for the tax and wilfully fail to discharge that duty. This statute was enacted to provide the federal government with a method to collect unpaid taxes.13 Once an employee has had taxes withheld from their wages, the United States has no recourse to recoup money from the employee which was not remitted by the employer.14 This statute has been construed liberally by courts to impose liability on any “responsible person” who wilfully fails to remit employer withholding taxes.15

¶11 In Commonwealth National Bank of Dallas v. United States, 665 F.2d 743 (5th Cir. 1982) the CEO of a company, the lending bank to that company, and the CEO of the bank were sued by the United States as “responsible persons” under 26 U.S.C. §6672(a)16 for failing to pay taxes withheld from employee wages. In that case, the officers of the lending company were executing payroll checks as well as checks for the employer withholding taxes, but they only honored the payroll checks even though the company’s account was afforded a large overdraft varying between $98,500 and $237,000. The cause went to trial and the jury found both
officers liable for the failure to pay the employer withholding tax contributions. Apparently, the lending bank’s officers were found to be liable because they were primarily responsible for determining which of the company’s creditors were paid. The jury determined that they each had a duty and responsibility to ensure the payment of the company’s taxes. On appeal, the Circuit Court affirmed the decision of the trial court.\textsuperscript{17}

\textsection{12} Many cases acknowledge that a “responsible person” need not be vested with routine duties of collection and payment; it is sufficient that they have the authority to avoid the default that gave rise to the violation.\textsuperscript{18} Here, the School District had the power to see that the taxes were paid and had significant, if not exclusive, control over the disbursement of the bonuses. The SDE had the responsibility to pay employer withholding tax contributions, and the School District, acting as a conduit, had a duty to remit the money to the IRS.

\textsection{13} The Act provides that bonuses are “subject to the availability of funds.”\textsuperscript{19} In the past, the SDE sent enough money for the payment of the employer withholding tax contribution and the full amounts of the bonus. However, in 2010, the SDE did not send enough money to fully fund the bonuses and to pay the employer withholding tax contribution. This suggests that there were not sufficient funds available to do so. We recognize that the diminishment of the bonus is disappointing to the qualifying teachers, but it appears in this period of state budgetary shortfalls that the SDE determined that partial bonus was better than no bonus at all. The lack of availability of funds is illustrated by the recent amendments to the Act. Title 70 O.S. Supp. 2010 §6-204.2, was amended during the 2010 legislative session to suspend the payment of bonuses beginning June 30, 2010, through June 30, 2012, for teachers who attain national board certification during that period.\textsuperscript{20}

CONCLUSION

\textsection{14} Pursuant to an IRS determination, insofar as the bonuses are concerned, the teachers are employees of the SDE, and the State is responsible for the payment of employer withholding tax contributions for the payment of these bonuses. Because the SDE was responsible for paying the employer withholding tax contributions, and the School District acted as a conduit for the SDE, the School District had a duty to pay the employer withholding tax contributions from the monies sent by the State for the payment of the bonuses to the teachers. It was not required to pay the full amount of the bonus if the funds were unavailable.

AFFIRMED.

ALL JUSTICES CONCUR.

1. Title 70 O.S. Supp. 2007 §6-204.2 provides in pertinent part:
A. Subject to the availability of funds, the Oklahoma Commission for Teacher Preparation and the State Board of Education are authorized to establish the Education Leadership Oklahoma program.
B. The purposes of the Education Leadership Oklahoma program are:
   1. Provide teachers throughout the state information about National Board certification and the Education Leadership Oklahoma program scholarships and services;
   2. Provide technical assistance and National Board certified mentors to all teachers seeking National Board certification upon request;
   3. Provide scholarships, pursuant to the Education Leadership Oklahoma Act and Oklahoma Commission for Teacher Preparation rules, for teachers seeking National Board certification;
   4. Provide a bonus to teachers who achieve National Board certification pursuant to the Education Leadership Oklahoma Act and State Board of Education rules;
   5. Reward teachers who achieve National Board certification without the financial support of the Education Leadership Oklahoma program by awarding them the application fee and the amount of the scholarship given to Education Leadership Oklahoma participants pursuant to this section and commission rules; and
   6. Provide recognition to National Board certified teachers.
E. Subject to the availability of funds appropriated by the Legislature for the purposes of this subsection, the application fee for National Board certification shall be paid for scholarship recipients by the Commission, and scholarship recipients shall be provided a scholarship in the amount of Five Hundred Dollars ($500.00) to cover other expenses associated with obtaining National Board certification.
F. It is the intent of the Legislature that the Oklahoma Commission for Teacher Preparation contract with Southeastern Oklahoma State University to establish Education Leadership Oklahoma program training in higher education teacher preparation programs in the state to assist teachers in meeting the requirements to obtain National Board certification.
G. All teachers seeking National Board certification shall be eligible to participate in Education Leadership Oklahoma program training to assist them in meeting the requirements of the National Board certification process, free of charge.
H. The Oklahoma Commission for Teacher Preparation shall promulgate rules for the selection of scholarship recipients, the selection and utilization of alternates, the payment and reimbursement of application fees, and the issuance of scholarships.
I. Subject to district board of education policy or collective bargaining agreement, additional professional leave days may be granted to teachers seeking National Board certification for National Board certification portfolio development. During the two (2) days of the additional professional days granted to teachers for National Board certification portfolio development, a substitute teacher shall be provided by the school district at no cost to the teacher.
J. The State Board of Education shall provide all teachers who attain National Board certification a bonus in the amount of Five Thousand Dollars ($5,000.00) annually no later than January 31 for as long as they maintain their National Board certification and are teaching in the classroom full-time in an Oklahoma public school. No school or school district shall be liable for payment of bonuses pursuant to this section.
K. The bonus shall not be included in the calculation of the teacher’s salary for purposes of meeting the district or statutory minimum salary schedule or for purposes of compensating Oklahoma Teachers’ Retirement System contributions or benefits.
L. The State Board of Education shall promulgate rules for the provision of the bonus pursuant to this section to include, but
not be limited to, a process by which a National Board certified teacher will verify that:
1. The National Board certification has not lapsed; and
2. The teacher is still a full-time teacher.

M. It is the intent of the Legislature that the Oklahoma State Regents for Higher Education incorporate the National Board certification portfolio development into all programs in education leading to a master's level degree.

N. Upon implementation of this subsection as provided for in subsection O of this section, the State Board of Education shall provide all teachers who attain National Board certification a bonus in the amount of Seven Thousand Dollars ($7,000.00) annually no later than January 31 for as long as they maintain their National Board certification and are full-time teachers in an Oklahoma public school. No school or school district shall be liable for payment of bonuses pursuant to this section. Upon implementation, the bonus provided for in this subsection shall replace the bonus provided for in subsection J of this section.

O. Implementation of subsection N of this section shall be contingent upon the appropriation by the Legislature of state funds for the specific purpose of implementing subsection N of this section. Nothing in this section shall prevent the State Board of Education or a school district board of education from utilizing private, local, or federal funds to implement subsection N of this section.

The current version of the statute is not referenced because it was not in effect at the time the bonuses were distributed.

2. Although the IRS rulings are not a part of the record, the following information regarding the IRS determination is helpful. It was sent in a December 6, 2007, letter to Sandy Garrett, State Superintendent of Public Instruction of the Oklahoma State department of Education from Brenda Bolander, State Comptroller of the Oklahoma Office of State Finance:

Dear Superintendent Garrett,

We have recently settled an appeal with the Internal Revenue Service (IRS) for the limited scope examination of the State of Oklahoma Employment Tax Returns (Forms 941) for calendar years 2001, 2002, and 2003. At issue was whether the annual bonus paid to teachers for National Certification by the Oklahoma State Department of Education is wages for purposes of Internal Revenue Code (IRC) 3121(b)(7)(E) and/or IRC 3121(b)(7)(F).

The IRS has found for the purposes of the bonus payment that wages are to the will and control of the School District, Teacher, and School, and the teachers are subject to the employer's will and control over the disbursement of funds. The fact that the bonus was paid by the State, rather than the school district, does not change the teachers' classification from employee to independent contractor. The amounts were paid in connection with the employee's services as a public school teacher. IRC 3401(d) provides that the employer (for purposes of withholding) can pay someone other than the common law employer, if that person has control of the payment of wages.

Based on the IRS worker classification determination, the bonus is wages and the teachers would be considered employees of the State, per IRC 3121(a) and 3121(b). These wages are subject to Social Security, Medicare, and income tax withholding per IRC 3402(d).

Effective immediately, as part of the settlement agreement, the State has agreed to no longer process these payments as 1099-MISC reports and the State is not required to issue corrected 1099-MISC or W-2 forms to the teachers. Accordingly, OSF will reject any miscellaneous claims from this point forward which include these bonus payments.

At this point, the State Department of Education will need to determine which method of payment it chooses to use, either add the teachers to the state PeopleSoft payroll system and pay them directly as state employees, or forward the funds to the school districts for payment to the teachers through the districts' payroll systems. There are issues to consider in making that decision and our staff is available to provide additional information as needed.

Please let me know if you require any assistance during this transition.

Sincerely,
Brenda Bolander
State Comptroller

3. Letter from Garrett, State Superintendent, Defendant’s Motion to Dismiss, Exhibit “C.”
Matter determined to be ineffective pursuant to daniel's attempted resignation by letter was the suspension should be set aside. The respon
directed to show cause by January 1, 2011, why,
order of the Court. The respondent was also
Rules governing disciplinary proceedings, 5
December 6, 2010, pursuant to Rule 7.3 of the
the respondent from the practice of law on
had pled guilty to one count of sexual exploita
daniel Allen woolverton (lawyer/respondent),
Office of the Chief Justice that the respondent,
Association (Bar Association), notified the
37 L. Ed. 2d. 1001.
470 F.2d 1348, 1360 (6th Cir. 1972),
United States
991, 95 S. Ct. 1998, 44 L. Ed. 2d 482: Pacific National Insurance Co. v. United States, 422 F.2d 26, 30 (9th Cir. 1970),
cert. den. 398 U.S. 937, 90 S. Ct. 1838, 26 L. Ed. 2d 269; Werner v. United States, 374 F.Supp 558,
United States v. Hill, 368 F.2d 617, 621 (5th Cir. 1966); Mueller v. Nixon, 470 F.2d 1348, 1360 (6th Cir. 1972),
cert. den. 412 U.S. 949, 93 S. Ct. 3011, 37 L. Ed. 2d. 1001.
1. The respondent has voluntarily resigned
from the Oklahoma Bar Association by complying with Rule 8.1 and Rule 8.2, Rules Governing Disciplinary Proceeding,
App. 1-A and it should be approved.
IT IS THEREFORE ORDERED, ADJUDGED,
AND DECREED that daniel A. Woolverton’s resignation pending discipline be approved.

¶3 THE COURT FINDS:
1. The respondent has voluntarily resigned from the Oklahoma Bar Association by complying with Rule 8.1 and Rule 8.2, Rules Governing Disciplinary Proceedings, 5 O.S. 2001 Ch. 1, App. 1-A. The respondent’s affidavit of resignation reflects that: a) it was freely and voluntarily rendered; b) he was not subject to coercion or duress; and c) he was fully aware of the consequences of submitting the resignation.
2. The respondent states in his affidavit of resignation that he is aware that his judgment and sentence constitutes a violation Rule 8.4 of the Oklahoma Rules of Professional Conduct, 5 O.S. 2001, Ch. 1, App. 3-A and Rule 1.3 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2001, Ch. 1, App. 1-A and of his oath as an attorney.
3. The respondent’s resignation pending disciplinary proceedings is in compliance with all of the requirements set forth in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, Ch. 1, App. 1-A and it should be approved. Because of the respondent’s voluntary resignation, the Court’s previous order of December 6, 2010, referring the matter to the Professional Responsibility Commission to initiate and conduct disciplinary proceedings immediately pursuant to Rule 7.7, and 7.6 of the Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2007 Ch. 1, App. 1-A has been rendered moot by today’s resignation.
4. The official roster address of the respondent as shown by the Oklahoma Bar Association is: Daniel A. Woolverton, 7104 Remington Oaks Loop, Lakeland Fl 33810-4790. His current mailing address is Daniel A. Woolverton, #73872-083, FCI Petersburg Medium, P.O. Box 1000, Petersburg, VA 23804.
5. The Bar Association has not sought the imposition of costs and the respondent asks that any costs incurred be waived.

IT IS THEREFORE ORDERED, ADJUDGED,
AND DECREED that Daniel A. Woolverton’s resignation pending discipline be approved.

IT IS FURTHER ORDERED, ADJUDGED,
AND DECREED that Daniel A. Woolverton’s name be stricken from the roll of attorneys. Because resignation pending disciplinary proceedings is tantamount to disbarment, the respondent may not make an application for reinstatement prior to the expiration of 5 years from the date of this order. Pursuant to Rule
9.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, Ch. 1, App. 1-A, the respondent shall notify all of his clients, if any, having legal business pending with him within 20 days, by certified mail, of his inability to represent them and of the necessity for promptly retaining new counsel. The Bar Association has waived the imposition of costs. Repayment to the Client Security Fund for any monies expended because of the malfeasance or nonfeasance of the respondent, shall be a condition of reinstatement.

DONE BY ORDER OF THE SUPREME COURT THIS 2nd DAY OF MAY 2011.

/s/ Steven W. Taylor
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2011 OK 36

RAYMOND ENGLAND and EVA ENGLAND, Plaintiffs/Appellees, v.
DOUGLAS D. WALTERS and CINDY M. WALTERS, Defendants/Appellants.


CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III

¶0 The trial judge’s term expired on Sunday, January 7, 2007, and the next day, before his successor was sworn in, the judge signed a journal entry. The appellants filed a motion to vacate and set aside the judgment asserting that the judge lacked legal authority after the expiration of his term of office. The successor judge denied the motion and ordered that the journal entry should stand without modification of the language contained in it. The Court of Civil Appeals reversed and remanded after determining the judgment was void.

CERTIORARI GRANTED;
OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT AFFIRMED.

Clark S. Wood, Sallisaw, Oklahoma, for plaintiffs/appellees.
William Orendorff and Matthew Orendorff, Sallisaw, Oklahoma, for defendants/appellants.

WINCHESTER, J.

¶1 The plaintiffs/appellees, Raymond England and Eva England, seek certiorari to review an opinion of the Court of Civil Appeals. That court reversed the trial court’s refusal to vacate a judgment signed by a trial judge one day after his term had expired. The primary question before this Court is whether a judgment is valid if signed by the trial judge after his term expired but before his successor takes his oath of office. We hold that the judgment is valid.

¶2 In December of 2006 Judge Garrett conducted a bench trial regarding a land dispute, and took the matter under advisement so he could view the land. After he viewed the land, he told the appellees’ counsel that he was ruling in their favor, and asked counsel to prepare a journal entry for his signature. He reviewed the proposed journal entry and signed it the day after his term was set to expire, but before his successor, Judge Payton, took his oath of office.

¶3 The defendants/appellants, Douglas D. Walters and Cindy M. Walters, filed a motion to vacate the judgment, alleging it was void, which motion Judge Payton denied. The appellants filed a petition in error, the Court of Civil Appeals determined the judgment was void, and reversed and remanded the case. The appellees filed a petition for certiorari, which this Court granted.

¶4 Title 51 O.S. 2001, § 1 provides in pertinent part that “the regular term of all officers elected under the laws of the state, when elected to a full term, shall commence on the second Monday of January next succeeding their election.” In 2007 that date fell on January 8, the date which Judge Payton took his oath of office.

¶5 In Coyle v. Smith, 1911 OK 64, 113 P. 944, aff’d 221 U.S. 559, the Court resolved various issues regarding the move of the State Capital from Guthrie to Oklahoma City. The governor called an extraordinary session more than fifteen days after the election in which the voters approved the move. One of the issues in Coyle was whether that legislative body was legally constituted. The Court found that it was. In its discussion of the expiration dates of certain members of the First Legislature, the Court observed that the framers of Oklahoma’s Constitution set those legislators’ terms to expire on a specific date, that is, the fifteenth day succeeding the day of the regular state election in 1908. The Court observed that the framers of the Constitution “intended to cover exigencies arising from a failure in an election or appointment, or after an election or appointment being had or made the officer fails to qualify. . . .” If
that happened the incumbent of such office should remain in office until the successor is qualified. The Court reasoned this showed the abhorrence of the framers of the Constitution of bringing about an interregnum, a period of time where the functions of the government would be suspended. Coyle, 1911 OK 64, ¶ 11, 113 P. at 947.

¶6 The Coyle Court cited Article 23, § 10 of the Constitution, which provides: “all officers within this state shall continue to perform the duties of their office until their successors shall be duly qualified”, and § 41 of the Schedule of the Constitution, which provides: “All persons elected at the time of the adoption of this Constitution to any of the offices provided under the Constitution shall be deemed to have duly qualified upon their taking the oath of office before any officer authorized by law to administer oaths, and executing such bond as may be required by law”. The Court concluded that the framers of the Constitution intended for the terms of the members of the Lower House and the short-term Senators of the First Legislature would be less than two years. The terms were to expire on the fifteenth day succeeding the day of the regular state election in 1908 and the terms of their successors should begin that day. Coyle, 1911 OK 64, ¶ 9, 113 p. at 946-947.

¶7 The application of these provisions of our Constitution as applied to the unique facts found in Coyle reveals why that Court held as it did on this issue. In Robertson v. Brewer, 1945 OK 89, ¶ 6, 156 P.2d 804, 805, the Court recognized that after an officeholder takes the oath of office prescribed by the Constitution, the officeholder becomes “duly qualified” and succeeds to the office. Coyle, 1911 OK 64, ¶ 11, 113 P. at 947. Because Article 23, § 10 provides that officers shall continue in their offices until their successors are duly qualified, and Coyle and Robertson recognize that the succeeding officers do not become qualified to perform the duties of their office until they take their oaths, we conclude that a judge continues in office until his successor takes the oath. This constitutional provision avoids gaps between the time one judge leaves office and another takes that office. Judge Garrett properly continued to perform the duties of his office up until his successor was duly qualified by taking his oath of office.

¶8 Regarding allegations of irregularities in communication between the attorney for the appellees and Judge Garrett, the appellants cite no record revealing irregularities took place. Their allegations seem to remain in the realm of speculation of what may have happened. The trial attorney did not represent the appellants during the appeal, and we have no record of testimony to support these speculations of what communications occurred with the attorneys for the parties during the time Judge Garrett made his decision and signed the journal entry. We will presume the decision of the judge was correctly reached. Reeves v. Agee, 1989 OK 25, ¶ 16, 769 P.2d 745, 753.

CERTIORARI GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT AFFIRMED.

ALL JUSTICES CONCUR

2011 OK 39


SCBD # 5716. May 2, 2011

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 Upon consideration of the Oklahoma Bar Association’s application for an order approving the resignation of Michael C. Taylor pending disciplinary proceedings, this Court finds:

1. On April 4, 2011, Taylor submitted his affidavit of resignation from membership in the Oklahoma Bar Association pending disciplinary proceedings.

2. Taylor’s affidavit of resignation reflects that: a) it was freely and voluntarily rendered; b) he was not subject to coercion or duress; and c) he was fully aware of the consequences of submitting his resignation.

3. Taylor states the following in his affidavit of resignation:

I am aware that the following disciplinary complaint has been filed against me with the Supreme Court of the State of Oklahoma: State of Oklahoma ex rel. Oklahoma Bar Association v. Michael C. Taylor SCBD 5716, OBAD 1850.

4. Taylor is aware that the allegations set forth, if proven, would constitute violations of the Oklahoma Rules Governing Professional Conduct, Okla. Stat. tit. 5, ch. 1, app. 3-A (2001 & 2010), and his oath as
an attorney. He waives any and all right to contest the allegations.

5. Taylor’s resignation pending disciplinary proceedings is in compliance with all the requirements set forth in Rule 8.1, Rules Governing Disciplinary Proceedings (RGDP), Okla. Stat. tit. 5, ch.1, app. 1-A (2001 & 2010), and it should be approved.

6. Taylor acknowledges and agrees that he may be reinstated to the practice of law only upon full compliance with the conditions and procedures prescribed by Rule 11 RGDP, and he will make no application for reinstatement prior to the expiration of five years from the effective date of this Order Approving Resignation Pending Disciplinary Proceedings.

7. Taylor acknowledges that, as a result of his conduct, the Client Security Fund may receive claims from his former clients. Taylor agrees that, should the Oklahoma Bar Association approve and pay such Client Security Fund claims, he will reimburse the Fund the principal amounts and the applicable statutory interest prior to the filing of any application for reinstatement.

8. Taylor acknowledges that the Oklahoma Bar Association has incurred costs in the investigation of this matter and may apply to the Court that those costs be reimbursed by him.

9. The official roster address of Taylor as shown by the Oklahoma Bar Association records is Michael C. Taylor, OBA #8877, 7030 S. Yale, Tulsa, Oklahoma 74136.

¶2 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the name of Michael C. Taylor be stricken from the roll of attorneys. Because resignation pending disciplinary proceedings is tantamount to disbarment, Taylor may not make application for reinstatement prior to the expiration of five years from the effective date of this order. Pursuant to Rule 9.1, Taylor shall notify all of his clients having legal business pending with him of his inability to represent them and of the necessity for promptly retaining new counsel. Notification shall be given to these clients within twenty days by certified mail. Repayment to the Client Security Fund for any monies expended because of the malfeasance or nonfeasance of the attorney shall be one of the conditions of reinstatement.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 2nd day of May, 2011.

/s/ Steven W. Taylor
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2011 OK 32

IN THE MATTER OF THE REINSTATEMENT OF: JAMES MARK DOBBS, TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS.

SCBD No. 5665. April 26, 2011

ORIGINAL PROCEEDING FOR ATTORNEY REINSTATEMENT

¶0 James Mark Dobbs petitioned for reinstatement to membership in the Oklahoma Bar Association and to the roll of attorneys. On June 15, 2004, Dobbs was suspended from the practice of law for two years and one day for misconduct involving dishonesty and perjury. Upon de novo review, we find that the petitioner presented clear and convincing evidence that he has not engaged in the unauthorized practice of law since his suspension, that he possesses the necessary learning in the law and that he possesses the moral fitness required for admission to the Oklahoma Bar Association.

REINSTATEMENT ORDERED.
PETITIONER ORDERED TO PAY COSTS.

Charles F. Alden, III, ALDEN DABNEY, Oklahoma City, Oklahoma, for petitioner.
Gina L. Hendryx, General Counsel, OKLAHOMA BAR ASSOCIATION, Oklahoma City, Oklahoma, for the Oklahoma Bar Association.

EDMONDSN, J.

¶1 The petitioner, James Mark Dobbs, was admitted to the Oklahoma Bar Association on September 19, 1990. The petitioner was suspended from the practice of law for two years and one day by this Court on June 15, 2004, in State ex rel. Oklahoma Bar Association v. Dobbs, 2004 OK 46, 94 P.3d 31. Petitioner filed a petition for reinstatement to the Oklahoma Bar Association on August 27, 2010 alleging compliance with all requirements of Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2001 Ch. 1, App. 1-A (RGDP).

¶2 A hearing before a trial panel of the Professional Responsibility Tribunal on Dobb's
petition for reinstatement was held on November 22, 2010. The trial panel heard sworn testimony from the petitioner, from former congressman J.C. Watts, from assistant district attorney Greg Stidham, from the Bar’s investigator and from the Hon. James Pratt, associate district judge, by video deposition. Thirty-nine exhibits were admitted into evidence. No witnesses were opposed to Dobbs’ reinstatement. Dobbs had complied with Rule 9.1, RGDP, by timely notifying his clients and the courts of his suspension from the practice of law. The trial panel found that Dobbs established by clear and convincing evidence that he has not engaged in the unauthorized practice of law and that he has maintained the competency and learning in the law required for admission. The trial panel was not convinced by clear and convincing evidence, however, that the petitioner had shown the good moral character sufficient to overcome his past conduct and recommended that his petition for reinstatement be denied.

¶3 The Oklahoma Bar Association took a neutral position and neither recommended nor contested Dobbs’ reinstatement. Counsel for the Bar stated that, in conducting their investigation, in their discussions with witnesses and in looking over Dobbs’ past, they found that he had met all of the requirements that the Bar is charged with investigating. The Bar admitted that the evidence submitted by the petitioner was compelling, but the Bar was uncertain whether the evidence presented was sufficient to overcome this Court’s previous findings of misconduct, given the heavier burden of proof placed on one guilty of serious misconduct, citing Matter of Reinstatement of Hird, 2001 OK 28, 21 P.3d 1043.

¶4 This Court is not bound by the recommendations of the trial panel or the Oklahoma Bar Association, and our review of the evidence is de novo. In reinstatement proceedings the Supreme court does not function as a reviewing tribunal but as a licensing court exercising its exclusive jurisdiction. Matter of Reinstatement of Smith, 1994 OK 19 ¶3, 871 P.2d 426, 427. Reinstatement is governed by Rule 11, RGDP. The requirements for reinstatement are set forth at Rule 11.4:

An applicant for reinstatement must establish affirmatively that, if readmitted or if the suspension from practice is removed, the applicant’s conduct will conform to the high standards required of a member of the Bar. The severity of the original offense and the circumstances surrounding it shall be considered in evaluating an application for reinstatement. The burden of proof, by clear and convincing evidence, in all such reinstatement proceedings, shall be on the applicant. An applicant seeking such reinstatement will be required to present stronger proof of qualifications than one seeking admission for the first time. The proof presented must be sufficient to overcome the Supreme Court’s former judgment adverse to the applicant. Feelings of sympathy toward the applicant must be disregarded. If applicable, restitution, or the lack thereof, by the applicant to an injured party will be taken into consideration by the Trial Panel on an application for reinstatement. Further, if applicable, the Trial Panel shall satisfy itself that the applicant complied with Rule 9.1 of these rules.

¶5 Additional factors for considering evidence presented for reinstatement were set forth in Matter of Reinstatement of Kamins, 1988 OK 32, 752 P.2d 1125, 1130: 1) the present moral fitness of the applicant; 2) the applicant’s demonstrated consciousness of wrongful conduct and the disrepute that such conduct brought to the profession; 3) the extent of the applicant’s rehabilitation; 4) the seriousness of the original misconduct; 5) the applicant’s conduct after the resignation; 6) the time that has elapsed since the resignation or discipline; 7) applicant’s character, maturity and experience at the time of discipline or resignation; 8) applicant’s present competence in legal skills.

¶6 The record reflects that Dobbs was admitted to the Oklahoma Bar Association in 1990. He moved back to his hometown of Eufaula, Oklahoma, and began practicing law. Shortly afterwards, he became involved in business matters with Joe Johnson, the mayor of Eufaula and a long-time friend. The complaint against Dobbs that led to his suspension was filed on July 2, 2001, and was based on three matters referred to as The Cargile Matter (11 counts), The Water Companies (3 counts) and MegaStar Entertainment Center (2 counts). Dobbs was exonerated on numerous charges, including the two counts related to MegaStar. A detailed account of Dobbs’ misconduct and the evidence that led to his suspension is set out in this Court’s opinion in State ex rel. Oklahoma Bar Association v. Dobbs, supra. The serious misconduct for which Dobbs was disciplined included
that he is very ashamed of what he did, but to help others stay out of trouble. He states and believes that he could serve as an example involved in CLE and the educational process he has done. He would look forward to being and lawyers, to try to make amends for what he owes it to the Bar, to his friends and the legal profession. He has been frank with his children and that actions have consequences and bad children have participated in. He is active in the FFA, and has organized and coached little league baseball and football teams. He helped to found and has served as president of the Eufaula Dugout Club, which supports the high school baseball team. He started the Eufaula golf team. He has been on the board and served as Chairman of the Eufaula Planning and Zoning Committee. Dobbs states that he has tried to live his life right and to be an honest and upright person and that he has tried to ex-emplify those qualities through his involvement with the community and through his family.

Dobbs fully admits and accepts responsibility for the dishonest conduct that led to his suspension, and he makes no excuses for his conduct. He has been frank with his children and with people in the community about losing his law license. He made it clear to friends and people on the street who come up to him for advice that his license is suspended and that he cannot give legal advice. He explained to his children that he lost his license to practice law because he did something bad: he got caught lying and being dishonest and not doing the right thing, and so he can’t practice law any more. He hopes to instill in his children that actions have consequences and bad acts will be punished. Mr. Stidham testified that Dobbs has, by his conduct, set an example to people in the community, as well as to his children.

Dobbs expressed remorse for his actions and regret for the discredit that he brought upon his family and the legal profession. He believes that he owes it to the Bar, to his friends and lawyers, to try to make amends for what he has done. He would look forward to being involved in CLE and the educational process and believes that he could serve as an example to help others stay out of trouble. He states that he is very ashamed of what he did, but that he is not afraid to talk about it. He recognizes that his youth and inexperience at the time is no excuse for his conduct because “lying is lying,” regardless of age, and he should not have done it.

Mr. Stidham has known Dobbs for many years and considers him a good friend. Dobbs has discussed with him the shame and disrepute that he brought on himself, his family and the legal profession as a whole. Mr. Stidham has observed that Dobbs has not only expressed remorse, but has tried to change the way he lives to atone for it. Mr. Stidham stated that Dobbs has admitted that his actions were dishonest and has expressed his regret for allowing ambition to overcome his good judgment. Mr. Stidham has served on the Board of Bar Examiners and it was his sincere belief that Dobbs has redeemed himself. He stated that if he were not convinced of that, he would not be testifying in favor of Dobbs’ reinstatement.

Judge Pratt testified that he would have no hesitation in recommending Dobbs for reinstatement. Dobbs has accepted responsibility for his actions and he has never heard Dobbs lay blame on anyone but himself, or make excuses for his conduct. He has never heard Dobbs complain that he was misunderstood or that he got a bad deal. Judge Pratt testified that Dobbs was young and immature and exercised poor judgment at the time of his misconduct, but that he has learned from it and has rectified his mistakes and does not wish to repeat them. He is certain that Dobbs would not make the same mistakes today. He has never heard anything in the community to Dobbs’ discredit. Judge Pratt was cognizant of his duty as a member of the Bar to protect the integrity of the Bar and stated that he would err on the side of caution; if he had any hesitation about recommending Dobbs for reinstatement, he would not be testifying for him.

J. C. Watts has known Dobbs for almost his entire life, but has not lived in Eufaula since 1976, and spends time there infrequently. He has had business dealings with Dobbs and his brother in the past four or five years related to gas gathering systems. Mr. Watts was not aware of the Supreme Court’s findings against Dobbs, but knew that he had lost his law license. Mr. Watts’ testimony indicated that he would trust Dobbs acting in a trust capacity for his family and that he had found Dobbs to be honest in his business dealings with him.
¶13 The Bar’s investigator testified, in response to questioning by Dobbs’ counsel, that all of Dobbs’ answers to an extensive questionnaire sent by the Bar were accurate, that his investigation did not find anything negative about Dobbs since his suspension and that he found positive things about his character, his conduct, his CLE and all of the things that a lawyer is required to do for reinstatement.

¶14 The more serious the original misconduct, the heavier the applicant’s burden of proof for reinstatement. In re Pierce, 1996 OK 65, 919 P.2d 422, 425. The Bar was uncertain whether Dobbs had met the heightened burden of proof sufficient to overcome this Court’s former adverse judgment. In Matter of Reinstatement of Cantrell, 1989 OK 165, 785 P.2d 312, 314, this Court categorically rejected the Bar’s argument that a disbarred attorney, guilty of a particularly egregious offense against the legal profession, would be forever barred as incapable of any meaningful rehabilitation. This Court has said on numerous occasions that even felony conviction of a crime is not tantamount to a death sentence regarding reinstatement of the license to practice law. Matter of Reinstatement of Johnston, 2007 OK 46, 162 P.3d 922.

¶15 In looking at reinstatement after conviction of a crime, the evidence must support a finding that the applicant would not commit any serious crime if readmitted. Foremost consideration must be given to protecting the public welfare. Matter of Reinstatement of Cantrell, 1989 OK 165, 785 P.2d 312, 313. We apply the same standard for serious misconduct that does not involve conviction of a crime. The evidence must support a finding that the applicant would not repeat the past behavior. The duty of this Court is to safeguard the interests of the public, the courts and the legal profession. Matter of Reinstatement of Smith, 1994 OK 19 ¶6, 871 P.2d 426.

¶16 The serious misconduct for which Dobbs was suspended included perjury and deceit. This Court has reinstated attorneys after convictions of crimes involving perjury and deceit, convictions of felonies and other similar misconduct such as misappropriation of trust account monies. Factors that the Court has looked at are whether the attorney shows remorse for his conduct and whether the attorney accepts responsibility for it or continues to downplay or rationalize his actions. Matter of Reinstatement of Kamins, 1988 OK 32, 752 P.2d 1125. Where misappropriation of funds has occurred, we look to see whether restitution has been made. We look at the probability that the attorney will repeat the past behavior patterns if given the opportunity. We look at whether the attorney has been disciplined previously for similar conduct. We must determine whether the attorney has been rehabilitated.

¶17 Each case must be decided on its particular facts and circumstances. Our opinion in Matter of Reinstatement of Elias, 1988 OK 86, 759 P.2d 1021, 1023, is instructive. Elias’ transgressions involved criminal activity, blatant disregard of the nature of the attorney/client relationship, commingling and conversion of client funds, and misrepresentations to clients. The trial panel recommended reinstatement and the Bar argued against it. We identified the primary issue as being whether Elias had presented evidence sufficient to establish clearly and convincingly that his future conduct, if admitted, would conform to the high standards of a member of the Bar. Elias presented testimony that he had been treated for the gambling addiction that led to his prior misconduct. He had repaid the money due to his clients and all of his gambling debts. Unpaid child support and debts to a bank and to the IRS were being repaid on schedule. Even though we expressed some reservations, we said that Elias clearly recognized that any future misbehavior would jeopardize his legal career. Elias had presented testimony to show the great value he placed on the law as his personal career and had put great effort into placing himself in a position to be considered for readmission. Elias’ witnesses testified that in their opinion he could and would conform to the standards required for readmission to the Bar. We concluded that the evidence was sufficient to establish clearly and convincingly that Elias possessed the moral character that would indicate future conformity to the high standards of conduct required of a member of the Oklahoma Bar Association.

¶18 In the present matter, there has been a considerable lapse of time between the misconduct and the application for reinstatement. The petitioner was not charged with or convicted of any crime. The petitioner had not been disciplined previously. The evidence before us reflects petitioner’s consciousness of his wrongful conduct and of the shame and disrepute he has brought upon himself, his family and the legal profession. The evidence reflects that his conduct since suspension has been exemplary. The petitioner’s testimony
reflects his regret and remorsefulness, and his dedication to setting a good example to atone for his past misconduct. The evidence reflects that Dobbs does not pose a threat to the public nor is there a threat of repeat behavior. The Respondent has shown that reinstatement is important to him by meeting the mandatory continuing legal requirements each year and keeping current on oil and gas law.

¶19 The evidence reflects that Dobbs has proven himself rehabilitated according the rules of this Court and that he is entitled to be reinstated. Dobbs established by clear and convincing evidence that he has not engaged in the unauthorized practice of law in the State of Oklahoma, that he possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association and that he possesses the good moral character that will entitled him to be readmitted. By granting the petition for reinstatement, we are giving James Mark Dobbs a second chance. The petitioner is aware that his law license is dependent upon his maintaining the high standards required of a member of the Bar.

¶20 Petitioner has agreed to pay the fees and expenses of investigation in processing his petition for reinstatement and the Oklahoma Bar Association has filed an application to assess costs in the amount of $880.66. Petitioner is directed to pay costs of the proceeding in the amount of $880.66 within ninety (90) days of the date of this opinion.

¶21 COLBERT, V.C.J., KAUGER, WATT, WINCHESTER, EDMONDSON, REIF, GURICH, JJ. - Concur

¶22 COMBS, J. — Dissents. I would deny reinstatement.

¶23 TAYLOR, C.J. — Not Participating


2. Elias' testimony regarding his past conduct reflected a general understanding of the wrongfulness of his actions, but he offered some rationalizations for his conduct. Elias' testimony did not clearly indicate his realization that his actions degraded not only the individual lawyer, but the Bar itself. Among other issues, Elias had not strictly complied with Rule 9.1 following his suspension, and he had represented to the Department of Public Safety that he was employed as an attorney in order to obtain a hardship modification.

3. The grievances that resulted in Dobbs' discipline were not filed until several years after most of the misconduct had occurred.
OFFICERS
PRESIDENT-ELECT
JAMES T. STUART, SHAWNEE
Nominating petitions have been filed nominating James T. Stuart for election of President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2012.
A total of 407 signatures appear on the petitions.
Nominating Resolutions have been received from the following counties:
Comanche and Pottawatomie

BOARD OF GOVERNORS
SUPREME COURT JUDICIAL DISTRICT NO. 6
KIMBERLY K. HAYS, TULSA
Nominating Petitions have been filed nominating Kimberly K. Hays for election of Supreme Court Judicial District No. 6 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2012. Twenty-five of the names thereon are set forth below:
A total of 131 signatures appear on the petitions.
OBA/CLE PRESENTS

OKLAHOMA INSURANCE LAW UPDATE 2011

PROGRAM PLANNERS/MODERATORS
MARY ROBERTSON, CROWE & DUNLEVY, P.C., NORMAN
KEVIN GORDON, CROWE & DUNLEVY, P.C., OKLAHOMA CITY

TULSA:
RENAISSANCE HOTEL
6808 S. 107TH E. AVE.
13 MAY

OKC:
OKLAHOMA BAR CENTER
1901 N. LINCOLN BLVD.
20 MAY

8:30 a.m.
9
9:50
10

THE NEW INSURANCE LANDSCAPE
COMMISSIONER JOHN DOAK,
OKLAHOMA INSURANCE DEPARTMENT, TULSA (TENTATIVE)

NETWORKING LUNCH
(INCLUDED IN REGISTRATION)

10:50
11:40

DUTIES AND OBLIGATIONS OF PARTIES TO INSURANCE CONTRACT;
RESERVATION OF RIGHTS, DUTY TO DEFEND, COUNSEL'S OBLIGATION TO INSURE WHEN HIRED BY INSURER
ALAN W. BARDELL
HAYES, MAGRINI & GATEWOOD,
OKLAHOMA CITY

12:10

MEDIATION AND USE OF CONSULTANTS IN INSURANCE DISPUTES
JOE PAULK,
DISPUTE RESOLUTION CONSULTANTS, TULSA

2
2:50

YOU HAVE A CHOICE!
THIS YEAR YOU CAN RECEIVE YOUR MATERIALS ELECTRONICALLY
OR THE OLD FASHION WAY IF YOU LIKE. JUST MARK YOUR CHOICE WHEN YOU REGISTER.

THE OKC PROGRAM WILL BE WEBCAST

9

1:50

TULSA:
OKLAHOMA BAR CENTER
1901 N. LINCOLN BLVD.
20 MAY

6007 S. 107TH E. AVE.
13 MAY

THE OKLAHOMA BAR JOURNAL
NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Associate District Judge
Twentieth Judicial District
Johnston County, Oklahoma

This vacancy is created by the retirement of the Honorable Robert M. Highsmith effective May 1, 2011.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained online at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Štiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address no later than 5 p.m., Friday, May 13, 2011. If applications are mailed, they must be postmarked by midnight, May 13, 2011.

Allen M. Smallwood, Chairman
Oklahoma Judicial Nominating Commission
The Sovereignty Symposium XXIV - 2011

Seeds of Sovereignty
June 1 – 2, 2011

Skirvin - Hilton Hotel • Oklahoma City, Oklahoma

THE SOVEREIGNTY SYMPOSIUM XXIV - 2011
Seeds of Sovereignty
June 1 – 2, 2011
Skirvin - Hilton Hotel • Oklahoma City, Oklahoma
## THE SOVEREIGNTY SYMPOSIUM AGENDA

**June 1-2, 2011 at the Skirvin-Hilton Hotel, Oklahoma City, Oklahoma**

### Wednesday Morning:

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>7:30 – 4:30</td>
<td>Registration</td>
</tr>
<tr>
<td>8:00 – 8:30</td>
<td>Complimentary Continental Breakfast</td>
</tr>
<tr>
<td>10:30 – 10:45</td>
<td>Morning Coffee / Tea Break</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL A: ECONOMIC DEVELOPMENT AND INTERNATIONAL TRADE</td>
</tr>
<tr>
<td>8:30 – 5:30</td>
<td>PANEL B: SEEDS OF SOVEREIGNTY – FROM THE PRESERVATION OF HISTORIC SEEDS TO THE FUTURE OF FOOD</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL C: INTERNET GAMING IS COMING, IS INDIAN COUNTRY READY?</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL D: NURTURING THE SEEDS – WATER LAW</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL E: VETERANS ISSUES</td>
</tr>
</tbody>
</table>

### Wednesday Afternoon:

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>1:15 – 2:30</td>
<td>OPENING CEREMONY</td>
</tr>
<tr>
<td>2:30 – 5:30</td>
<td>PANEL A: ECONOMIC DEVELOPMENT AND INTERNATIONAL TRADE [A Continuation of the Morning Panel]</td>
</tr>
<tr>
<td>2:30 – 5:30</td>
<td>PANEL B: INDIGENOUS RIGHTS AND JUSTICE IN GUATEMALA: THE MAYA EXPERIENCE</td>
</tr>
<tr>
<td>2:30 – 5:30</td>
<td>PANEL C: INDIAN COUNTRY CONSTRUCTION DEVELOPMENT ISSUES</td>
</tr>
<tr>
<td>2:30 – 5:30</td>
<td>PANEL D: DNA AND TRIBAL MEMBERSHIP</td>
</tr>
<tr>
<td>2:30 – 5:30</td>
<td>PANEL E: THE SEEDS OF THE FUTURE: EDUCATION</td>
</tr>
</tbody>
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### Thursday Morning:

<table>
<thead>
<tr>
<th>Time</th>
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<tbody>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL A: INDIAN GAMING: AN INDUSTRY PERSPECTIVE ON REGULATION</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL B: UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES RECOGNITION BY THE UNITED STATES—WHAT’S NEXT?</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL C: SEEDS OF SOVEREIGNTY AND THE LAND IN WHICH THEY GROW</td>
</tr>
<tr>
<td>8:30 – 12:00</td>
<td>PANEL D: INDIAN TRUST ISSUES</td>
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<tr>
<td>8:30 – 12:00</td>
<td>PANEL E: INDIAN LAND USE ISSUES</td>
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<tr>
<td>8:30 – 12:00</td>
<td>PANEL D: INDIAN LAND OWNERSHIP ISSUES</td>
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<tr>
<td>8:30 – 12:00</td>
<td>PANEL E: INDIAN CHILD WELFARE ACT ISSUES</td>
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### Thursday Afternoon:

<table>
<thead>
<tr>
<th>Time</th>
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<tbody>
<tr>
<td>1:30 – 5:00</td>
<td>PANEL A: GAMING</td>
</tr>
<tr>
<td>1:30 – 5:00</td>
<td>PANEL B: CRIMINAL LAW</td>
</tr>
<tr>
<td>1:30 – 5:00</td>
<td>PANEL C: SEEDS OF SOVEREIGNTY AND THE LAND IN WHICH THEY GROW         [A Continuation of the Morning Panel]</td>
</tr>
<tr>
<td>1:30 – 5:00</td>
<td>PANEL D: IMPACTS OF THE INDIAN RESERVATION ROADS PROGRAM IN INDIAN COUNTRY-PAST AND FUTURE</td>
</tr>
</tbody>
</table>

16 hours of CLE credit for lawyers will be awarded, including 1 hour of ethics.

**NOTE:** Please be aware that each state has its own rules and regulations, including the definition of “CLE,” therefore, certain programs may not receive credit in some states.

*The Sovereignty Symposium was established to provide a forum in which ideas concerning common legal issues could be exchanged in a scholarly, non-adversarial environment. The Supreme Court espouses no view on any of the issues, and the positions taken by the participants are not endorsed by the Supreme Court.*
Baroness Nicholson of Winterbourne is a member of the Council of Europe and the European Security and Defence Assembly. A former Member of the European Parliament (1999-2009) she now serves as a working peer in the United Kingdom’s House of Lords where she is Chairman of the All-Party Parliamentary Group (APPG) on Foreign Affairs and the APPG for Economic Development in Iraq and the Region; as well as Vice-Chairman for the APPGs on Human Trafficking, EU Enlargement and Georgia. From 1999-2004 she was Vice-President of the European Parliament Committee on Foreign Affairs, Human Rights, Common Defence & Security Policy; and from 2004-2009 she was Vice-President of the Committee on Foreign Affairs and Member of the Subcommittee on Human Rights. Her other responsibilities included seven years as Rapporteur for Romania, Rapporteur for Kashmir and for Iraq, President of the Permanent Ad-Hoc Delegation for Relations with Iraq, Chief Observer of the European Union Election Observation Mission to Yemen and election observer in many other countries including Russia, Moldova, Azerbaijan and Armenia.
The Sovereignty Symposium XXIV is presented by the Oklahoma Supreme Court, The Oklahoma Indian Affairs Commission, The Indian Law Section of the Oklahoma Bar Association, The Oklahoma Arts Council, The University of Tulsa College of Law, The University of Oklahoma College of Law, The Oklahoma City University School of Law and The Sovereignty Symposium, Inc.
Men Helping Men ..........
Oklahoma City • June 2, 2011

Time - 5:30-7 p.m.

Location
The Oil Center – West Building
1st Floor Conference Room – 2601 NW Expressway
Oklahoma City, OK 73112

Tulsa • April 28, 2011

Time - 5:30-7 p.m.

Location
The Center for Therapeutic Interventions
4845 South Sheridan, Suite 510
Tulsa, OK 74145

Food and drink will be provided! Meetings are free and open to OBA members. Reservations are preferred (we want to have enough space and food for all.) For further information and to reserve your spot, please e-mail stephaniealton@cabainc.com.

Women Helping Women.....
Oklahoma City • May 12, 2011

Time - 5:30-7 p.m.

Location
The Oil Center – West Building
10th Floor – 2601 NW Expressway, Suite 1000W
Oklahoma City, OK 73112

Tulsa • June 2, 2011

Time - 5:30 - 7 p.m.

Location
The Center for Therapeutic Interventions
4845 South Sheridan, Suite 510
Tulsa, OK 74145

You are not alone.

LAWYERS HELPING LAWYERS
ASSISTANCE PROGRAM
The selection of qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 15 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and three at large members, one selected by the Speaker of the House of Representatives; one selected by the President Pro Tempore of the Senate; and one selected by not less than eight members of the Commission. All serve six-year terms, except the members at large who serve three-year terms. Members may not succeed themselves on the commission.

The lawyers of this state play a very important role in the selection of judges since six of the members of the commission are lawyers elected by lawyers. The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2002.) Elections are held each odd numbered year for members from two districts.

2011 ELECTIONS

This year there will be elections for members in Districts 1 and 2. District 1 is composed of Creek and Tulsa Counties. District 2 is composed of counties in the northeastern corner of the state. The procedures for the election will be published in the bar journal.

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 20, 2011, at 5 p.m. to submit their Nominating Petitions. Ballots will be mailed on June 3, 2011, and must be returned by June 17, 2011, at 5 p.m.

It is important to the administration of justice that the OBA members in the First and Second Congressional Districts become informed on the candidates for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission. Hopefully, the lawyers in the First and Second Congressional Districts will fulfill their responsibility by voting in the election for members of the Judicial Nominating Commission.

PROCEDURES OF THE OKLAHOMA BAR ASSOCIATION GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).

2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be
elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more County Bar Associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.

4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.

5. If no candidates are nominated for any Congressional District, the Board of Governors shall select at least two candidates to stand for election to such office.

6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.

7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.

9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.

10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.

11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.

12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.

13. The election procedures, with the specific dates included, shall be published in the Oklahoma Bar Journal in the three issues immediately preceding the date for filing nominating resolutions.

COUNTIES IN EACH DISTRICT ARE AS FOLLOWS:

District No. 1
Creek
Tulsa

District No. 2
Adair
Cherokee
Craig
Delaware
Mayes
McIntosh
Muskogee
Nowata
Okfuskee
Okmulgee
Osage
Ottawa
Pawnee
Rogers
Sequoyah
Wagoner
Washington

see next page for a map of Congressional Districts
Note: The Congressional Districts are those existing at the date of the adoption of Article 7-B of the Oklahoma Constitution.

**NOTICE**

**JUDICIAL NOMINATING COMMISSION ELECTIONS CONGRESSIONAL DISTRICTS 1 AND 2**

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 1 and 2 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 20, 2011. Ballots will be mailed on June 3, 2011, and must be returned by 5 p.m. on June 17, 2011.

---

**Custom Designed Binders for your Oklahoma Bar Journal**

Attractive, durable binder will keep your Bar Journals accessible and provide easy storage for 12 issues. They cost $15.95 each prepaid.

Please send: _______ binders for the Oklahoma Bar Journal at $15.95. Make check payable to Oklahoma Bar Association.

TOTAL ENCLOSED $ _______________________

______________________________________________
NAME (PRINT)

______________________________________________
STREET ADDRESS

______________________________________________
CITY    ZIP    PHONE

Mail to:
Communications Dept.
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152
ORDER FOR MANDATE TO ISSUE

Now, on the 22nd day of April, 2011, the Clerk of this Court is hereby ordered to issue the mandate in the following styled and numbered cause:

Case No. Case Description

WITNESS MY HAND AND THE SEAL OF THIS COURT, THIS 22nd DAY of April, 2011.

/s/ ARLENE JOHNSON
PRESIDING JUDGE

ATTEST:
Michael S. Richie
Clerk

2011 OK CR 15
KEVIN WAYNE ROBINSON, Appellant, vs.
THE STATE OF OKLAHOMA, Appellee.

No. F-2009-1168. April 21, 2011

OPINION

SMITH, JUDGE:

¶1 Kevin Wayne Robinson was tried by jury and convicted of Murder in the First Degree in violation of 21 O.S.2001, § 701.7, in the District Court of Tulsa County, Case No. CF-2008-2277. In accordance with the jury’s recommendation the Honorable Kurt Glassco sentenced Robinson to life imprisonment. Robinson must serve 85% of his sentence before he is eligible for consideration for parole. From this judgment and sentence, Appellant appeals, raising four propositions of error.

¶2 Robinson argues in Proposition I that his case must be reversed because he was not afforded nine peremptory challenges. Every defendant in a first degree murder case is entitled by statute to nine peremptory challenges. Every defendant in a first degree murder case is entitled by statute to nine peremptory challenges. The failure to do so is a violation of the right to due process. Golden v. State, 2006 OK CR 2, ¶ 4, 127 P.3d 1150, 1152. This Court held in Golden that this error is structural, affecting the entire trial, and not subject to harmless error review. Golden, 2006 OK CR 2, ¶ 18, 127 P.3d at 1155. This Court’s decision in Golden is clear and unambiguous: failure to afford a defendant nine peremptory challenges in a trial for first degree murder is structural error. Were this Court to follow the plain language of Golden, this case must be reversed and remanded.

¶3 However, it is time to reexamine our decision in Golden. Peremptory challenges are granted by state statute, not the Oklahoma or federal constitutions. 22 O.S.2001, § 655. The erroneous denial of peremptory challenges is a constitutional error because it deprives a defendant of due process, not because the denial itself violates a constitutional provision. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988); Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980). It is in this context that we examine the question of structural versus trial error. Most constitutional errors are subject to harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Trial errors may be assessed along with the evidence presented, to determine whether the error prejudiced the defendant. Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). Structural errors, by contrast, affect the conduct of the entire trial and cannot be separated from it for purposes of analysis. Fulminante, 499 U.S. at 309-10, 111 S.Ct. at 1265. They “undermine the fairness of a criminal proceeding as a whole.” U.S. v. Dominguez Benitez, 542 U.S. 74, 81, 124 S.Ct. 2333, 2239, 159 L.Ed.2d 157 (2004). We explained in Golden that, “Structural errors are those which affect a trial from beginning to end, such as the absence of counsel for a defendant, a biased judge, the unlawful exclusion of members of the defendant’s race from a grand jury, the right to self-representation at trial, and the right to a public trial.” Golden, 2006 OK CR 2, ¶ 15, 127 P.3d at 1154.

¶4 There is a strong presumption that errors which occur during trial are subject to harmless error analysis, as long as a defendant is represented by counsel and is tried by an impartial judge. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106,

¶5 The Supreme Court has addressed the issue of whether denial of peremptory challenges is or is not structural error in a series of cases. In *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), the Court discussed the history of the peremptory challenge and noted that denial or impairment of the right was reversible without a showing of prejudice. The Court returned to that discussion in *U.S. v. Martinez-Salazar*, 528 U.S. 304, 317 n. 4, 120 S.Ct. 774, 782 n. 4, 145 L.Ed.2d 792 (2000). The defendant claimed that, under *Swain*, he was not required to show prejudice from the alleged impairment of his right to peremptory challenges. As the Court found his right to peremptory challenges was not impaired, it declined to address the issue. However, the Court specifically rejected this interpretation of *Swain*, noting that the sentence was both dicta and founded on cases which were decided before the adoption of harmless-error review. *Id.*

¶6 Finally, the Supreme Court recently held that state law, not federal law, determines the consequences when a peremptory challenge is erroneously denied. *Rivera v. Illinois*, _ U.S. _, 129 S.Ct. 1446, 1450, 173 L.Ed.2d 320 (2009). In *Rivera*, the Illinois Supreme Court had applied state law in concluding that denial of the right to peremptory challenges was not structural error. That court found that the error in Rivera’s case was harmless beyond a reasonable doubt. The Supreme Court granted certiorari to resolve the apparent conflict among jurisdictions as to whether the error was structural or subject to harmless error analysis. The Court concluded, “If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court’s good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.” *Rivera*, 129 S.Ct. at 1453. The Court further found that good-faith errors of state law do not always result in federal due process violations. A trial decision which violates state law did not violate due process where there was “no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner.” *Rivera*, 129 S.Ct. at 1455, citing *Martinez-Salazar*, 528 U.S., at 316, 120 S.Ct. 774; *Ross*, 487 U.S., at 91, n. 5, 108 S.Ct. at 2279-80. Discussing the limited and serious nature of issues which constitute structural error, *Rivera* concludes, “The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character.” *Rivera*, 129 S.Ct. at 1455.

¶7 This Court has not always clearly related the standard under which it reviewed erroneous denial of peremptory challenges. However, in cases previous to *Golden*, this Court consistently applied harmless error analysis in deciding these claims. We twice referred to this as a “structural” error, but applied harmless error analysis. In *Marrero*, we said that the error was “a structural error that affected the entire trial. This error, *under the facts of this case*, cannot be said to be harmless.” *Marrero v. State*, 2001 OK CR 12, ¶ 13, 29 P.3d 580, 582 (emphasis added). In *Spunaugle* we stated that the error “pervaded the entire trial” and was “not subject to harmless error analysis”, but also found “facts sufficient to prove prejudice are contained in the record” and discussed the facts which showed the defendant was prejudiced by the error. *Spu-
naugle v. State, 1997 OK CR 47, ¶ 32, 946 P.2d 246, 252. Reading Spunaugle as a whole, it appears that we applied harmless error analysis and found the error was not harmless under the facts of the case.

¶8 In two earlier cases we did not discuss the nature of the error, but simply applied harmless error analysis, requiring the defendant to show prejudice. In White v. State, 1986 OK CR 153, ¶ 4, 726 P.2d 905, 907, we found the denial of four peremptory challenges was harmless where no prejudice was shown. Landrum v. State is more complex. The voir dire was not transcribed, but the parties agreed that the trial court cut off voir dire after both parties consecutively waived peremptory challenges, without allowing the defendant to exercise his remaining five statutory challenges. We ruled that the error did not require relief because the “defendant has failed to show error coupled with injury, and how he might have been prejudiced thereby.” Landrum v. State, 1971 OK CR 235, ¶ 18, 486 P.2d 757, 759.

¶9 Golden cited cases from several other jurisdictions in its general discussion of structural error. Several of these cases did not concern either voir dire issues or, specifically, peremptory challenges. The Supreme Court of Montana has found that the entire jury selection process is structural, securing the defendant’s fundamental right to an impartial jury and indelibly affecting the essential fairness of the trial, and not subject to harmless error analysis. State v. Lamere, 112 P.3d 1005, 1013 (Mont. 2005). The Sixth Circuit, addressing a Batson claim, found that the denial of a right to exercise peremptory challenges was structural. U.S. v. McFerron, 163 F.3d 952, 956 (6th Cir.1998). The Second Circuit has held that the denial of peremptory challenges arising from a Batson claim is structural error, but did not extend that to all denials of peremptory challenges. Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir.1998).

¶10 The Court of Special Appeals of Maryland considered this question and found that deprivation of the statutory number of peremptory challenges was not structural error. Whitney v. State, 857 A.2d 625 (2004). In Whitney, defense counsel did not know the defendant was entitled to ten peremptory challenges and did not object when the trial court afforded each party four peremptory challenges. On appeal, Whitney claimed this amounted to ineffective assistance of counsel. Considering the question of prejudice, the Court noted that, generally, Maryland case law held that denial of peremptory challenges was reversible without a showing of prejudice. Without disturbing that rule, the Court found that the error “does not rise to the level of presumptive error or structural defect.” Whitney, 857 A.2d at 636. The Court found that this error was not so extraordinary as to relieve Whitney of his burden to show he was prejudiced by defense counsel’s omission. Id.

¶11 Several jurisdictions revised their case law after the Supreme Court comment in Martinez-Salazar. The Supreme Court of Michigan reversed its earlier cases, holding that denial of peremptory challenges is not structural error, and is subject to harmless error analysis. People v. Bell, 702 N.W.2d 128, 138 (Mich. 2005). In declining to find the error structural, the Court emphasized that, as peremptory challenges are created by statute, this is a non-constitutional right. Bell, 7002 N.W.2d at 139. The Seventh Circuit also reversed its earlier rulings, finding that peremptory challenges are subject to harmless error analysis. U.S. v. Patterson, 215 F.3d 776, 780-81 (7th Cir. (2000), vacated in part on other grounds, Patterson v. U.S., 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000). The Ninth Circuit originally determined that denial of peremptory challenges was not subject to harmless error analysis, without deciding whether it was structural error. U.S. v. Annigoni, 96 F.3d 1132, 1144 (9th Cir. 1996). The Ninth Circuit later recognized this was implicitly overruled by Rivera.

¶12 We now review Golden in light of our own previous case law and the Supreme Court’s decision in Rivera. Golden concludes that the trial court’s error denied the defendant due process and is thus of constitutional dimensions. Golden, 2006 OK CR 2, ¶ 4, 127 P.3d 1150, 1152. Rivera, by contrast, holds that a violation of state law, made in good faith, may not constitute a due process violation. Rivera also holds that such a violation does not necessarily constitute structural error. In our earlier cases, we looked to the seriousness of the error and its effect on the trial to determine whether the error required relief. The error in Golden was egregious and clearly required relief. Given defense counsel’s complete lack of opportunity to exercise a significant number of statutory peremptory challenges, we were compelled to conclude that we could not determine what effect the exercise of additional peremptory challenges might have had upon either the jury or
the outcome of the case. *Golden*, 2006 OK CR 2, ¶ 19, 127 P.3d at 1155. However, the fact that the denial or impairment of peremptory challenges defied harmless error analysis in *Golden* does not lead to a conclusion that it must do so in every case. Under some circumstances, such as those in *Golden*, this error will require reversal. Under other circumstances, we conclude, it may not. We will review these claims on a case-by-case basis, and determine whether the error is harmless beyond a reasonable doubt. *Chapman*, 386 U.S. 18, 24, 87 S.Ct. 824, 828; *Bartell v. State*, 1994 OK CR 59, ¶ 10, 881 P.2d 92, 95. Our holding in *Golden*, that this is structural error not subject to harmless error review, is overruled.

¶13 We turn to the substance of Robinson’s claim in Proposition I. The trial court did not afford Robinson his nine peremptory challenges. The trial court used the struck method of jury selection. Thirty-four panelists were called and questioned, after which the parties each were to exercise nine peremptory challenges for jurors, and one each for an alternate juror. The remaining panelists comprised the jury and alternates. The record shows that the trial court lost count when taking the parties’ peremptory challenges. The Court announced the number of each challenge as it was made, e.g., “That will be State’s No. 1.” [Trial Tr. III 165] This worked until the parties reached the fourth challenge, where the following exchange occurred:

Court: State’s No. 4?
Ms. Keely: Ms. Bridges, 5-A.
Court: Ms. Bridges will be State’s No. 5.
The defendant?
Ms. Burgess: 11-A, Dulin.
Court: Juror 11, Dulin, will be Defendant’s No. 5.

[Trial Tr. III 166] The trial court and all parties proceeded with the remainder of the peremptory challenges for the jury panel, after which each party exercised a challenge for alternates, and two alternate jurors were selected.

¶14 After the initial exercise of peremptory challenges the trial court read out the remaining panelists comprising the jury by number, along with two alternates. At this point the parties might have noticed the error in peremptory challenges. After the court read fourteen names, defense counsel asked, “What happened to Baucom and Moore?” The trial court replied, “Oh, I missed those two, didn’t I?” [Trial Tr. III 169] Defense counsel said yes, and the court replied that it was at fault. [Trial Tr. III 170] The trial court then re-read the juror list of fourteen names, using a different list. At the end of this list, there were still two extra juror names. The trial court said, “Then that means that we will excuse McBride and Markham, is that correct?” and both parties agreed. [Trial Tr. III 171] This was unfortunate. All parties, and the trial court, could and should have realized that, given the number of jurors called and the number of peremptory challenges to be used, there should have been no extra jurors.

¶15 The record reflects that Robinson did not have the opportunity to exercise peremptory challenges against two sitting jurors, and that two potential jurors were excused without having been subject to peremptory challenge. The State concedes that the error occurred, but argues it was harmless. We agree. It is clear that the trial court, acting in good faith, mistakenly counted the number of peremptory challenges remaining, and both parties joined in that good faith mistake. Neither Robison nor the record suggests that the trial court deliberately misapplied the law, or acted irrationally. Robinson does not name any juror he would have excused with the missing peremptory challenges. Nothing in the record suggests, and Robinson does not claim, that any person sitting on Robinson’s jury should have or could have been excused for cause. Nothing in the record supports a conclusion that Robinson’s jury was anything less than impartial. There is no indication that any sitting juror was biased. Each party had the opportunity to thoroughly voir dire the entire venire. Robinson received a fair trial before an impartial and properly instructed jury. *Rivera*, 129 S.Ct. at 1456. The trial court’s failure to afford Robinson his full complement of statutorily-required peremptory challenges is harmless beyond a reasonable doubt.

¶16 We find in Proposition II that no prosecutorial misconduct deprived Robinson of a fair trial. Robinson claims that the prosecutor improperly questioned jurors during voir dire. Robinson failed to object to these questions or comments and we review for plain error. There is none. *Voir dire* allows both sides to gather enough information about prospective jurors to discover grounds for challenges for cause, and to permit the intelligent use of peremptory challenges. *Sanchez*, 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997. The manner and extent of *voir dire* are within the trial court’s discretion. *Id.* The prosecutor’s questions were appropriate.
Robinson first claims that the prosecutor asked jurors questions based on the facts of the case. An attorney should not use voir dire to test prospective jurors’ willingness to accept a party’s theory of the case, rather than the jurors’ impartiality. Black v. State, 2001 OK CR 5, ¶ 19, 21 P.3d 1047, 1058. However, the questions about fighting were appropriate as an attempt to discover whether any jurors had biases on this issue, and did not contradict the laws defining self-defense. Robinson also claims the prosecutor improperly tried to define “reasonable doubt”. Prosecutors may not define reasonable doubt. However, they may distinguish that standard from commonly heard phrases, and ask jurors not to hold the State to a higher burden of proof, as the prosecutor did here. Mack v. State, 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1289; Myers v. State, 2006 OK CR 12, ¶ 57, 133 P.3d 312, 329. The record does not support Robinson’s insistence that jurors were confused by these questions.

¶17 We find in Proposition III that sufficient evidence supports Robinson’s conviction. To support a conviction for first degree malice murder the State must show that Robinson caused, with deliberate intent, Christianson’s unlawful death. 21 O.S.2001, § 701.7. Robinson claimed the homicide was justified because he acted in self-defense. Robinson must show that he killed Christianson while he had reasonable grounds to believe he was in imminent danger of death or great bodily injury from Christianson. 21 O.S.2001, § 733. He presented sufficient evidence of self-defense to raise the claim, and the State was obligated to disprove that defense beyond a reasonable doubt. McHam v. State, 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667. The testimony at trial conflicted. This Court will not interfere with a verdict, even where evidence sharply conflicts, if evidence supports the jury’s finding of guilt. Hancock v. State, 2007 OK CR 9, ¶ 67, 155 P.3d 796, 812. Where evidence conflicts, we must presume on appellate review that the jury resolved any conflicts in favor of the prosecution. McDaniel v. Brown, __ U.S. __, 130 S.Ct. 665, 673, 175 L.Ed.2d 582 (2010). Jurors heard the evidence that Robinson believed the victim was armed, that the victim threatened to harm Robinson, and that the victim started the fist fight. Evidence also showed that the victim started to leave Robinson’s house, Robinson chased him, Robinson put down the knife and dared the victim to fight, and Robinson stabbed the victim after he stopped fighting. Sufficient evidence supports the jury’s finding that the State proved, beyond a reasonable doubt, that Robinson did not act in self-defense.

¶18 Robinson also claims in Proposition III that the State failed to prove he acted with malice aforethought. Malice may be formed in the instant before the fatal act, and may be established from the fact of the killing alone. Hancock, 2007 OK CR 9, ¶ 65, 155 P.3d at 812. Jurors may find intent to kill from circumstantial evidence. Davis v. State, 2004 OK CR 36, ¶ 23, 103 P.3d 70, 78. The manner of killing and pattern of wounds may support a finding of intent to kill. Hogan v. State, 2006 OK CR 19, ¶ 22, 139 P.3d 907, 919. Evidence showed Robinson chased Christianson down a public street brandishing a knife, engaged in a fight with Christianson, and stabbed him as the fight concluded. The fatal stab wound, to the back of Christianson’s neck, was made with enough force to sever his spinal column. Evidence also showed Christianson was unarmed. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Robinson did not act in self-defense and killed Christianson with malice aforethought. Easlick v. State, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

¶19 We find in Proposition IV that error in instruction does not require relief. In Easlick, this Court discontinued use of the “reasonable hypothesis” test for circumstantial evidence. Easlick, 2004 OK CR 21, ¶ 15, 90 P.3d at 559. The corresponding Oklahoma Uniform Jury Instruction on circumstantial evidence, OUJI-CR 2d 9-5, was subsequently modified to reflect this change. The trial court instructed jurors using the language of the old instruction. Jurors were told that the facts necessary to prove guilt must be “consistent with each other and with the conclusion of guilt”, and that all the facts and circumstances together must be “inconsistent with any reasonable theory or conclusion of a defendant’s innocence.” Robinson failed to object to this instruction, and we review for plain error.

¶20 The trial court should have given the current instruction, which accurately reflects the State’s burden of proof. However, before we may grant relief for plain error, Robinson must show (a) an error (a deviation from a legal rule), (b) which is plain or obvious, which (c) affected his substantial rights, by affecting the outcome of the proceeding. Hogan, 2006 OK
CR 19, ¶ 38, 139 P.3d at 923. Even if all these requirements are met, we will only grant relief “if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” Id. (quotations omitted).

¶21 While the incorrect instruction constituted a plain and obvious error, Robinson fails to show it affected his substantial rights. As we noted in Easlick, the “reasonable hypothesis” test for circumstantial evidence was based on distrust of circumstantial evidence. Easlick, 2004 OK CR 21, ¶ 6, 90 P.3d at 558. Because circumstantial evidence might lend itself to decisions based on speculation or suspicion, the “reasonable hypothesis” test was intended to work to a defendant’s benefit. It supplemented, rather than supplanted, the “beyond a reasonable doubt” standard of proof required in all criminal cases. For this reason, its erroneous use here did not prejudice Robinson. Robinson’s jury was instructed both that the State must prove his guilt beyond a reasonable doubt, and that in considering the evidence jurors should determine whether the facts supporting guilt were consistent with one another and inconsistent with any reasonable theory of Robinson’s innocence. Particularly given Robinson’s claim of self-defense, this erroneous instruction benefited Robinson. He cannot show he was prejudiced by the error.

DECISION

¶22 The Judgment and Sentence of the District Court of Tulsa County is AFFIRMED. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2011), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT GLASSCO, DISTRICT JUDGE

ATTORNEYS AT TRIAL
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OPINION BY: SMITH, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: SPECIALLY CONCUR
LUMPKIN, J.: SPECIALLY CONCUR
C. JOHNSON, J.: SPECIALLY CONCUR

1. In U.S. v. Hall, 152 F.3d 381, 408 (5th Cir.1998), the Fifth Circuit held that denial of peremptory challenges was structural error. This conclusion was later found to be abrogated by the Supreme Court’s decision in Martinez-Salazar.

LUMPKIN, JUDGE: SPECIALLY CONCURRING

¶1 I agree with the rationale and result reached in the present case, but write further to explain that the denial of a peremptory challenge is a due process issue.

¶2 First, I note that Appellant did not challenge the deprivation of the peremptory challenge before the trial court. As such Appellant has waived appellate review of the instant challenge for all but plain error. Wackerly v. State, 2000 OK CR 15, ¶ 7, 12 P.3d 1, 7; Simpson v. State, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. However, this analysis is only applicable because the United States Supreme Court has determined that the loss of a peremptory challenge is a due process issue.


¶4 A majority of this Court determined in Golden v. State, 2006 OK CR 2, ¶¶ 13-19, 127 P.3d 1150, 1153-54, that a denial of the complete array of peremptory challenges to which a defendant is entitled to under Oklahoma law constitutes structural error which may not be deemed harmless error. Since Golden, the United States Supreme Court has determined that the erroneous denial of a peremptory challenge does not require automatic reversal of a defendant’s conviction as a matter of federal law. Rivera, --- U.S. at ---, 129 S.Ct. at 1452-53. Golden was decided on federal Constitutional grounds and not an independent state law basis. Golden, 2006 OK CR 2, ¶¶ 14-15, 127 P.3d at 1153-54. Therefore, Rivera mandates the overruling of Golden. Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-77, 77 L.Ed.2d 1201 (1983) (holding that state courts are free and unfettered to interpret their state constitutions however the United States Supreme Court’s determinations of federal constitutional questions is controlling).

¶5 Turning to our analysis of due process in jury formation, the key question is: “was the jury as finally composed fair and impartial and no member removable for cause.” See Rivera, -- - U.S. at ---, 129 S.Ct. at 1453-54; Ross, 487 U.S. at 89, 108 S.Ct. at 2279 (“If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court’s good-faith error is not a matter of federal constitutional concern.”); Grant v. State, 2009 OK CR 11, ¶ 22, 205 P.3d 1, 12; Rojim v. State, 2006 OK CR 7, ¶¶ 36-37, 130 P.3d 287, 295; Harris v. State, 2004 OK CR 1, ¶¶ 13-14, 84 P.3d 731, 741; Ross v. State, 1986 OK CR 49, ¶¶ 11, 717 P.2d 117, 120. As the jury in the present case was fair and impartial no due process violation has been shown.

¶6 As no constitutional error occurred we turn to state law to determine the effect of the error. “Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge.” Rivera, --- U.S. at ---, 129 S.Ct. at 1450. The erroneous deprivation of the peremptory challenge is harmless. 20 O.S.2001, § 3001.1.

¶7 Further, in relation to Proposition IV, I note that in Harmon v. State, 2011 OK CR 6, ¶ 55-57, --- P.3d ---, ---, this Court finally settled the reasonable hypothesis argument and directed the Oklahoma Uniform Instruction Committee (Criminal) to correct the instructions regarding proof of aggravating circumstances just as it had for the rest of our sufficiency of the evidence analysis in Easlick v. State, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

C. JOHNSON, JUDGE: SPECIALLY CONCURRING

¶1 I agree with the result reached by the Court in this case. The Court is proper in revisiting Golden v. State, 2006 OK CR 2, 127 P.3d 1150, wherein my opinion held that the error was “structural error” and reversal was required.

¶2 The recent U.S. Supreme Court case of Rivera v. Illinois, --- U.S. ---, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009), indicated that state courts could look to basically a harmless error analysis as to the problem with the challenges and “structural error.” I agree with the Court in this case that the error could be harmless. There is no question that all parties agreed and it is not the egregious problem that we had in Golden.

¶3 I still have a firm belief that the right of an Appellant to have the proper number of peremptory challenges goes to the heart of a defendant’s due process rights. Again, the Court should look at this on a case by case basis, but my belief still is that this is a fundamental right and must be protected. I am authorized to state that Judge David Lewis joins in this writing.
2011 OK CIV APP 38

ED WINTERHALDER, BLUE COLLAR FINANCIAL GROUP OF OKLAHOMA, MERIDIAN CAPITAL, DONNA MURPHY, SHARON FEARY, BILL GREGORY, GALE DAVIS and CAROLYN DAVIS, Plaintiffs/Appellants, vs. BURGGRAF RESTORATION, INC., et al., Defendants/Appellees, PERRY W. NEWMAN, Third Party Defendant.

Case No. 106,868. February 25, 2011

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY FITZGERALD, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Perry W. Newman, Owasso, Oklahoma, for Plaintiffs/Appellants Gale Davis and Carolyn Davis

John W. Anderson, Jr., Tulsa, Oklahoma, for Defendants/Appellees

JOHN F. FISCHER, JUDGE:

¶1 Gale and Carolyn Davis appeal the judgment entered by the district court in favor of Burggraf Restoration, Inc., on the ground that the Davises’ claim was barred by previous litigation between these parties. Because it cannot be determined from the record on appeal whether the Davises’ claim is barred, we reverse and remand to the district court for further proceedings consistent with this Opinion.

BACKGROUND

¶2 The Davises joined with six other plaintiffs and filed this suit alleging breach of contract, negligence, fraud and home repair fraud against Burggraf. Burggraf answered and asserted affirmative defenses contending that the Davises’ claims arose from the same construction contract as Burggraf’s earlier small claims action and were barred. Burggraf and the Davises entered into a Stipulation and Order, stipulating to certain facts and agreeing that the district court could enter judgment based on those facts. The relevant facts from the Stipulation are summarized as follows:

1. On March 9, 2002, the Davises suffered fire, smoke and water damage to their home located in Claremore, Oklahoma.

2. Defendant, Burggraf Restoration, Inc., was employed by Allstate, the Davises’ insurance company, to perform fire, smoke and water damage repair and restoration services on the Davises’ home.

3. Burggraf began work on the Davises’ home on March 14, 2002, and was dismissed from the work site by the Davises in September 2002.

4. On October 4, 2002, Burggraf filed a small claims case in Tulsa County District Court, Case No. SC-2002-17400, to collect sums due for work performed on the Davises’ home.

5. On November 15, 2002, the Davises sent a letter to Burggraf listing 18 items of substandard work and/or damage caused by Burggraf during the restoration and repair services. The Davises refused to pay the full amount of Burggraf’s last billing statement and demanded Burggraf address the items listed in the letter. Burggraf refused to perform further work on the residence until the Davises paid the balance of the account billed.

6. Burggraf’s case was scheduled for trial on October 31, 2002. At the court’s direction, the parties met to see if the case could be resolved. The parties agreed to pass the trial to November 15 so that the Davises could work with their Allstate agent to get Burggraf paid. The Davises also requested a sample of the carpet Burggraf was storing that had been ordered for the Davises’ home.

7. On November 15, the trial was rescheduled for December 2 by the agreement of the parties to allow the Davises’ insurance agent more time to investigate their claim.

8. On December 2, the Davises asked the district court for a continuance in order to secure counsel and determine whether
9. The Davises retained an attorney, who negotiated a settlement with Burggraf the morning of trial. The Davises agreed to pay the $1,616.00 owed Burggraf and Burggraf agreed to deliver the carpet it was storing to the Davises. Based on that agreement, Burggraf’s counsel informed the Court of the settlement and the trial date was stricken.

10. However, the Davises did not pay Burggraf as agreed. On July 14, 2003, Burggraf’s counsel filed a motion to set the case for trial on the small claims docket. When Burggraf failed to appear for the scheduled trial on August 15, 2003, the court dismissed the case.

11. Burggraf filed a second small claims action against the Davises on April 12, 2004 (SC-2004-4971). The Davises were served with summons on May 4, 2004. The Davises again did not file a counterclaim within the period required by Okla. Stat. tit. 12, § 1758. Burggraf’s second action was based on the same underlying transaction or occurrence as its first action, SC-2002-17400.

12. Both parties appeared for trial on May 17, 2004. The Davises agreed to pay the $1,616 owed Burggraf plus $348 in court costs and attorney’s fees in exchange for Burggraf delivering the carpet to their son’s residence. The parties informed the court of their resolution and the case was stricken from the docket to be reset on application. No journal entry of judgment, written settlement agreement or minute order was prepared or filed in this case on the day of trial.

13. On May 28, 2004, the Davises paid the sum of $1,616 to Burggraf, plus $348 in costs, and Burggraf delivered the carpet to the Davises’ son as agreed in the parties’ settlement.


15. No written settlement was executed in either small claims case. The court did not grant relief to either party. Neither party executed a release and waiver in either of the small claims cases.

3 After submission of briefs, the district court found that the Davises’ claim in the current action was barred by section 1758 of the Small Claims Procedure Act and the doctrine of res judicata and entered judgment in favor of Burggraf. The Davises appeal.

STANDARD OF REVIEW

4 Although no motion was pending when the order appealed was filed, it appears that the parties intended that their Stipulation be treated as cross-motions for summary judgment. “The meaning and effect of an instrument filed in court depends on its contents and substance rather than on the form or title given it by the author.” Whitehorse v. Johnson, 2007 OK 11, n.13, 156 P.3d 41. We review a trial court’s order granting summary judgment de novo. Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. The district court’s judgment was based on its interpretation of statutes regulating counterclaims and the doctrine of res judicata. “A legal question involving statutory interpretation is subject to de novo review … i.e., a non-deferential, plenary and independent review of the trial court’s legal ruling.” Heffron v. Dist. Court of Oklahoma County, 2003 OK 75, ¶ 15, 77 P.3d 1069, 1076 (citing Samman v. Multiple Injury Trust Fund, 2001 OK 71, ¶ 8 and n.5, 33 P.3d 302, 305).

ANALYSIS

5 The procedural history of the parties’ dispute is unusual. The parties reached a settlement in the first case filed by Burggraf. That settlement was not reduced to writing, but the Stipulation discloses the central terms of the settlement — the Davises agreed to pay Burggraf $1,616 and Burggraf agreed to deliver carpet it had been storing for the Davises. The Davises failed to pay according to the terms of the settlement and, rather than filing a motion to enforce the settlement, Burggraf caused the case to be placed back on the trial docket. The court dismissed the case when Burggraf failed to appear on the scheduled trial date. Eight months later, Burggraf filed a second action. Like the first action, this case was based on breach of the construction contract for repair of the fire damage to the Davis home, i.e., “the same underlying transaction or occurrence as its first action.” Apparently, Burggraf did not seek to enforce the settlement agreement in the second suit either. However, the record for this appeal does not include the judgment roll for
either of the cases filed by Burggraf. According to the Stipulation, on the date the second suit was set for trial the parties informed the district court that the “Davises agreed to pay the $1,616.00 owed Burggraf plus $348.00 in court costs and attorney’s fees in exchange for Burggraf delivering the carpet . . . .” The case was then stricken from the trial docket. After the parties exchanged the agreed performance, Burggraf dismissed the second suit with prejudice. According to the Stipulation, there is no written agreement documenting the terms of the parties’ settlement and none of the parties “executed a release and waiver in either small claims case.”

I. The Settlement Agreement

¶6 The district court stated two bases for its judgment. The first was that the Small Claims Procedure Act barred the claim. See 12 O.S.2001 § 1758. The second was that the claim was barred by res judicata. Before addressing these issues, we must determine the effect of the settlement agreement reached in the first case. “A settlement agreement is a contract which constitutes a compromise between two or more parties to avoid a lawsuit and amicably to settle their differences on such terms as they can agree.” Whitehorse, 2007 OK 11, ¶ 9, 156 P.3d at 46 (footnotes omitted). “A settlement agreement is an oral or written contract between the parties. As such, it is subject to the rules of offer and acceptance and of mutual assent which control any issue of contract formation.” In re De-Annexation of Certain Real Property from City of Seminole, 2009 OK 18, ¶ 8, 204 P.3d 87, 89 (citation omitted). Once a settlement has been reached, the parties’ rights and liabilities as to the subject matter of the action are fixed by contract rather than by the judgment of the court. Corbett v. Combined Commun’ns Corp. of Oklahoma, Inc., 1982 OK 135, ¶ 5, 654 P.2d 616, 617-18.

¶7 The agreement in the first small claims case clearly settled the claims that Burggraf asserted against the Davises in that case. Because the settlement agreement was not reduced to writing, the Stipulation is the only document in the record providing evidence of the terms of that agreement. Critical to this appeal is whether the terms of the settlement required the Davises to release any claim against Burggraf. The parties stipulated that the Davises did not sign a “release and waiver.” Nonetheless, “[a] contract includes not only the promises set forth in express words, but all such implied provisions as are indis-pensable to effectuate the intent of the parties and as arise from the language of the contract and the circumstances under which it was made.” Whitehorse, 2007 OK 11, ¶ 9, 156 P.3d at 46 (footnote omitted).

¶8 The dismissal with prejudice filed by Burggraf in the second action was necessary to “effectuate” the parties’ intent to settle the claim Burggraf asserted in the first action. That conclusion, however, is not necessarily required with respect to the claims the Davises assert in the present litigation other than the release of any claim related to the carpet that was eventually returned. There is simply no evidence in this record from which to determine whether the Davises agreed, as part of the settlement of the first action, to waive and release any of the claims they now assert in this case. If the Davises did agree to waive or release any claims, then Burggraf is entitled to judgment, although not for the reasons articulated by the district court. In the absence of such an agreement by the Davises, Burggraf is not entitled to judgment in this case unless there is some other legal bar preventing the Davises from litigating the claims they assert in this action.

II. The Counterclaim Bar of Section 1758

¶9 Burggraf first argues that the Davises’ claims are barred by 12 O.S.2001 § 1758:

If the defendant wishes to state a new matter which constitutes a counterclaim or a setoff, he shall file a verified answer, a copy of which shall be delivered to the plaintiff in person, and filed with the clerk of the court not later than seventy-two (72) hours prior to the hour set for the first appearance of said defendant in such action.

Specifically, Burggraf contends that because the Davises did not file a counterclaim it was “statutorily extinguished at the time the case was first called to trial in October of 2002.” (Emphasis in original). As supporting authority, Burggraf cites Carter v. Gullett, 1979 OK 146, 602 P.2d 640, in which the Supreme Court issued a writ of prohibition preventing the district court from permitting a defendant to file a counterclaim after the date scheduled for hearing the plaintiff’s petition. The Supreme Court found that strict compliance with the time limit in section 1758 was required. Id. “The act requires a strict compliance with the [72] hour provision of § 1758. The Legislature has mandated a counterclaim should not be allowed unless
filed [72] hours before the date of hearing.” Id. ¶ 7, 602 P.2d at 641 (emphasis added).

¶10 The parties herein do not cite, and we have not found, case law interpreting the term “first appearance” as used in section 1785. In Carter, the date discussed in the opinion was, at least, the second time the case had been set for hearing. See Interstate Brands Corp. v. Stephens, 1980 OK 121, n.1, 615 P.2d 297 (recognizing that the Carter court “in passing, noted that the appearance date [in small claims court] had been once continued” but that Carter did not suggest that as a result of the continuance the counterclaim was barred). The issue before the court in Interstate Brands was whether a similar time bar contained in section 1757 on transfers from small claims court applied from the date of the last, rather than the first, scheduled appearance:

We find no expression in [section 1757] which permits a motion to transfer to be filed only before the original appearance date. The language of § 1757 merely states that such motions must be filed 48 hours before the “time fixed in the order for defendant to appear.” The meaning of this section we think is clear and unambiguous. Petitioner’s motion to transfer, filed seven days before the appearance date last ordered and set, was timely.

Id. ¶ 9, 615 P.2d at 298-99. We find a similar interpretation is appropriate for section 1758. “Procedures under the small claims act are less formal, void of rigid restrictions . . . .” Carter, 1979 OK 146, ¶ 7, 602 P.2d at 641. Review of these authorities indicates that the intent of the 72-hour rule in section 1758 of the Small Claims Act was to provide the plaintiff sufficient notice prior to actual litigation of any counterclaim.

¶11 Consequently, we do not find, as urged by Burggraf, that the Davises were required to file their counterclaim seventy-two hours prior to October 31, 2002. And, because of the several continuances ordered by the district court at the parties’ request after that date and the eventual dismissal of the case because of Burggraf’s failure to appear, there is no “date last ordered and set” for the Davises to appear in this case that could have triggered application of section 1758. Therefore, section 1758 did not operate to bar the Davises from asserting claims arising out of the construction contract against Burggraf in any suit filed after August 15, 2003, the date Burggraf’s first small claims suit was dismissed without prejudice.

III. The Counterclaim Bar of Section 2013

¶12 Burggraf argues, in the alternative, that because the Davises failed to raise a compulsory counterclaim in Burggraf’s original action, those claims are now barred by 12 O.S.2001 § 2013(A).

That section requires a party to assert as a counterclaim any claim against any opposing party that “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim . . . .” 12 O.S.2001 § 2013(A). “The failure to assert a compulsory counterclaim bars a later action on that demand.” Robinson, 2004 OK 50, ¶ 8, 100 P.3d at 675. A judgment in a small claims suit will trigger the section 2013(A) counterclaim bar. See McIntosh v. Limestone Nat’l Bank, 1995 OK CIV APP 24, ¶ 6, 894 P.2d 1145, 1147.

¶13 However, the Committee comments to section 2013 are clear; the statute was not intended to bar unasserted compulsory counterclaims if the action was dismissed before trial.

If a defendant fails to assert a compulsory counterclaim in an answer, but the action is dismissed before trial, the defendant is not precluded from raising his claim in a second action. Lawhorn v. Atlantic Ref. Co., 299 F.2d 353 (5th Cir.1962); Douglas v. Wisconsin Alumni Research Found., 81 F.Supp. 167 (N.D. Ill. 1948). See also Drager Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967) (assertion of compulsory counterclaim does not waive defense of lack of jurisdiction).

12 Okla. Stat. Ann. § 2013, Committee cmt. (West 1993). The Supreme Court has confirmed this rule:

Since Oklahoma has rested its compulsory counterclaim bar on the doctrine of claim preclusion, the bar must rest upon the existence of a judgment on the merits rendered in the prior action. If the prior action was dismissed before judgment, a party cannot successfully invoke the compulsory counterclaim preclusive bar under § 2013(A) in a subsequent action.

Robinson, 2004 OK 50, ¶ 12, 100 P.3d at 676-77. Burggraf’s first small claims suit was not terminated by a judgment. The first suit was dismissed by the district court after Burggraf
failed to appear. A dismissal for failure to appear is not a decision on the merits. 12 O.S. Supp. 2004 § 683 (amended eff. Nov. 1, 2009). Therefore, any claims the Davises have against Burggraf were not barred by section 2013(A) when the first small claims case was dismissed.

IV. Claim Preclusion

¶14 Burggraf’s final argument is that the Davises’ claims in this case are barred by the doctrine of res judicata, now known as claim preclusion. See Deloney v. Downey, 1997 OK 102, ¶ 16, 944 P.2d 312, 318. As a general rule, claim preclusion bars relitigation of issues that either were or could have been litigated in a prior action that resulted in a judgment on the merits. See State ex rel. Tal v. City of Oklahoma City, 2002 OK 97, ¶ 20, 61 P.3d 234, 245. Burggraf contends that its dismissal with prejudice in the second small claims suit barred future litigation of all claims, including all compulsory counterclaims, that were or could have been raised by the Davises in that case. It has long been the rule in Oklahoma that:

A dismissal of a suit made after, and based upon, an agreement between the parties by which a compromise settlement and adjustment of the subject-matter in dispute is made, is a dismissal on the merits, and is equivalent to a judgment of retraxit at common law; and as such would be a bar to further litigation on the same subject between the parties.

Turner v. Fleming, 1913 OK 155, ¶ 3, 130 P. 551, 552. However, where there is no agreement between the parties, the rule in Turner v. Fleming does not control. See Colonial Royalties Co. v. Hinds, 1948 OK 203, 216 P.2d 958. A retraxit is an open and voluntary renunciation by the plaintiff of the lawsuit. 2 William Blackstone, Commentaries *296.

Retraxit is equivalent to a judicial admission on the part of the plaintiff that the allegations of his petition are to be considered as without further merit, and that he is willing to become forever barred from again asserting rights under the same allegations and issues. This is entirely proper, for when a defendant enters into a bona fide agreement of compromise and settlement, and dismissal is filed by plaintiff pursuant thereto, the defendant should not be required again to defend himself on issues arising out of the same subject matter. There is nothing of a harsh nature in the rule announced in [Turner v. Fleming]. A retraxit is a voluntary acknowledgment that plaintiff has no cause of action, and will not proceed further.

Boettcher Oil & Gas Co. v. Westmoland, 1941 OK 52, ¶ 11, 113 P.2d 824, 825-26. The difference between the dismissal in this case and the dismissals in the Turner and Boettcher cases is that the dismissals in those cases were entered by the court. In this case, the dismissal was filed by Burggraf. The previously undecided issue raised by Burggraf in this appeal is whether a voluntary dismissal with prejudice by one party has the same effect as a judgment on the merits entered by the court.

¶15 “A judgment is the final determination of the rights of the parties in an action.” 12 O.S.2001 § 681. A judgment of retraxit is “[a] judgment against a plaintiff who has voluntarily retracted the claim.” Black’s Law Dictionary 847 (7th ed. 1999). After the open and voluntary renunciation of the suit, such a judgment “bars the plaintiff from relitigating the claim.” Id. It is “equivalent to a judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact.” United States v. Parker, 120 U.S. 89, 95-96, 7 S. Ct. 454, 458 (1887). Clearly, Burggraf’s dismissal with prejudice barred it from further litigating the subject matter of its claim against the Davises. See Perfect Invs., Inc. v. Underwriters at Lloyd’s, London, 1989 OK 148, n.1, 782 P.2d 932. Burggraf points to no case, however, holding that a plaintiff may unilaterally dismiss his case with prejudice and thereby automatically preclude the defendant from subsequently litigating his or her claims against the plaintiff. Such a rule, authorizing the use of a voluntary dismissal with prejudice as a preemptive strike against meritorious claims, would be contrary to the purpose and intent of the Oklahoma Pleading Code, which requires not only the “speedy” but also the “just” determination of every action. 12 O.S.2001 § 2001.

¶16 Further, a dismissal with prejudice filed by a party is not a judgment entered by the court. Whether it has the same effect depends on the facts of the particular case. When Burggraf filed its dismissal with prejudice, the applicable statute provided:

A plaintiff may . . . without an order of court, dismiss any civil action brought by
him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action . . . . All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the district court, the judge or clerk of the county court, or the justice, where the action is pending, who shall note the fact on the proper record: Provided, such dismissal shall be held to be without prejudice, unless the words “with prejudice” be expressed therein.


¶17 Although the judgment roll from the second small claims case is not included in the record on appeal, a copy of what purports to be Burggraf’s “Dismissal With Prejudice” in that case is included. That document is signed only by Burggraf’s counsel. Therefore, Burggraf’s dismissal was authorized by only the first sentence of section 684 and effective to dismiss only the “civil action” Burggraf brought. Further, Burggraf’s automatic preclusion rule would be contrary to the express language of section 684. If a counterclaim has been filed:

A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action.

12 O.S.2001 § 684. In order to preclude the Davises from subsequently asserting any claims they have, Burggraf was required to obtain their release of those claims as part of the settlement or obtain their consent to dismissal of those claims on the record. Neither circumstance is established by the appellate record.

CONCLUSION

¶18 Because the appellate record does not include the judgment roll from either of Burggraf’s small claims actions, we are unable to determine whether the Davises agreed to release, as part of a settlement, any claims they had against Burggraf arising out of the same transaction or occurrence that was the subject of Burggraf’s prior litigation. Absent an agreement to release their claims, the Davises were not barred by 12 O.S.2001 § 1758; 12 O.S.2001 § 2013(A) or the doctrine of claim preclusion from asserting those claims in a subsequent action against Burggraf. Consequently, we reverse the judgment in favor of Burggraf and remand this case for the determination of the terms of the settlement agreement and further proceedings consistent with this Opinion.

¶19 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BARNES, P.J., and WISEMAN, J., concur.

1. It appears that the agreement to pay the $348 may have been a new term agreed to at that time, but because there is no written settlement agreement, this cannot be confirmed.

2. Published cases mentioning the statute include Patterson v. Baill, 2000 OK 92, 19 P3d 839 (holding that motions for summary judgment under Rule 13 are not applicable in small claims actions); Gibson v. Copeland, 2000 OK CIV APP 112, 13 P3d 989 (holding that the settlement courts’ procedures do not provide for an oral motion to dismiss); Jackson v. Scott, 2000 OK CIV APP 139, 18 P3d 369 (discussing the same issues as Patterson and Gibson); Fowler Equip. Co. v. Harry Houston Oil Co., Inc., 1997 OK CIV APP 52, 945 P2d 513 (holding that the announcement by both parties that they were ready to proceed on the petition and counterclaim waived any argument that the counterclaim was untimely); McIntosh v. Limestone Nat’l Bank, 1995 OK CIV APP 24, 894 P2d 1145 (holding that a small claims judgment triggers counter-claim preclusion pursuant to section 2013); Interstate Brands Corp. v. Stephens, 1980 OK 121, 615 P2d 297 (discussed in this Opinion); Carter v. Guillet, 1979 OK 146, 602 P2d 640 (holding that a counterclaim in excess of small claims limits is subject to the section 1758 time requirement); Hughes v. Dunsmon, 1977 OK CIV APP 13, 550 P2d 1079 (holding that a counterclaim filed no more than 24 hours prior to the only hearing set in the case was untimely), and Lee Wayne Co., Inc. v. Pruitt, 1976 OK CIV APP 23, 550 P2d 1374 (examining evidentiary issues not related to a counterclaim).

3. This interpretation is consistent with other district court proceedings in which a party may be permitted to file a counterclaim after the time required by the Oklahoma Pleading Code. See 12 O.S.2001 § 2013(F) (“Omitted Counterclaim”).

4. Burgraff does not argue that section 1758 was triggered by the Davises’ failure to file a counterclaim in the second small claims action. Our interpretation of section 1758 would preclude that result for essentially the same reasons discussed with respect to the first small claims suit.

5. Burgraff contends that the parties stipulated that the Davises’ counterclaim was compulsory. We find no such stipulation. The parties did stipulate that Burgraff’s second small claims action “was based on the same underlying transaction or occurrence as its first action.” This does not address the nature of the Davises’ claims. Nonetheless, for purposes of this analysis, we assume that the claims asserted by the Davises in this case arose out of the transaction or occurrence that was the subject of Burgraff’s small claims actions, and are, therefore, “compulsory” as defined in 12 O.S.2001 § 2013(A). Because the appellate record does not contain the judgment roll from either of Burgraff’s small claims actions, we cannot determine whether this assumption is well founded. See Robinson v. Tealma Limestone, Inc., 2004 OK 50, ¶ 13, 100 P3d 673, 677. There are several exceptions to the compulsory counterclaim rule. For example, it does not apply if third parties are required for adjudication or the claim is the subject of another action. See 12 Okla. Stat. Ann. § 2013, Committee cmt. (West 1993). Neither of these possible exceptions is precluded by the record in this appeal.

6. Burgraff cites several cases, but these cases do not support its contention. Goins v. Fox, 1958 OK 266, ¶ 11, 332 P2d 220, 222, decided prior to the enactment of section 2013, deals neither with voluntary dismissal, nor the preclusive effect of a voluntary dismissal on unsettled counterclaims. Pueblo de Taos v. Archuleta, 64 F2d 807, 812 (10th Cir. 1933), holds that a “dismissal with prejudice implies a decision on the merits.” Although cases interpreting the federal counterclaim rule may be instructive because Oklahoma’s compulsory counterclaim requirement “parallels exactly” the language of Fed. R. Civ. P. 13, McIntosh v. Lynn Hickey Dodge Inc., 1999 OK 30, n.15, 979 P2d 252, 256 n.15, the Pueblo de Taos case was decided five years before the first (1938) version
of the federal rules of civil procedure, and consequently does not assist in interpreting section 2013. Burgraf further cites numerous cases generally stating the claim preclusion rule, but these cases involve either final judgments or dismissals with prejudice entered by the court.

7. Because of our disposition of this appeal, Burgraf’s Motion to Dismiss for Absence of Substantive Merit is denied. Burgraf’s Motion for Appeal Related Attorney Fees is denied without prejudice.

2011 OK CIV APP 43

ADECCO INC. and AMERICAN HOME ASSURANCE CO., Petitioners, vs. PATRICIA DOLLAR and the WORKERS’ COMPENSATION COURT, Respondents.

Case No. 107,967. March 7, 2011

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS’ COMPENSATION COURT

HONORABLE MARY A. BLACK,
TRIAL JUDGE

SUSTAINED

Nelson Christiansen, MCIVERN, GILLIARD & CURTHOYS, Tulsa, Oklahoma, for Petitioners

William C. Doty, THE BELL LAW FIRM, Norman, Oklahoma, for Respondent

DOUG GABBARD II, VICE CHIEF JUDGE:

¶1 Petitioners, Adecco Inc., and American Home Assurance (collectively, Employer), seek review of a workers’ compensation court order awarding benefits for psychological overlay to Respondent, Patricia Dollar (Claimant). For the reasons set forth below, we sustain the workers’ compensation court’s decision. We deny Claimant’s motion to tax costs.

BACKGROUND

¶2 In September 2004, Claimant sustained a work-related, cumulative trauma injury to her back for which she was awarded temporary total disability (TTD) benefits per a workers’ compensation court order in March 2005. Additional TTD benefits were ordered in January 2006, October 2006, and, on reopening, July 2009. In April 2007, the court found Claimant had sustained 30% permanent partial disability (PPD) to the lumbar spine with radiculopathy to the legs and right hip, and disfigurement secondary to fusion surgery. The court awarded PPD benefits and continuing medical maintenance limited to pharmaceutical prescriptions for medication monitoring by Dr. Mark Newey, Claimant’s primary care doctor.

¶3 In November 2008, Claimant moved to reopen, alleging additional impairment to her back and psychological overlay due to depression. Employer denied Claimant had under-
Medical Examiner,” a “Permanent Impairment Examiner,” and that he is “Certified in Impairment Rating.”

¶7 Employer submitted a medical report by William Gillock, M.D., reflecting that he found no evidence of injury or impairment related to psychological overlay from the alleged injury. The court admitted Gillock’s report over Claimant’s general probative value objection.

¶8 The trial court found Claimant had sustained a change of condition for the worse, resulting in 12% PPD to the back over and above 30% pre-existing, and 3% PPD psychological overlay. The court also ordered Employer to provide continuing medical maintenance from Newey for prescription medications. Employer appeals, seeking review only of the finding as to psychological overlay. Claimant has filed a motion to tax costs “for frivolous appeal,” which has been deferred to this stage of the proceedings for decision.

STANDARD OF REVIEW

¶9 Rulings concerning expert witness qualifications and the admissibility of expert testimony “rest in the discretion of the trial court, and a decision on them will not be disturbed unless it clearly appears that discretion has been abused.” Sharp v. 251st St. Landfill, Inc., 1996 OK 109, ¶ 6, 925 P.2d 546, 549; see also Christian v. Gray, 2003 OK 10, ¶ 42, 65 P.3d 591, 608. To determine whether an abuse of discretion has occurred, “a review of the facts and the law is essential.” Id. at ¶ 43, 65 P.3d at 608 (quoting Bd. of Regents of Univ. of Okla. v. Nat’l Collegiate Athletic Ass’n, 1977 OK 17, 561 P.2d 499). An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. Id.

ANALYSIS

¶10 The only issue on appeal is whether the workers’ compensation court abused its discretion in admitting the medical report tendered by Claimant and relying on the report to support an assessment and award of permanent partial disability for psychological overlay. If so, then the workers’ compensation court erred in overruling Employer’s objection, and there is no evidence in the record to support the psychological overlay award. If the trial court properly exercised its discretion in admitting the document, then its decision should be sustained. No additional inquiry by this Court is required, because Employer has advanced no other propositions of error.

¶11 Expert medical testimony is required to establish the existence and extent of a claimant’s permanent disability. Brown v. Mom’s Kitchen, LLC, 2004 OK CIV APP 66, ¶ 11, 96 P.3d 808, 810. Pursuant to 85 O.S. Supp. 2010 § 17(A)(1), a claim for “permanent disability must be supported by competent medical testimony which shall be supported by objective medical findings, as defined in Section 3 of this title . . . .” Title 85 O.S. Supp. 2010 § 3(17) defines “objective medical evidence,” as evidence meeting “the criteria of Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto.” “Objective findings” are considered “those findings which cannot come under the voluntary control of the patient.”

¶12 In its brief on appeal, Employer does not contend that McClure’s report lacks “objective medical findings.” Rather, it argues the report was deficient because (1) the Zung Depression Test was not shown to constitute “objective medical evidence” under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993); and (2) a chiropractor is not qualified to testify as an expert to the degree of a patient’s psychological impairment resulting from a work-related injury. In support of the latter argument, Employer asserts that a chiropractor’s scope of expertise is limited to the areas of practice covered by a chiropractor’s license under Oklahoma Statutes, Title 59, which do not specifically include psychological evaluation or testing.

¶13 Federal Rule of Evidence 702, 28 U.S.C.A. (FRE 702) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

¶14 In Scruggs v. Edwards, 2007 OK 6, 154 P.3d 1257, the Supreme Court “determined that medical opinions formulated under the AMA Guidelines and the workers’ compensation law
would comply with ‘Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto,’” and further recognized that different physicians could have “admissible opinions with varying probative value” under this standard. Conaghan v. Riverfield Country Day Sch., 2007 OK 60, ¶ 17, 163 P.3d 557, 563 (quoting Scruggs at ¶ 21, 154 P.3d at 1265).

¶15 Significantly, FRE 702 “makes no attempt to set forth procedural requirements for exercising the trial court’s gatekeeping function over expert testimony.” Comments to FRE 702, 28 U.S.C.A. In Scruggs, the Court noted that under Oklahoma law, specifically § 2705 of the Oklahoma Evidence Code, the opinion of a duly qualified expert is admissible “without an explanation of its basis,” and that the Code “cast[s] on the cross-examining counsel the burden of showing that the opinion, once elicited, lacks probative value.” Scruggs at n. 10. See also Zebo v. Houston, 1990 OK 113, 800 P.2d 245; and Bostick Tank Truck Serv. v. Nix, 1988 OK 128, 764 P.2d 1344.

¶16 That a chiropractor is qualified to give expert medical testimony to matters “cover[ing] the particular field of his professional knowledge” has long been recognized by the Oklahoma Supreme Court. Okla. Natural Gas Corp. v. Schwartz, 1930 OK 458, ¶ 21, 293 P. 1087, 1091; see also Turner v. Dewbre, 1974 OK CIV APP 44, 530 P.2d 144. This is consistent with “the general rule that a chiropractor is competent to testify in a personal injury action, as an expert or medical witness, concerning matters within the scope of the profession and practice of chiropractic.” Annotation, Chiropractor’s Competency as Expert in Personal Injury Action as to Injured Person’s Condition, Medical Requirements, Nature and Extent of Injury, and the Like, 52 A.L.R. 2d 1384, 1385 (1957).

¶17 Moreover, the Oklahoma Court has indicated that a chiropractor may be considered an expert as to other matters as well. As stated by the Court in Inter Ocean Oil Co. v. Marshall, 1933 OK 580, ¶ 18, 26 P.2d 399, 403-04, where a chiropractor was permitted to testify as to the potential causes of miscarriage:

There are many manners and methods of treating and healing the human body, which might not be strictly termed “medical science,” but nevertheless are recognized as scientific methods and render their qualified practitioners eligible to testify as expert witnesses within the scope of their knowledge, according to their qualifi-

The Oklahoma Supreme Court also has recognized that physicians generally are presumed to be competent to testify as experts “on matters concerning mental condition.” Trout v. Gandy, 1967 OK 11, ¶ 0, 424 P.2d 52 (syllabus #1 of the Court); see also Holt v. State, 1947 OK CR 65, 181 P.2d 573.

¶18 While the Supreme Court has never specifically held that a licensed chiropractor’s scope of expertise, for workers’ compensation purposes, should be considered equivalent to that of a medical doctor, the Oklahoma Legislature has so indicated. The Workers’ Compensation Act, 85 O.S. Supp. 2010 § 14(E) states:

The term “physician” as used in this section shall mean any person licensed in this state as a medical doctor, chiropractor, podiatrist, dentist, osteopathic physician or optometrist. The Court may accept testimony from a psychologist if the testimony is requested by the Court.

¶19 As noted above, it is undisputed that McClure is licensed as a chiropractor in Oklahoma, and that he is certified or authorized in a number of additional or more specialized areas of expertise. It also is undisputed that McClure has been permitted to give his opinion as to the psychological overlay in other workers’ compensation cases, in matters where — although the “probative value” of his opinion may have been challenged — his qualification as an “expert” to give that opinion was not raised.
¶20 The opinion that McClure submitted clearly states that it was formulated in accordance with AMA Guidelines, that the opinions therein “are within a reasonable degree of medical certainty,” and that “under penalty of perjury” they are “true, correct and complete.” Aside from counsel’s one-line objection to the trial court, Employer offers no evidence otherwise. As such, and in light of the authorities cited above, the record demonstrates that the workers’ compensation court acted within its discretion in accepting McClure’s opinion as being from a qualified expert and compliant with FRE 702 and applicable U.S. Supreme Court case law.

¶21 Employer was, of course, entitled to challenge the trial court’s decision to admit McClure’s report, and by invoking Daubert, Employer challenged not only the probative value — i.e. the weight — of the report, but also its admissibility. However, by doing so, Employer took on the burden of demonstrating through cross-examination that the evidence presented by the report was either novel or such that its reliability “could not be taken for granted,” and also that it was so lacking in reliability — whether due to the lack of qualification of its author or due to the methodology he employed — that it was inadmissible to prove Claimant’s psychological overlay. Thus, Employer failed to meet its burden, and its argument — that there is no evidentiary support for a finding of Claimant’s permanent partial disability for psychological overlay — also fails. The trial court’s decision to admit and rely on McClure’s report was not an abuse of discretion. This ends our review, as no further allegations of error are presented.

CONCLUSION

¶22 For the reasons set forth above, the workers’ compensation court’s decision is sustained. Claimant’s motion to tax costs, based on the argument that Employer’s appeal is frivolous, is denied.

¶23 SUSTAINED.

GOODMAN, P.J., and RAPP, J., concur.

1. Claimant’s employer is identified in the record by several names, including “Adecco Personnel — Plano.”

2. A cursory review of Court of Civil Appeals’ opinions issued within the last few years further reveals that the workers’ compensation court has accepted McClure’s opinion as a medical expert as to psychological overlay, based on the Zung Test, in the past. See, e.g., Norman Reg’l Hosp. v. Johnson, Unpublished Opinion No. 104,358 (mandate issued August 31, 2007); Hoop, Brunnen & Link, Inc. v. Griffin, Unpublished Opinion No. 107,415 (mandate issued July 9, 2010).

3. Employer has responded to Claimant’s motion to tax cost in its reply brief. Its motion to proceed in this manner is granted.

4. Although Claimant argues that Employer waived any objection to McClure’s report because counsel made only a probative value objection, rather than seeking to prohibit the admissibility of the report altogether, the Supreme Court in Scruggs made clear that an objection invoking the applicability of Daubert raises issues going to both probative value and competency or admissibility. Scruggs, 2007 OK 6 at ¶ 15, 154 P3d at 1263-64. Moreover, Employer made clear in the trial court that it did not object to the report as far as it concerned McClure’s findings as to body parts other than psychological overlay. Claimant’s argument would require Employer to object to something it had no objection to in order to protect its right to object at all.

2011 OK CIV APP 44

RCB BANK, Plaintiff/Cross-Claimant/Appellant, vs. VILLAS DEVELOPMENT, L.L.C., an Oklahoma Limited Liability Company; HAROLD W. TOMPKINS; ROBERT M. COX; THE TOMPKINS FAMILY LLC, an Oklahoma Limited Liability Company; MARVIN Y. JIN and SOOHYUN JIN; BANK OF COMMERCE; TULSA ENERGY CONTROL, INC., a Florida Corporation; LIFESTYLES STORES, INC., an Oklahoma Corporation; MILL CREEK LUMBER & SUPPLY COMPANY, an Oklahoma Corporation; and DAVIS CUSTOM PAINTING, INC., an Oklahoma Corporation, Defendants, and BANK OF COMMERCE, Plaintiff/Cross-Claimant/Appellee, vs. BREAKERS, L.L.C., an Oklahoma Limited Liability Company; POINTE MARIN, L.L.C., an Oklahoma Limited Liability Company; HAROLD W. TOMPKINS, a/k/a HAL TOMPKINS, a/k/a HAROLD W. THOMKINS; RCB BANK, an Oklahoma Banking Corporation; VILLAS DEVELOPMENT, L.L.C., an Oklahoma Limited Liability Company; TULSA ENERGY CONTROL, INC., a Corporation; LIFESTYLES STORES, INC., a Corporation; MILL CREEK LUMBER & SUPPLY COMPANY, a Corporation; DAVIS CUSTOM PAINTING, INC., a Corporation; FULLER, CHLOUBER & FRIZZELL, L.L.P., an Oklahoma Limited Liability Partnership; and MARY JANE LAW, in her capacity as Treasurer of Delaware County, Oklahoma, Defendants.

Case No. 108,370. March 18, 2011

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

HONORABLE ROBERT G. HANEY, JUDGE

AFFIRMED

Jeffrey D. Hassell, GABLE GOTWALS, Tulsa, Oklahoma, and James C. Hodges, ELLER & DETRICH, a Professional Corporation, Tulsa, Oklahoma, for Plaintiff/Appellant,

GOODMAN, P.J., and RAPP, J., concur.
Kenneth L. Buettner, Judge:

¶1 Plaintiff/Appellant RCB Bank and Plaintiff/Appellee Bank of Commerce (BOC) each filed foreclosure actions involving the same property, which were consolidated in the trial court. Although the District Court action involved several lienholders, the issue on appeal is only the priority between mortgages held by the two banks. The trial court found BOC’s mortgage had priority; RCB appeals that decision. BOC’s mortgage, which was executed and recorded four years before RCB’s, has priority over RCB’s mortgages. BOC’s mortgage included a future advances clause and it secured both the note given by BOC’s mortgagor and one for which BOC’s mortgagor was guarantor; these notes were both made before RCB’s mortgages. Accordingly, we affirm the trial court’s finding that BOC’s mortgage was superior to RCB’s.

BOC’s Mortgage

¶2 BOC’s Petition alleged that Defendant Breakers, L.L.C. executed a $4,000,000 promissory note (“Breakers’ Note 1”) to BOC October 8, 2004. Breakers’ Note 1 was secured by a mortgage, recorded October 27, 2004, on Lots 12-18 of the Villas at Shangri-La. BOC claimed that Breakers was in default and then owed $469,166.72 in principal and $76,931.92 in interest, plus $84.71 per day accruing interest and $1,344.46 in accrued late fees, and it sought judgment for that amount. BOC sought an order foreclosing the mortgage and declaring it superior to other liens on the property. BOC further asserted that Defendant Harold Tompkins executed Guaranty Agreements in 2004 in which he guaranteed payment of Breakers’ Note 1 and that Tompkins had defaulted. BOC sought judgment against Tompkins on the Guaranty Agreements. BOC asserted that in June 2007, Defendant Pointe Marin executed a promissory note (“Breakers’ Note 2”) to BOC for $801,350 and, as a condition precedent to BOC making that loan, Breakers executed a Guaranty Agreement in which it guaranteed payment of Breakers’ Note 2. BOC alleged Pointe Marin and Breakers for $801,350 in principal, $193,076.95 in interest, plus accruing interest from May 15, 2009. BOC contended that its mortgage also secured Breakers’ Note 2, and it sought foreclosure of the mortgage based on the default on Breakers’ Note 2. BOC’s remaining allegations are not relevant to the issues on appeal.

RCB’s Mortgages

¶3 In its Petition for Foreclosure, RCB alleged that on May 22, 2008, Villas borrowed $1,325,000 (“Villas’ Note 1”) and $2,000,000 (“Villas’ Note 2”) under two promissory notes secured by two mortgages, recorded the same day, on Lots 12-18 of the Villas at Shangri-La and five units in Pointe Marin Town Homes, Phase II (“Property”). RCB alleged Villas was in default and then owed $1,292,267.70, plus $14,447.02 interest, on Villas’ Note 1, and $2,000,000, plus $22,458.33 interest, on Villas’ Note 2. RCB sought judgment for those amounts, as well as foreclosure on the real property securing the notes and foreclosure on the deposit account securing the notes, judgments against Tompkins and Cox on the Commercial Guaranties, and an order appointing a receiver.

Summary Judgment Proceedings

¶4 BOC filed a Motion for Partial Summary Judgment December 10, 2009, in which it sought judgment that its mortgage was superior, and judgment foreclosing its mortgage and loans. BOC listed thirteen paragraphs of undisputed facts. BOC contended that the undisputed facts showed that its mortgage had been recorded and effective since 2004 and that it was therefore superior to the other liens against the property. BOC claimed there was no dispute that Breakers was in default on Breakers’ Note 1 and was liable as guarantor on Breakers’ Note 2, and that both debts were secured by its mortgage on Lots 12-18 of the Villas.

¶5 RCB filed its Response to the Motion for Partial Summary Judgment and its Cross-Motion for Summary Judgment and Motion for Default Judgment December 28, 2009. RCB specifically disputed BOC’s facts 7, 8, 10, and 11. RCB further disputed all of BOC’s statements of fact which conflicted with RCB’s 25 statements of undisputed material facts. RCB argued that Breakers’ Note 1 was paid off in 2005 and therefore BOC’s mortgage expired before Breakers’ Note 2 was executed. RCB contended that the Second Modification of
BOC’s mortgage was executed over two years after BOC’s mortgage expired and that the modification was therefore ineffective to renew or extend the note or the mortgage. RCB further asserted BOC was not entitled to priority under the “dragnet clause” in BOC’s mortgage, also called a “future advances clause,” which provides that the mortgage secured all future debts Breakers owed to BOC.

¶6 BOC filed a Response to RCB’s Cross-Motion for Summary Judgment January 20, 2010. BOC disputed RCB’s statement 16 “to the extent it implies a legal necessity to include Note 2 or Pointe Marin in the Mortgage and Note Modifications” to allow BOC’s mortgage to secure payment of Breakers’ Note 2. BOC asserted its security interest for payment of Breakers’ Note 2 attached pursuant to Breakers’ Guaranty and the future advance clause in its mortgage. BOC also disputed RCB’s fact 17, contending that there was no reason for it to list every note subject to Breakers’ Guaranty because it was a continuing guaranty not limited to specifically named notes. BOC disputed RCB’s 18th statement of fact, asserting it implied “a legal conclusion that an LLC cannot properly execute a Resolution ratifying its prior conduct.” BOC disputed statement of fact 21 to the extent it implied it was legally necessary for Breakers’ Note 2 and Breakers’ Guaranty to be executed simultaneously. BOC disputed fact 22, claiming it implied a legal conclusion that a modification of mortgage was required for BOC’s mortgage to secure Breakers’ Note 2. BOC disputed fact 25 to the extent it implied “Breakers could not contract to guaranty Pointe Marin’s debt prior to Pointe Marin’s registration as an LLC with the Secretary of State.” Finally, BOC disputed RCB’s 26th statement of fact that Breakers’ Note 1 was paid off May 5, 2006. BOC asserted $1,500,000 of the debt was sold to Canadian State Bank and that amount was paid in full; BOC asserted that the full $4,000,000 was not paid in full and that more than $500,000 in principal and interest were currently owing on Breakers’ Note 1.

¶7 Following a hearing, the trial court issued its Journal Entry of Judgment May 4, 2010. The trial court granted BOC’s Motion for Partial Summary Judgment in its entirety. The court granted in part and denied in part RCB’s Cross-Motion for Summary Judgment and Motion for Default Judgment. As to the dispute between the banks, the trial court found that BOC’s mortgage from Breakers secured both Breakers’ Note 1 and Breakers’ Note 2. The court further found that BOC’s 2004 mortgage had priority over RCB’s 2008 mortgages and over all other liens on the property except for an ad valorem tax lien. The court granted judgment to BOC against Breakers for $469,166.72 in principal, $76,931.92 in accrued interest, $1,344.46 in late fees, $1,586.44 in costs, accruing interest of $84.71 per day, and attorney fees to be decided. The court granted judgment to BOC against Pointe Marin and Breakers for $801,350 in principal, $193,076.95 in accrued interest and fees, $1,344.46 in late fees, $1,586.44 in costs, accruing interest of $194.77 per day, and attorney fees allowed by law.

¶8 Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2001, Ch. 2, App.1. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. Brown v. Alliance Real Estate Group, 1999 OK 7, 976 P.2d 1043, 1045. Summary judgment is not proper where reasonable minds could draw different inferences or conclusions from the undisputed facts. Id. Further, we must review the evidence in the light most favorable to the party opposing summary judgment. Vance v. Fed. Natl. Mortg. Assn., 1999 OK 73, 988 P.2d 1275.

¶9 In its Petition In Error, RCB contends the trial court erred in finding that Breakers’ Note 1 was not fully paid and in finding that BOC’s mortgage was not released or extinguished by Note 1 being paid. RCB also contends that the trial court erred in finding that BOC’s mortgage secured Breakers’ Note 2 pursuant to the future advances clause in the mortgage.

¶10 We first address RCB’s claim that Breakers’ Note 1 was paid off, causing BOC’s mortgage to expire. RCB argued that Breakers’ Note 1 was fully paid May 5, 2006, and that BOC was required by law to release the mortgage at that time, citing 46 O.S.2001 §15. That section provides for a penalty against a mortgagee who refuses to release a mortgage upon the mortgagor’s request within 50 days of the debt secured by the mortgage being fully paid. Any claim for such a penalty would be Breakers’ to make, not RCB’s. Nothing in the record here suggests that Breakers asked to have the mortgage released, likely because the mortgage, by its express terms, was a continuing mortgage. A mortgage which provides that it secures future advances or debts of any kind is considered legal and valid in Oklahoma. First Natl. Bank in Dallas v. Rozelle, 493 F.2d 1196, 1201(10th
1938 OK 195, 79 P.2d 242, 246, 182 Okla. 567. A mortgage securing future advances is considered “open-ended” and as such, until a release is recorded, it continues even after the original debt has been paid. Central Production Credit Assoc. v. Page, 268 S.C. 1, 231 S.E.2d 210, 214 (1977). RCB’s contention that “the mortgage follows the note” rule means that when the note was paid the mortgage ended, is not relevant here because the mortgage expressed the parties’ intent that the mortgage continue to secure future advances. See In re Mancle, 314 B.R. 397 (E.D.Ark.2004).

¶11 In Rozelle, supra, after the bank sought foreclosure, the mortgagor countersued for release of the mortgage, citing 46 O.S. §15. The bank responded that it was not obligated to release the mortgage because of a future advances clause. The Tenth Circuit Court of Appeals held that the future advances clause in the mortgage showed the parties’ intent for the mortgage to secure later loans in addition to the note given at the time of the mortgage. 493 F.2d at 1202. Accordingly, whether Breakers’ Note 1 was fully paid at some previous point is not a question of fact material to the issues in this case. The record shows that BOC and Breakers amended the note and modified the mortgage after the date that RCB claims it was paid and should have been released. BOC’s mortgage did not expire and served as security for later advances or loans BOC made to Breakers.

¶12 RCB also claims the trial court erred in finding Breakers was in default on its Note 1 and in awarding judgment therefor to BOC. The record includes BOC’s President, Jan Miller’s December 9, 2009 affidavit, in which she averred that Breakers was in default on Note 1 and then owed $469,166.72 in principal, plus $76,931.92 in interest and fees accrued through May 15, 2009, plus accruing interest. RCB’s exhibit purporting to show that Breakers’ Note 1 was paid off is a computer screenshot dated May 5, 2006, and states “participation sold to Canadian State Bank.” BOC asserted RCB’s exhibit was not authenticated, and that the exhibit at most shows that a portion of Note 1 was paid off by being sold to another bank. RCB has not presented evidence creating a question of fact on the amount in default on Breakers’ Note 1 at the time of the foreclosure proceedings.

¶13 We next consider RCB’s arguments related to Breakers’ Note 2. As explained above, Breakers’ Note 2 is a note given by Pointe Marin to BOC. When Pointe Marin defaulted, BOC sought to foreclose on the mortgage based on Breakers’ guaranty of Pointe Marin’s debts. RCB contends that the future advances clause should not include Breakers’ Note 2 because Breakers was not the borrower but the guarantor. RCB contends that Breakers’ Note 2 is not of the same class as the other note secured by BOC’s mortgage and was not intended by the parties to be secured by BOC’s mortgage. However, even the out of state authority on which RCB relies for this claim notes that the parties may express intent for a mortgage to secure debts of a different kind or character than the original debt secured. See Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 390 (Iowa, 1988), which quoted the rule in Iowa that:

[1]In the absence of clear, supportive evidence of a contrary intention a mortgage containing a dragnet type clause will not be extended to cover future advances unless the advances are of the same kind and quality or relate to the same transaction or series of transactions as the principal obligation secured or unless the document evidencing the subsequent advance refers to the mortgage as providing security therefor.

Id., quoting Freese Leasing v. Union Trust & Sav. Bank, 253 N.W.2d 921, 927 (Iowa 1977) (emphasis added). The future advances clause, quoted above, in BOC’s mortgage is almost without limit and expressly provides that the mortgage secures debts of every kind and character.

¶14 In Rozelle, supra, the Tenth Circuit Court of Appeals considered the effect of a future advances clause of similar breadth. In that case, the borrower mortgaged his interest in oil and gas leaseholds and personal property to secure a loan of $40,000 and the mortgage included provisions securing “all loans and advances which Mortgagee may hereinafter make to Mortgagor” and “all other and additional debts... of every kind and character of Mortgagor now or hereinafter existing in favor of Mortgagee.” The appellate court held that the clauses were broad enough to secure subsequent loans to the mortgagor to finance the mortgagor’s ranching operations on other land secured by a mortgage thereon. The court declared that the “future advance” and “omnibus” provisions were both clear and broad, and the court recognized that an agreement to secure future advances would necessarily intend to secure sums that were indefinite and
uncertain at the time the mortgage was executed. 493 F.2d at 1201-1202. The future advances clause is this case, which states in part that it extends to “all other debts, obligations and liabilities of every kind and character” plainly shows the parties’ intent to include different kinds and qualities of debts.

¶15 A future advances clause similar to the one in BOC’s mortgage has been held to secure debts on which the mortgagor is a guarantor or surety. See Hepburn v. Tri-County Bank, 842 N.E.2d 378, 385 (Ind.App.2006) (where the court held that future advances or dragnet clause could not have been written more broadly, as it encompasses any future obligation [borrower] may have to the Bank. Accordingly, the dragnet clauses attach the mortgages to the later executed guaranty.”); C&S Dekalb Bank v. Hicks, 232 Ga. 244, 206 S.E.2d 22 (1974).

¶16 We agree with the trial court that the future advances clause in this case is written broadly enough to include a debt which Breakers was obligated to pay as a guarantor. The parties to the mortgage expressed their intent that the mortgage secure all debts of every kind and character on which Breakers was liable to BOC. Breakers later guaranteed payment of Pointe Marin’s note to BOC. The plain language of the future advances clause of the mortgage embraces amounts which Breakers owed BOC under the Guaranty. Accordingly, BOC was entitled to judgment as a matter of law foreclosing its mortgage to satisfy the default of Breakers’ Note 2.

¶17 The summary judgment record shows no dispute of facts material to the issues presented. AFFIRMED.

MITCHELL, P.J., and JOPLIN, J., concur.


2. BOC asserted Breakers executed amendments to the note in 2004 and 2005, and two modifications to the mortgage were recorded in 2005 and 2007.

3. The record elsewhere indicates that Tompkins was the manager of Breakers, L.L.C. and Pointe Marin, L.L.C. Breakers conveyed all of its interest in Lots 12-18 of the Villas to Tompkins October 4, 2007, and Tompkins conveyed all of his interest to the Villas May 22, 2008.

4. BOC asserted these same claims in its July 22, 2009 Cross-Claim against RCB and all Defendants.

5. RCB asserted Defendant Villas Development, LLC (Villas) was the borrower; Defendant Tompkins Family, LLC assigned a deposit account as security for the loans; Defendants Tompkins and Robert Cox were guarantors; Defendants Tompkins and Robert Cox were guarantors; Defendants Marvin and Soohyun Jin were in possession of a portion of the property; BOC possibly claimed an interest in the property; and Defendants Tulsa Energy Control, Lifestyle Stores, Mill Creek Lumber & Supply, and Davis Custom Painting, had all filed materialman’s or mechanic’s liens against the property.

6. On the same date, Tompkins Family LLC gave RCB an Assignment of Deposit Account, also as security for the notes, and Tompkins executed a Commercial Guaranty promising to pay on demand all sums due on the notes. Cox also executed a Commercial Guaranty for the notes the same day.

7. RCB later dismissed without prejudice its claims for foreclosure against the deposit account and against Tompkins as guarantor.

8. BOC asserted there was no dispute that: 1) on October 8, 2004, Breakers executed and delivered to BOC Breakers’ Note 1, a $4,000,000.00 note, with 6.75% interest beginning November 8, 2004 and ending October 8, 2005, secured by Lots 12-18 of the Villas at Shangri-La, and providing that any unpaid balance is due immediately upon default; 2) as security for Breakers’ Note 1, Breakers also executed a mortgage on Lots 12-18 of the Villas on the same date; 3) the mortgage provides that it is given to secure payment of the following:

(a) The Indebtedness evidenced by the following described promissory Note(s) (“the Note,” whether one or more) and any modifications, renewals or substitutions of the Note: Promissory note dated 10/08/2004, in the name of BREAKERS, L.L.C., . . .

(b) All future loans and advances and all future renewals of loans which Mortgagee may make to Mortgagor or to the Debtor identified in the Note, if different from Mortgagor (the “Debtor”); and all other debts, obligations and liabilities of every kind and character of Mortgagor or Debtor now existing, whether or not explicitly referred to, or arising in the future in favor of Mortgager, whether direct or indirect, absolute or contingent, or originally payable to Mortgagee or any other person; and any renewals or extensions provided, however, if the Mortgage is released or terminated, the Mortgagee will not secure any future loan, advance, debt, obligation or liability taken or incurred principally for a personal, family or household purpose.

9. The mortgage also gives BOC the right to accelerate payment and exercise the power of sale or foreclosure upon demand; 3) the mortgage was recorded October 27, 2004; 5) on July 29, 2005, Breakers executed an Amendment to Note 1 and Modification of Mortgage, which were recorded September 2, 2005, and which modified the note secured by Lots 12-18 of the Villas and that the agreement was amended as follows: Promissory note dated 10/08/2004, in the name of Breakers, L.L.C., with note number of 2422083, in the amount of $4,000,000.00, at the rate of 6.75%, with a maturity date of 10/08/2005 has been modified as follows: The rate of 6.75% shall change to the initial rate of 7.25% and then will adjust with Prime plus 1%. The maturity will be extended to August 01, 2006. All other terms remain unchanged.

CONTINUING VALIDITY. The terms of the Mortgage shall remain unchanged and in full force and effect, except as expressly modified above. Mortgagee’s consent to this Modification does not waive Mortgagee’s right to require strict performance of the Mortgage as modified above nor obligate Mortgagee to agree to any future modifications. Nothing in this Modification shall be construed as satisfaction of the Promissory Note or otherwise that the Mortgage is released or terminated. The Mortgagee intends to retain as liable all parties to the Mortgage and all parties to the note, unless a party is expressly released by mortgagee in writing.

6) Breakers executed a second Amendment to Note and Modification of Mortgage May 18, 2007, which covered Lots 12-18 of the Villas on which the agreement was satisfied on the October 8, 2004 note previously modified July 29, 2005; the second amendment changed the interest rate and extended the maturity date, and it included the Continuing Validity clause set out in fact no. 5; 7) during all relevant times, BOC’s mortgage has remained duly and validly recorded, with the security perfected, and has not been released; 8) Breakers has failed to make the required payments under Breakers’ Note 1 and has defaulted, owing $469,166.72 principal, $76,931.92 interest, and $1,344.46 late charges; 9) the 2004 mortgage secured the $4,000,000.00 principal in Breakers’ Note 1 as well as future advances to Breakers (as quoted in fact no. 3, above); 10) December 5, 2005 Breakers executed a Guaranty Agreement in favor of BOC to induce BOC to extend credit to Pointe Marin, by which Breakers guaranteed all of Pointe Marin’s debts to BOC; the guaranty stated in part that Breakers:
guarantees to the Lender that Debtor will fully and promptly pay or otherwise discharge indebtedness . . . upon which Debtor now is or may later, from time to time, become obligated to Lender . . . regardless of the nature and form of indebtedness and whether due or not due; (2) agrees, . . . to liquidate any security interest created by the Mortgage as modified above nor obligate Mortgagee to agree to any future modifications. Nothing contained in this Modification shall be interpreted to mean any outstanding balance owing under the Note is paid or any security interest created by the Mortgage is released or terminated.

The Mortgagee intends to retain as liable all parties to the Mortgage and all parties, makers and endorsers to the note, unless a party is expressly released by mortgagee in writing.

(Emphasis added.)
APP EAL FROM THE DISTRICT COURT OF
BECKHAM COUNTY, OKLAHOMA
HONORABLE F. DOUG HAU GHT, 
TRIAL JUDGE

AFFIRMED
Dennis A. Smith, DISTRICT ATTORNEY, Gina 
R. Webb, ASSISTANT DISTRICT ATTORNEY, 
Sayre, Oklahoma, for Plaintiff/Appellee
Thomas W. Talley, TALLEY & TALLEY, Hobart, 
Oklahoma, for Claimant/Appellant

JOHN F. FISCHER, JUDGE:
¶1 Brett Clymer appeals the forfeiture of his 
1997 GMC SK1 pickup truck. Because his 
vehicle was used in the commission of a bur-
glary to transport stolen property, we affirm.

BACKGROUND
¶2 Clymer was charged with and pled guilty 
to knowingly concealing stolen property and 
transporting stolen property across state lines in 
Beckham County, Oklahoma. The property 
involved was stolen by Clymer and others in 
February or March of 2008 from a barn in Quail, 
Texas, and brought back to Oklahoma in Cly-
mer’s pickup. The charge against Clymer in 
Texas was reduced to “Theft, Class A,” a misde-
meanor. Clymer also pled guilty to this charge 
and received a one-year deferred sentence. The 
State of Oklahoma filed its petition for forfeiture 
of the pickup in Beckham County relying on 21 

¶3 Clymer raises two issues in this appeal. 
First, he contends that he was not convicted of 
burglary, section 1738 does not 
authorize forfeiture of his vehicle. The relevant 
portion of that statute provides:

\[
\text{Any commissioned peace officer of this state is authorized to seize . . . }
\text{any equipment owned by or registered to the defendant which is used in the attempt or commission of any act of burglary in the first or second degree, motor vehicle theft, unauthorized use of a vehicle, obliteration of distinguishing numbers on vehicles or criminal possession of vehicles with altered, removed or obliterated numbers as defined by Sections 1431, 1435, 1716, 1719 and 1720 of this title or Sections 4-104 and 4-107 of Title 47 of the Oklahoma Statutes . . . .}
\]

21 O.S. Supp. 2010 § 1738. Clymer’s argument 
fails for two reasons.

¶5 Clymer argues that because he was not 
convicted of burglary, section 1738 does not 
authorize forfeiture of his vehicle. The relevant 
portion of that statute provides:

Any commissioned peace officer of this state is authorized to seize . . . any equipment owned by or registered to the defendant which is used in the attempt or commission of any act of burglary in the first or second degree, motor vehicle theft, unauthorized use of a vehicle, obliteration of distinguishing numbers on vehicles or criminal possession of vehicles with altered, removed or obliterated numbers as defined by Sections 1431, 1435, 1716, 1719 and 1720 of this title or Sections 4-104 and 4-107 of Title 47 of the Oklahoma Statutes . . . .

21 O.S. Supp. 2010 § 1738. Clymer’s argument 
fails for two reasons.

¶6 First, burglary in the second degree is 
defined as follows: “Every person who breaks 
and enters any building . . . in which any prop-
erty is kept . . . with intent to steal any property 
therein or to commit any felony, is guilty of 
burglary in the second degree.” 21 O.S.2001 
§ 1435. At the 2009 hearing, Clymer admitted 
that he used his vehicle to drive to Quail, Texas, 
steal various items out of a barn, load those 
items on his truck and transport them back to 
Beckham County. Clymer also testified that the 
doors of the barn was closed and that he and the 
others “kind of pushed a little bit . . . barely 
tapped it” to open the door so they could enter 
the barn. Any physical force, no matter how 
slight, satisfies the “breaking” element of bur-
glary in the second degree. Luker v. State, 1976 
OK CR 135, ¶ 9, 552 P.2d 715, 718. Clymer’s 
testimony admits every element of the crime of 
burglary in the second degree. Clymer may 
have pled guilty in Texas to an offense other 
than burglary in the second degree, but as the 
State correctly argues, section 1738 does not 
require that a vehicle owner be convicted of an
offense described in the statute before forfeiture is permitted.

¶7 On this point, we find persuasive the Supreme Court’s reasoning with respect to the forfeiture provision of the Uniform Controlled Dangerous Substances Act (UCDSA):

The next step in the resolution of the questions before us is to determine whether a subsection 2-503(A)(7) forfeiture is dependent on an in personam criminal charge or conviction for possession. Forfeiture proceedings under title 63, section 2-503 are in rem and civil in nature. State ex rel. Turpen v. A 1977 Chevrolet Pickup Truck, 1988 OK 38, ¶ 9, 753 P.2d 1356. Civil forfeiture is based on the legal fiction that the object is guilty of the crime. Austin v. United States, 509 U.S. 602, 615-616 (1993) (quoting J.S. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 511 (1921). Under the common law, in rem civil forfeiture is “independent of, and wholly unaffected by any criminal proceeding in personam.” In re The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827). Thus, the common law does not require section 2-503 forfeitures to be based on a criminal charge, such as possession with intent to distribute, or on a criminal conviction.

State ex rel. Campbell v. Eighteen Thousand Two Hundred Thirty-five Dollars, 2008 OK 32, ¶ 13, 184 P.3d 1078, 1081. Like section 2-503 of the UCDSA, a forfeiture proceeding conducted pursuant to section 1738 is an in rem proceeding. State v. One 1965 Red Chevrolet Pickup, 2001 OK 82, ¶ 10, 37 P.3d at 819-20. “There are no constitutional, statutory or common-law exceptions to any personal property that must stand subject to a § 1738 forfeiture.” Id. ¶ 19, 37 P.3d at 822. And, there is no language in section 1738 that requires the crime to be committed in Oklahoma before a vehicle used in that crime may be forfeited. What is required by the plain language of section 1738 is that the owner of the vehicle sought to be forfeited use that vehicle in the commission of a crime described in the statute. See In re Notice of Seizure and Intended Forfeiture of One 1985 Two Door BMW Model 325, VIN No. WBAAB640F1210839, 1985 Texas License Tag 96 PNH, 1991 OK CIV APP 108, 819 P.2d 722 (holding that an automobile driven to the scene of a burglary was equipment used in the commission of that crime and subject to forfeiture pursuant to section 1738).

¶8 Second, section 1738 is not limited to burglaries. Forfeiture is also authorized if Clymer used his truck in the commission of a motor vehicle theft defined by 21 O.S. Supp. 2010 § 1720. That statute provides in part: “Any person in this state who shall steal an aircraft, automobile or other automotive driven vehicle, construction equipment or farm equipment, shall be guilty of a felony . . . .” One of the items Clymer admits he stole in Texas and transported back to Oklahoma in Clymer’s truck was a four wheel all-terrain vehicle. Prior to the theft in Texas, Clymer admitted that he also drove his truck to Washita County, Oklahoma, and stole another four-wheel vehicle. Clymer used his truck to transport this vehicle back to Beckham County as well. Clymer has raised no argument that would prevent the forfeiture of his truck for these crimes.

CONCLUSION

¶9 It is undisputed that the vehicle that is the subject of this forfeiture proceeding was used in the commission of a burglary and in the theft of motor vehicles. Section 1738 authorizes the State to seek forfeiture of the vehicle based on the circumstances of this case. The district court correctly granted the State’s petition for forfeiture, and we affirm that decision.

¶10 AFFIRMED.

BARNES, P.J., and WISEMAN, J., concur.

1. The 2002 version of section 1738 is the version applicable to this 2008 forfeiture proceeding. However, there is no change to the portions of the statute relevant to this appeal, future citations will be to the current version of the statute.

2. An objection to venue is waived if not raised by motion or in the party’s responsive pleading. 12 O.S.2001 § 2012(F)(1). Clymer neither filed a motion objecting to venue nor raised that issue in his answer. Further, Clymer confuses the nature of this proceeding. It is an in rem action directed at the vehicle. “No personal liability is imposable in § 1738 forfeitures. It is only the object (or the rei) to be forfeited which stands liable for unconditional delivery to the State. A forfeiture proceeding is one in rem. It is predicated upon the property’s illegal use.” State v. One 1965 Red Chevrolet Pickup, 2001 OK 82, ¶ 10, 37 P.3d 815, 819-20 (footnotes omitted). Title 21 O.S. Supp. 2010 § 1738(C) specifically provides that notice of the seizure and the forfeiture proceeding shall be filed in the county in which the property is seized.

2011 OK CIV APP 40

E.J. MAYES and EVELYN MAYES, Plaintiffs/Appellees, vs. DAVID WILLIAMS and TERRY WILLIAMS, Defendants/Appellants, and DAVID WILLIAMS and TERRY WILLIAMS, Third-Party Plaintiffs/Appellants, vs. STEVE MAYES, HOWARD ROYCE and BOBBY MAYES, Third Party Defendants.

Case No. 107,135. February 16, 2011
APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA
HONORABLE NORMAN D. THYGSEN, TRIAL JUDGE
SUMMARILY AFFIRMED UNDER RULE 1.202(d) & (e)
C. Bart Fite, FITE LAW FIRM, Muskogee, Oklahoma, for Plaintiffs/Appellees
Wayne Bailey, BAILEY LAW, PLC, Tahlequah, Oklahoma, for Defendants/Appellants
JOHN F. FISCHER, JUDGE:
¶1 Defendants David and Terry Williams appeal from an order of the district court enjoining them from denying access across their property to Plaintiffs E.J. and Evelyn Mayes. We find the case appropriate for summary affirmance pursuant to Oklahoma Supreme Court Rule 1.202, 12 O.S.2001, ch. 15, app. 1.

DISCUSSION
¶2 Although much of the evidence produced at trial was conflicting, the dispositive facts in this case are clear. The Mayeses own property located south of property owned by the Williamses. The Mayeses seek access to their property across a section line pursuant to 69 O.S. Supp. 2008 § 1201. That statute describes the manner in which section lines may be opened or reserved for roads and provides: “Nothing in this section shall deny a fee owner their right of ingress or egress to their land.” Section 1201(C).

¶3 For more than fifty years, the Mayeses’ have used a section line road abutting the Williamses’ property to gain access to the north portion of their property.1 There was substantial testimony that others had used the road as well and that at one point, there was a house at the end of the road near the Mayeses’ property. Although the Mayeses have access to the south portion of their property, because of the terrain, this access does not provide access to the north portion of their property. After the Williamses bought their property in 2003, they blocked the Mayeses’ access to the section line road. The Mayeses filed this suit seeking an order preventing the Williamses from denying their access to the section line road.

¶4 The Supreme Court’s interpretation of section 1201 is dispositive:

[T]he plain statutory dictate is that no fee owner shall be denied the use of an abutting section-line for purposes of ingress and egress to his land. In the present case, Appellant’s land is not entirely land-locked, but accessibility to the . . . portion of Appellant’s forty acre tract is materially dependent upon use of the subject section-line which in the past has served as a common roadway, though not a public highway.

Wells v. Webb, 1989 OK 61, ¶ 4, 772 P.2d 400, 401. As in this case, the road in Wells had not been previously opened by the County Commissioners. Further, the argument that the Mayeses have alternate methods of access, either through their own property or through property now owned by their son is without merit:

The fact that the land in the Wells case was materially dependent on the section line is merely one factor that the Court considered in its decision. It does not create an additional element that must be satisfied in order for the statute to apply. Requiring the fee owner to show that his land is materially dependent on the section line is at odds with the “plain statutory dictate . . . that no fee owner shall be denied the use of an abutting section-line for . . . ingress and egress.” Therefore, a finding that the Burkhart property is not materially dependent on the use of the section line does not resolve the issues. The fact that their land abuts a section line gives rise to the right to use the road for ingress and egress if the use is reasonable.


CONCLUSION
¶5 The district court’s decision in this case is fully explained in its Amended Findings of Fact and Conclusions of Law filed July 15, 2009. That decision is clear, comprehensive, well-reasoned, and fully supported by competent evidence. We have reviewed the record and the applicable law and find no abuse of discretion. Further, the district court’s determination is not against the clear weight of the evidence. Finding no reversible error, we affirm the district court’s judgment pursuant to Oklahoma Supreme Court Rule 1.202(d) & (e), 12 O.S.2001, ch. 15, app. 1.
¶6 The Williamses’ motion for appeal-related attorney fees is denied. The Mayeses’ motion for appeal-related attorney fees is denied without prejudice to refiling based on a showing that they were entitled to attorney fees in the district court or otherwise entitled to appeal-related attorney fees. See Okla. Sup. Ct. R. 1.14(B), 12 O.S. Supp. 2010, ch. 15, app. 1.

¶7 SUMMARILY AFFIRMED UNDER RULE 1.202(d) & (e).

BARNES, P.J., and WISEMAN, J., concur.

1. The Williamses argue this road has not been “opened” and although that issue would be material if the Mayeses sought public access across this section line, whether the road has or has not been opened is not dispositive when access is sought pursuant to 69 O.S. Supp. 2008 § 1201. See Wells v. Webb, 1989 OK 61, 772 P.2d 400.

2011 OK CIV APP 49

TRACY MOORE, Plaintiff/Appellant, vs. OKLAHOMA STATE UNIVERSITY d/b/a OKLAHOMA COOPERATIVE EXTENSION SERVICE, Defendant/Appellee.

Case No. 107,928. December 22, 2010
APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA
HONORABLE MARK R. SMITH, TRIAL JUDGE
REVERSED AND REMANDED

Ronald E. Baze, EDDY LAW FIRM, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant
Kevin L. McClure, ASSISTANT ATTORNEY GENERAL, OKLAHOMA ATTORNEY GENERAL’S OFFICE, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, JUDGE:

¶1 Appellant Tracy Moore (Moore) filed a lawsuit on September 23, 2008, against her former employer, appellee Oklahoma State University d/b/a Oklahoma Cooperative Extension Service (OCES), claiming she was constructively discharged because of a hostile, retaliatory work environment after reporting “several instances of what she believed was fraudulent activity, including improper reporting of travel expense reimbursement, employee leave, and embezzlement of moneys entrusted with the Lawton extension office.” In particular, Moore states that in March of 2007, she “became aware of the account which had been opened with funds collected on behalf of a local 4-H Association and placed in the care of [OCES].” Moore alleges that the “circumstances of the creation of this account spurred significant suspicion within [Moore] that the funds were being illegally managed . . . . Unable to tolerate the perceived improprieties within the workplace, [Moore] reported the existence of the bank account to Oklahoma State University’s Ethics Point website in May of 2007.” An internal investigation ensued, establishing the existence and use of an unauthorized bank account.

¶2 As a result of her alleged constructive discharge, Moore asserted a claim for “Wrongful Discharge in Violation of State Public Policy — Burk Tort.” OCES moved for summary judgment, which the trial court granted in its “Journal Entry of Judgment,” filed on December 17, 2009. From that judgment, Moore appeals.

UNCONTROVERTED MATERIAL FACTS

¶3 OCES is a “Division of Agricultural Sciences and Natural Resources Oklahoma State University.” OCES’s office is entrusted to maintain monies from public groups and organizations on a regular basis through various activities, including charitable fundraisers.

¶4 Moore began to work as a secretary for OCES in Lawton, Oklahoma, in November of 2006. She resigned effective February 28, 2008.

¶5 OCES has a written internal policy that allows the extension office to open one checking account only. The policy provided that “County and District Extension Offices have authority to open and maintain one local checking account for the purpose of handling incidental fiscal affairs related to educational programming and clientele services. . . . The County Extension Director or the District Director will select a local bank to handle the Agency Funds in one bank account only . . . .”

¶6 It is undisputed that contrary to this internal policy, on March 1, 2007, an account was opened at Liberty National Bank in Lawton by Sherry McDonald, an OCES employee, at the direction of Alan Vandeventer, then County Extension Director, in violation of the policy. Money from a fundraiser held for an evolving 4-H Leader organization was deposited into this bank account.

¶7 Moore, believing the account to be fraudulent, had refused to assist in the management of that account. In May 2007, she reported her concerns to Alan VanDeventer, Sherry McDon-
Moore’s report was investigated by Steve Smith, SW District Extension Director. There is no dispute that the second bank account was unauthorized and established in violation of the written internal policy.

STANDARD OF REVIEW

Summary judgment shall be granted when there is no substantial controversy as to any material fact and one of the parties is entitled to judgment as a matter of law. Rule 13(e), Rules for District Courts, 12 O.S. Supp. 2002, ch. 2, app. The standard of review on the entry of judgment granting summary relief is de novo. Jennings v. Badgett, 2010 OK 7, ¶ 5, 230 P.3d 861, 864. We review rulings on issues of law pursuant to the plenary power of the appellate courts without deference to the trial court. Id.

Summary judgment is appropriate when the pleadings, affidavits, depositions, admissions or other evidentiary materials show there is no substantial controversy as to any material fact and one party is entitled to judgment as a matter of law. Tucker v. ADG, Inc., 2004 OK 71, ¶ 11, 102 P.3d 660, 665. “Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, ie whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.” Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. For purposes of summary judgment, “[a] fact is ‘material’ if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” Hadnot v. Shaw, 1992 OK 21, ¶ 18, 826 P.2d 978, 985. (Footnote omitted.)

ANALYSIS

Moore sued for damages for wrongful termination (constructive discharge) in violation of public policy — a Burk tort claim. As stated by the Oklahoma Supreme Court in Kruchowski v. The Weyerhaeuser Co., 2008 OK 105, ¶ 24, 202 P.3d 144, 151-152:

A viable Burk claim must allege (1) an actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma’s constitutio-
upon Moore’s ability to resign at any time. The record contains no contract of employment, executed by both parties, stating a certain length of employment or any other terms of the employment relationship.

¶15 The doctrine of employment at-will is firmly embedded in the common law of Oklahoma. Clinton v. State of Oklahoma ex rel. Logan County Election Board, 2001 OK 52, ¶ 5, 29 P.3d 543, 545. Under the at-will employment doctrine, employers are at liberty to fire an at-will employee without recourse, in good or bad faith, with or without cause, except where the termination is contrary to a clear mandate of public policy articulated by constitutional, statutory or decisional law. Gilmore v. Enogex, Inc., 1994 OK 76, ¶ 6, 878 P.2d 360, 362-363. Moore’s position was funded with grant funds of a definite duration; however, we find her status, being employed for an indefinite duration, as a matter of law, was one of at-will employment. See Singh v. Cities Service Oil Company, 1976 OK 123, 554 P.2d 1367; McCrady v. Oklahoma Department of Public Safety, 2005 OK 67, ¶ 10, 122 P.3d 473, 475.

¶16 The questions regarding whether Moore was constructively discharged and, if so, the reason for the constructive discharge, remain as questions of fact for the trier of fact on remand.

I. Public Policy Goal

¶17 There is a narrow exception to the at-will doctrine — the public policy exception. The exception is a limited restriction on employers’ rights to discharge at-will employees. Gilmore at ¶ 6. Application of the public policy exception to the at-will employment doctrine demands violation of a clear mandate of public policy. Otherwise, no exception to the doctrine will lie. Clinton at ¶ 6. To succeed on a Burk claim, there must be an identifiable Oklahoma public policy goal “that is found in Oklahoma’s constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma.” Kruchowski at ¶ 24, 202 P.3d at 151-152.

¶18 Moore argues that she was constructively discharged for the reason that she reported the second unauthorized account and that OCES’s having a second account, she contends, violates an Oklahoma public policy.19 It is uncontested that VanDeventer directed the opening of the second bank account and that having more than one bank account violated the internal policy, so the question becomes whether violation of the internal banking policy in this case satisfies the fourth Burk element. “The implication of a sufficiently discernible public policy presents a question of law to be resolved either at nisi prius or ultimately by an appellate court.” Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 9, 176 P.3d 1204, 1210. (Footnote omitted.)

¶19 The internal fiscal policy has its roots in the Oklahoma Constitution and the Oklahoma statutes, which reflect the public interest in fiscal integrity. The Oklahoma Constitution created the Board of Regents as follows: “There is hereby created a Board of Regents for the Oklahoma Agricultural and Mechanical College and all Agricultural and Mechanical Schools maintained in whole or in part by the State . . . .” Okla. Const., art. VI, § 31a.

¶20 Title 70 O.S. Supp. 2005 § 3412, provides, in part:

The Board of Regents for the Oklahoma Agricultural and Mechanical Colleges shall have the supervision, management and control of Oklahoma State University . . . and shall have the following additional powers and duties:

1. Adopt such rules and regulations as it deems necessary to govern each of the institutions under its jurisdiction . . . .

¶21 Title 70 O.S.2001 § 3906, provides that:

A. It is the intent of the Legislature that the Oklahoma State Regents for Higher Education establish uniform standard guidelines and criteria for all institutions of The Oklahoma State System of Higher Education for all special accounts, special agency accounts, or any other funds and for expenditures from such funds and accounts.

B. Interest income from investments of monies in special accounts and special agency accounts made through the Office of the State Treasurer shall accrue to the fund from which the investment was made.

¶22 Pursuant to that authority, Oklahoma State University promulgated its “Accounting Policy & Procedures for Oklahoma Cooperative Extension Service Extension Center’s Agency Funds Revised November, 2006” (Policy).22 The Policy states, in part, that “[t]hese
procedures are established pursuant to the authority contained in Article VI, Section 31 and 31a of the Oklahoma Constitution.23 . . . as well as the authority in Title 70, Oklahoma Statutes.”24

¶23 The Policy specifically covers “[i]ncome and expenditure for all 4-H funds received or handled by Extension staff.”25 Policy procedure 6.01 provides that one bank account will be established.26

¶24 The Policy is also reflective of 62 O.S. Supp. 2009 § 34.57 (emphasis added),27 which provides, in part, as follows:

A. There is hereby created in the official depository in the State Treasury an agency clearing account for each state officer, department, board, commission, institution or agency of the state, hereinafter referred to collectively as state agencies. An agency special account established under Section 7.2 of this title may be used for the purposes of an agency clearing account.

B. It shall be the duty of each state agency, officer or employee, to deposit in the agency clearing account, or agency special account, established under Section 7.2 of this title, all monies of every kind . . . .

C. All such monies collected pursuant to this section shall be deposited as follows in the agency clearing account or agency special account established therefor:

1. Receipts of One Hundred Dollars ($100.00) or more shall be deposited on the same banking day as received; and

2. Receipts of less than One Hundred Dollars ($100.00) may be held until accumulated receipts equal One Hundred Dollars ($100.00) or for five (5) business days, whichever occurs first, and shall then be deposited no later than the next business day.

a. Each state agency that has custody of receipts of less than One Hundred Dollars ($100.00) shall provide adequate safekeeping of such receipts.

b. No disbursements shall be made from such receipts prior to this deposit.

c. All checks received must be restrictively endorsed immediately upon receipt.28

This account is subject to audits by the State Auditor and Inspector, pursuant to 70 O.S. Supp. 2010 § 213, whose mission is “to independently serve the citizens of Oklahoma by promoting accountability and fiscal integrity in state and local government.”29

¶25 In Vannerson v. Board of Regents of the University of Oklahoma, 1989 OK 125, 784 P.2d 1053, the Oklahoma Supreme Court considered the Burk claim of an employee who alleged he was terminated after he reported discrepancies in the university warehouse inventory records. Months earlier, the employee had also reported seeing a university employee transfer two boxes of state-owned floor tiles to a non-employee. The Supreme Court held, as to the inventory records report that a university policy in favor of keeping accurate inventory records did not rise to the level of an established and well-defined state public policy. However, with respect to the floor tiles, the Court held that “[i]f [plaintiff] was in fact discharged for going over his supervisor’s head in complaint of an illegal disposition of state property then public policy is invoked . . . .” Vannerson at ¶ 11, 784 P.2d at 1055.30

¶26 In Hayes v. Eateries, Inc., 1995 OK 108, 905 P.2d 778, the Oklahoma Supreme Court, in distinguishing Hayes’s alleged Burk claim, stated that Hayes’s situation “involves only the private or proprietary interests of the employer-employee relationship, not the direct interests of the general public . . . .” Id. at ¶ 24. The Hayes Court went on to state that:

This situation [Hayes’s] is also distinguishable from that dealt with in Vannerson v. Board of Regents of University of Oklahoma, 784 P.2d 1053 (Okla.1989), where we held a public employee working for the University of Oklahoma, a State institution, had a viable claim under Burk if he could show he was terminated for going over his supervisor’s head in complaint of an illegal disposition of state property . . . . In Vannerson the activity subject to the discharged employee’s reporting involved the illegal transfer, by sale or gift, of public property, a situation which we believe concerns a clear and compelling public policy, protecting the public’s interest in seeing to it that the peoples’ tax dollars are not fraudulently stolen by State employees or officials, or other individuals, by either giving away or selling public property for their own private reasons or profit.
¶27 Only one OCES account is authorized. Moore reported that a second, unauthorized OCES account was created and used, contrary to the statutory scheme. Here, the clear public interest to support Moore’s Burks claim is embodied in the statutes that mandate that the public’s monies (in the instant case, 4-H funds) entrusted to OCES are accounted for in a manner prescribed by the Legislature and protected from illegal acts of State employees or officials. These statutes allow for one account only, in the absence of additional authorization.

I. Lack of Statutory Remedy

¶28 The fifth Burks element Moore must meet is that there be “no statutory remedy . . . that is adequate to protect the Oklahoma policy goal.” If Moore has a statutory remedy, then her complaint premised upon a Burks tort must fail. We find, however, no statutory remedy for a violation of the statutes set forth above.

¶29 Further, Moore has no remedy under the “whistle-blower” statute. Institutions subordinate to, and established by, the Board of Regents are within the Oklahoma Constitution’s mandate of self-governing entities; therefore, statutes like the “whistleblower” statute are not applicable to Moore as an employee of OCES.

¶30 In State of Oklahoma ex rel. Board of Regents of Oklahoma State University v. Oklahoma Merit Protection Commission, 2001 OK 17, 19 P.3d 865, the Oklahoma Supreme Court issued a writ prohibiting the Oklahoma Merit Protection Commission from exercising jurisdiction over the university and its president, as constitutional entities, empowered by Oklahoma Constitution art. VI § 31a, art. XIII-A §§ 1-2, and art. XIII-B §§ 1 and 2:

…to conduct the internal affairs of their subordinate institutions of higher learning free of any interference by the Oklahoma Merit Protection Commission. The Legislature is powerless to delegate the petitioners’ constitutional control over the management of their institutions to any department, commission or agency of state government.

Any provisions found in 74 O.S.Supp.2000 § 840-2.5 (popularly referred to as the whistle blower act) which may appear to contravene or abridge the petitioners’ fundamental-law power clearly offend the exclusive authority granted them by . . . the Oklahoma Constitution. The Commission is without jurisdiction over the grievance tendered by the instant controversy between a subordinate institution and one of its employees. It is hence prohibited from proceeding further in that pending matter.

¶31 Based on our review of the record and the applicable law, we reverse the trial court’s grant of summary judgment in favor of OCES. Moore has alleged facts for which relief is legally possible because they lie within the protected workplace parameters established for a wrongful discharge in breach of public policy. We remand the case for trial on the issues of whether Moore, whom we find as a matter of law to be an at-will employee, was constructively discharged and, if so, whether that discharge was “in significant part for a reason that violates” the Oklahoma public policy goal, as set forth in this Opinion and as required by Burks.

¶32 REVERSED AND REMANDED.

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

1. Record (R.), Tab 1, Petition, p. 2.
2. R., Tab 4, Moore’s Response to OCES’s motion for summary judgment, p. 2.
3. R., Tab 4, Moore’s Response to OCES’s motion for summary judgment, Exh. 3, Moore’s deposition testimony, pp. 98-99; R., Tab 3, OCES’s motion for summary judgment, Exh. 7; Moore’s deposition testimony, pp. 102, 139, 186; Exh. 8.
5. R., Tab 7. The trial court did not state a basis for its decision.
12. R., Tab 3, Exh. 8, July 18, 2007, investigation report by Steve Smith, SW district Extension Director, resulting from Moore’s internal report.
13. R., Tab 3, Exh. 7, deposition of Tracy Moore, p. 161; Tab 4, Exh. 3, deposition of Tracy Moore, p. 98.
14. R., Tab 4, p. 2; Exh. 4, deposition of Marty New, pp. 74-75; R., Tab 3, Exh. 8, pp. 1-2.
15. R., Tab 3, Exh. 8.
16. Petition in Error, Exh. C.
17. R., Tab 3, pp. 2-6-8.
18. R., Tab 3, Exhs. 2, 3, and 4.
19. “So the only thing that you know it was a violation of was a policy for OSU; is that correct? [Answer] Yes, sir.” (deposition of Tracy Moore at p. 102.) Moore had no evidence to support other allegations set forth in her Petition. When asked under oath if she had any evidence “that anything fraudulent occurred,” she answered, “No, sir.” (R., Tab 3, Exh. 7, deposition of Tracy Moore, pp. 165-166.) Moore alleged “improper reporting of travel expense reimbursement,” in her Petition, but when asked under oath about it, she admitted she had observed nothing and “[w]as told” that one incident occurred. Id. at p.
170. When asked in her deposition if she had any “evidence whatsoever that anyone stole any money or embezzled any money in this account” she responded, “No, sir.” Id. at p. 176. She also testified she had no knowledge that there was any “leave time slip tearing up.” Id. Finally, when Moore was asked under oath if she had any “evidence that there was any unlawful conduct dealing with the setting up of the account,” she answered in the negative. Id. at pp. 188-189. However, Moore insisted the second account was, if not unlawful, still in violation of a policy. Id. at p. 161, lines 16-21.

20 Title 70 O.S.2001 § 3401 provides that the institution located in Stillwater, Oklahoma, shall be known as “Oklahoma State University,” and is empowered to achieve and is therefore authorized to enact rules, regulations and bylaws for the good government and management of the university and its every department. [I]t is not proper for a state college to maintain an auxiliary bank account beyond the direct control and supervisory control of the State Insurance department, was required to claim where an employee of an insurance company, under the general supervision of a policy, p. 1.  

21. “There can be no question but that the Board of Regents has all power necessary to accomplish the objects it was constitutionally empowered to achieve and is therefore authorized to enact rules, regulations and bylaws for the good government and management of the university and its every department.” Randolph v. Board of Regents of Oklahoma Colleges, 1982 OK 75, ¶ 6, 648 p.2d 825, 827. (Citations omitted.)

22. The web address (http://intranet.okstate.edu/Fiscal_Affairs/ policy.html) containing the policy and procedure document is identified in Tab 4, Moore’s Response and Objection to OCES’s motion for summary judgment, at Exh. 2., pp. 8-10.


25. Id.

26. Id. at p. 4.


28. Another section of the Oklahoma State Finance Act (62 O.S. Supp. 2009 § 34.56, renumbered from 62 O.S. Supp. 2002 § 7.2 by Laws 2009, HB 2015, c. 441, § 64, emerg. eff. July 1, 2009), provides for “agency special accounts” which must be approved by a Special Agency Account Board and which further provides that “no money shall be deposited in banks or other depositories unless the bank accounts are maintained by the State Treasurer or are for the deposit of authorized petty cash funds.” (Emphasis added.) The Attorney General of Oklahoma (1978 OK AG 265) has also confirmed the policy: “[I]t is initially observed that the appropriate board of regents of the respective institution is charged with the responsibilities of receiving and making disposition of all moneys received from any other source by the institution under its jurisdiction . . . . [I]t is not proper for a state college to maintain an auxiliary bank account beyond the direct control and supervision of the appropriate board of regents.”


30. See also Crain v. National American Insurance Co., 2002 OK CIV APP 77, ¶ 21, 52 P3d 1035, 1040. In Crain, the Court of Civil Appeals reversed the trial court’s granting of a motion to dismiss a Burk tort claim where an employee of an insurance company, under the general supervisory control of the State Insurance Department, was required by statute to provide truthful information to outside auditors, reported financial irregularities and claimed he was terminated in retaliation for so doing. The Court of Civil Appeals noted the public policy interest - that the audit was part of a statutorily-prescribed process “ensuring that the public can safely rely on the ability of insurance companies to serve its interests . . . .”


2010 OK CIV APP 50

K.W., A MINOR CHILD, BY AND THROUGH HER MOTHER AND NEXT FRIEND, M.W., Plaintiff/Appellant, vs. INDEPENDENT SCHOOL DISTRICT NO. 12, EDMOND, OKLAHOMA, a/k/a EDMOND PUBLIC SCHOOLS, Defendant/Appellee.

Case No. 107,955. January 7, 2011

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA HONORABLE BRYAN C. DIXON, JUDGE

AFFIRMED

Kayla A. Bower, Joy J. Turner, Oklahoma Disability Law Center, Inc., Oklahoma City, Oklahoma, for Appellant,

Stephanie J. Mather, Heather N. Hendricks, Laura Lyn Holmes, The Center for Education Law, Inc., Oklahoma City, Oklahoma, for Appellee.

Larry Joplin, Judge:

¶1 Plaintiff/Appellant K.W., a minor child, by and through her mother and next friend, M.W. (Plaintiff) seeks review of the trial court’s order granting the motion to dismiss of Defendant/Appellee Independent School District No. 12, Edmond, Oklahoma, a/k/a Edmond Public Schools (Defendant) in Plaintiff’s action for a declaratory judgment. In this accelerated review proceeding, Plaintiff challenges the order of the trial court as affected by errors of both law and fact.

¶2 Plaintiff commenced the instant action for declaratory judgment in August 2009. Plaintiff alleged that she attended an elementary school within Defendant’s school district, that Defendant constructed at the school a “seclusion and restraint” room into which Defendant placed children with disabilities, but that such treatment of disabled children violated state law and administrative rules governing the use of restraints and seclusion for the mentally ill. See, 43A O.S. §§1-101, et seq.; 43A O.S. §§5-501, et seq.; O.A.C. 340:100-3-1.2; O.A.C. 340:100-5-58. By amended petition, Plaintiff subsequently prayed for an adjudication that the provisions of Title 43A applied to Defendant, and an injunction restraining Defendant from using the “seclusion and restraint” room.

¶3 Defendant filed a motion to dismiss. Defendant asserted Plaintiff had stated no valid claim for relief, and that Plaintiff had not exhausted her administrative remedies under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §1400, et seq. Defendant also alleged K.W.’s parent requested a Special Education Due Process Hearing to address use of the “time out” room, that the parties “held a Resolution Session and reached a resolution of the special education due process case [without] a decision . . . on the merits of the case,” and, that, at any rate, K.W. was not an enrolled student attending classes at any of Defendant’s schools. So, said Defendant, Plaintiff was not entitled to injunctive or any other relief.
¶4 Plaintiff responded. Plaintiff alleged that, given the imminent, potential harm to K.W. from her seclusion by Defendant, and the systemic violation of Title 43A governing the treatment of the mentally ill, she was not required to exhaust administrative remedies, and an injunction could properly issue compelling Defendant to correct its deficiencies.

¶5 Upon consideration of the parties’ submissions and arguments, the trial court granted Defendant’s motion to dismiss. Plaintiff appeals, and the matter stands submitted for accelerated review on the trial court record.1

¶6 We first note Defendant has filed a motion to dismiss the instant appeal, again arguing the parties have settled the underlying controversy. Defendant asserts that the parties agreed to execute and file “a joint stipulation of dismissal as moot, dismissing th[is] case in the Oklahoma State Supreme Court, and vacating the District Court’s decision in this case,” but that Plaintiff has wholly failed and refused to execute the proposed order of dismissal. Plaintiff responds, arguing the parties’ agreement did not settle the underlying question on the merits concerning the application of Title 43A to Defendant, and the parties are powerless to vacate the trial court’s order of dismissal by agreement.

¶7 The complete agreement of the parties does not appear in the record. Plaintiff denies any agreement to settle the merits of the controversy concerning the application of Title 43A to Defendant. The Defendant’s motion to dismiss the appeal, based on the parties’ alleged settlement, is therefore denied.

¶8 “A petition can generally be dismissed only for lack of any cognizable legal theory or for insufficient facts under a cognizable legal theory.” Miller v. Miller, 1998 OK 24, ¶15, 956 P.2d 887, 894. “The question, on a motion to dismiss, is whether, taking all of plaintiff’s allegations as true, she is precluded from recovering as a matter of law.” Estate of Hicks ex rel. Summers v. Urban East, Inc., 2004 OK 36, ¶5, 92 P.3d 88, 90. “A trial court’s dismissal of an action for failure to state a claim is reviewed de novo.” Id.

¶9 Where, on a motion to dismiss, “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment.” 12 O.S. §2012(B). “Summary relief issues stand before us for de novo review[,] [and] [a]ll facts and inferences must be viewed in the light most favorable to the non-movant.” Reed v. Walker, 2006 OK 43, ¶9, 157 P.3d 100, 106-107. (Footnotes omitted.) “Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.” Lowery v. Echostar Satellite Corp., 2007 OK 38, ¶11, 160 P.3d 959, 963-964. (Citations omitted.) “Summary judgment will be reversed if the appellate court determines that reasonable men might reach different conclusions from the undisputed material facts.” Id.

¶10 In the present case, both Plaintiff and Defendant submitted evidentiary materials in support of and opposition to dismissal. We accordingly view the Defendant’s motion to dismiss as a motion for summary judgment.

¶11 “In determining whether a statute applies to a given set of facts, we focus on legislative intent which controls statutory interpretation.” Tyler v. Shelter Mut. Ins. Co., 2008 OK 9, ¶12, 184 P.3d 496, 499-500. (Footnotes omitted.) “The fundamental rule of statutory construction is to ascertain and give effect to legislative intent, and that intent is first sought in the language of the statute.” YDF, Inc. v. Schlumar, Inc., 2006 OK 32, ¶6, 136 P.3d 656, 658. (Citations omitted.) We may not expand the reach of a plainly worded statute. Toxic Waste Impact Group, Inc. v. Leavitt, 1988 OK 20, ¶10, 755 P.2d 626, 630.2

¶12 Plaintiff argued below that Defendant is, by definition under §1-103(7) and (9), a “school” rendering “care and treatment” to K.W., a mentally ill person, and that Defendant is accordingly subject to the provisions of OMHL. So, said Plaintiff, because the OMHL, O.A.C. 340:100-3-1.2 and O.A.C. 340:100-5-58 expressly proscribe the use of restraints or seclusion for the treatment of the mentally ill, Defendant may not use the “time out” room. Defendant argued it was not a “facility” rendering “care and treatment” to the mentally ill, and therefore, neither Title 43A nor O.A.C. regulations applied to proscribe its use of the “time out” room.

¶13 Plaintiff’s claims thus plainly stand or fall on the question of whether the provisions of Title 43A apply to Defendant. We must therefore examine the statutes to determine their reach.

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¶14 In 1953, the Oklahoma Legislature created the Department of Mental Health, and placed all State institutions for the care and treatment of mentally ill and mentally retarded persons, under the control of the Department of Mental Health. Laws 1953, p. 152. Effective November 1, 1986, the Legislature renumbered the prior provisions, and enacted the Mental Health Law of 1986, 43A O.S. §1-101, et seq. (OMHL). The OMHL establishes the Department of Mental Health and Substance Abuse Services for the provision of those services to residents of this State. 43A O.S. 2-101, et seq., Within the OMHL is found:

the “Unified Community Mental Health Services Act, 43A O.S. §§3-301, et seq.,
the “Oklahoma Alcohol and Drug Abuse Services Act,” 43A O.S. §§3-401, et seq.,
the “Mental Hospital Voluntary Admission Procedures Act,” 43A O.S. §§5-301, et seq., and
the “Inpatient Mental Health and Substance Abuse Treatment of Minors Act,” 43A O.S. §§5-501, et seq.

The OMHL also contains provisions:

- governing narcotic treatment programs, 43A O.S. §§3-601, et seq.,
- governing treatment of inmates of correctional facilities, 43A O.S. §§3-701, et seq.,
- assuring the “humane care and treatment” of “[a]ll persons being treated at facilities within the Department of Mental Health and Substance Abuse Services,” 43A O.S. §§4-101, et seq.,
- prescribing the procedures for admission to a state facility, psychiatric hospital or private institution, 43A O.S. §§5-101, et seq.,
- defining the rights of detained persons upon entry into facility, 43A O.S. §§5-201, et seq.,
- prescribing the procedures for involuntary commitment, 43A O.S. §§5-410, et seq.,
- providing for the care, treatment and transfer of non residents, 43A O.S. §§6-101, et seq., and
- providing for provision of services after inpatient discharge, 43A O.S. §§7-101, et seq.

¶15 The stated purpose of OMHL is to “provide for the humane care and treatment of persons who: Are mentally ill; or Require treatment for drug or alcohol abuse.” 43A O.S. 2001 §1-102. As a matter of specifically expressed public policy, OMHL “assures adequate treatment of persons alleged to be in need of mental health treatment or treatment for drug or alcohol abuse, to establish behavioral standards for determination of dangerousness of persons in need of such treatment, to allow for the use of the least restrictive alternative in the determination of the method of treatment, to provide orderly and reliable procedures for commitment of persons alleged to be in need of treatment consistent with due process of law, and to protect the rights of consumers hospitalized pursuant to law.” 43A O.S. §1-104.

¶16 The OMHL defines “facility” as “any hospital, school, building, house or retreat, authorized by law to have the care, treatment or custody of an individual with mental illness, or drug or alcohol dependency, gambling addiction, eating disorders, or an individual receiving methadone treatment for dependency purposes only, including, but not limited to, public or private hospitals, community mental health centers, clinics, satellites or facilities.” 43A O.S. §1-103(7). As the phrase is used in OMHL, “care and treatment means medical care and behavioral health services, as well as food, clothing and maintenance, furnished to a person.” 43A O.S. §1-103(9).

¶17 The Oklahoma Administrative Code, Title 340, Chapter 100 sets out the rules and regulations for the delivery of services by Oklahoma Department of Health, Developmental Disabilities Services Division, to clients within the system. See, O.A.C. 340:100-1-1, et seq. Both the OMHL and the Oklahoma Administrative Code grant to the Department of Health control over “any and all state institutions established for the care of the mentally ill and drug- or alcohol-dependent person,” particularly, the “three State Institutions for the Mentally Retarded (the Northern Oklahoma Resource Center of Enid, the Southern Oklahoma Resource Center of Pauls Valley, and the Hissom Memorial Center at Sand Springs),” and more than twelve other community treatment facilities. 43A O.S. §2-102; 43A O.S. §§3-101 et seq.; O.A.C. 340:100-1-3(a).

¶18 In this regard, we are absolutely convinced the OMHL does not apply to Defendant school. The term, “school,” as used in the OMHL’s definitions, plainly refers to the three state “schools” at Enid, Pauls Valley and Sand Springs which are charged with the in-patient
care, custody and treatment of the mentally ill. A public school is not charged with the inpatient care and treatment of mentally ill patients under the Oklahoma Mental Health Law as we read it.

¶19 We therefore hold Defendant is not subject to either Title 43A of the Oklahoma Mental Health Law, or Title 340 of the Oklahoma Administrative Code. The order of the trial court granting Defendant’s motion to dismiss is AFFIRMED.

MITCHELL, P.J., and BUETTNER, J., concur.

2. "... It is the duty of a court to give effect to legislative acts, not to amend, repeal or circumvent them, and a court is not justified in ignoring the plain words of a statute. Neither the Supreme Court nor a district court may expand the plain wording of a statute by construction where the legislature has expressed its intention in the statute as enacted. ..." (Footnotes omitted.)
3. "The Developmental Disabilities Services Division, in accordance with the mission statement and guiding principles given at OAC 340:100-1-3.1, promotes the full exercise of rights by persons served as citizens of their communities, state, and country. (1) Each person receiving services has the right to: ... (K) freedom from restraints; ..."
4. "... (c) Seclusion, defined as the placement of a person alone in a locked room, is prohibited. ... (j) Use of exclusionary time out or time out rooms is prohibited, except by written permission of the director of the Developmental Disabilities Services Division (DSDS) for specific individuals residing at the Greer Center. ..."
5. "The facilities within the Department of Mental Health and Substance Abuse Services, which shall be maintained for residents of the state, are: 1. Griffin Memorial Hospital, Norman; 2. Oklahoma Forensic Center, Vinita; 3. Children’s Recovery Center of Oklahoma, Norman; 4. Tulsa Center for Behavioral Health, Tulsa; 5. Carl Albert Community Mental Health Center, McAlester; 6. Jim Taliaferro Community Mental Health Center, Lawton; 7. Central Oklahoma Community Mental Health Center, Norman; 8. Bill Willis Community Mental Health and Substance Abuse Services Center, Tahlequah; 9. Northwest Center for Behavioral Health, Woodward; 10. Oklahoma County Crisis Intervention Center, Oklahoma City; 11. Norman Alcohol and Drug Treatment Center, Norman; and 12. Rose Rock Recovery Center, Vinita."

2011 OK CIV APP 52

GAY A. HUTTS, individually, and as Parent and Next Friend of T.A.H., a minor, Plaintiff/Appellant, vs. WESTERN HEIGHTS INDEPENDENT SCHOOL DISTRICT NO. 1-41 OF OKLAHOMA COUNTY, Defendant/Appellee.


APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA G. SWINTON,
TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Thomas Rowe Kendrick, Timothy L. Martin, LOONEY, NICHOLS & JOHNSON, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Lance C. Cook, Brock C. Bowers, Michael W. Brewer, HILTGEN & BREWER, P.C., Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Plaintiff/appellant Gay A. Hutts (Hutts), individually, and as parent and next friend of T.A.H., a minor (Student), appeals the trial court’s judgment filed on September 24, 2010, granting the motion for summary judgment of defendant/appellee Western Heights Independent School District No. 1-41 of Oklahoma County (Western Heights). The issue presented on appeal concerns the following statute:

The state or a political subdivision shall not be liable if a loss or claim results from:

... 20. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a political subdivision....

51 O.S.2001 § 155(20). The issue is whether participation in an activity during a weightlifting class that fulfills the physical education requirement, wherein each student attempts to lift more than he/she lifted earlier in the school year but not in competition with one another, constitutes “[p]articipation in ... any ... athletic contest” pursuant to § 155(20). We find that it does not and, therefore, we reverse the trial court’s grant of summary judgment in favor of Western Heights and remand this case to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Student was injured while participating in a first-period weightlifting class that fulfilled his physical education requirement.1 Student stated in his deposition that he did not choose to take the weightlifting class but that it was assigned to him by Western Heights.

¶3 Student was required to attempt a maximum lift for a weightlifting exercise known as a “squat” that would account for a portion of his overall grade. The weightlifting teacher had recorded a “max” for each student at the beginning of the nine-week grading block, and, at the end of the nine-weeks, each student was expected to increase his/her maximum lift. Student was injured when he collapsed while attempting a maximum squat at the end of a nine-week grading block. Although Student was attempt-
ing to squat 240 pounds to exceed his own previous maximum lift in order to “make sure to pass the class,” he was neither competing against other students nor practicing for a future competition against other students.3

¶4 Student’s parent, Huits, brought a negligence action against Western Heights pursuant to the Oklahoma Governmental Tort Claims Act.4 On May 19, 2010, Western Heights filed a motion for summary judgment which the trial court granted in a Journal Entry of Judgment filed on September 24, 2010. From the Journal Entry of Judgment, Huits appeals.

STANDARD OF REVIEW

¶5 The appellate standard of review of a trial court’s grant of summary judgment is de novo. Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. On review, this Court will examine the pleadings and evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. Id. All inferences and conclusions to be drawn from the evidentiary materials will be viewed in the light most favorable to the non-moving party. Id. This Court will reverse the grant of summary judgment where it appears from the evidentiary materials that the material facts concerning issues raised in the case are conflicting or, if the material facts are undisputed, reasonable persons in the exercise of fair and impartial judgment might reach different conclusions from those facts. Buck’s Sporting Goods, Inc. v. First National Bank & Trust Company of Tulsa, 1994 OK 14, ¶ 11, 868 P.2d 693, 697-98. This Court will affirm the grant of summary judgment only where one party is entitled to judgment as a matter of law because there are no material disputed factual questions. Carmichael at ¶ 2, 914 at 1053.

ANALYSIS

¶6 In determining whether Student’s attempt to squat an increased amount of weight during his weightlifting class constitutes “participation in . . . any interscholastic or other athletic contest,” we are guided by two Oklahoma Supreme Court decisions. In Curtis v. Board of Education of Sayre Public Schools, 1995 OK 119, 914 P.2d 656, the injured party was a 12-year-old boy who was participating in a softball game during a physical education class. He was instructed by his teacher to play the position of catcher, but he was not provided with a catcher’s mask. He was injured thereafter when he was hit in the mouth by a baseball bat.

¶7 The issue presented to the Oklahoma Supreme Court was whether § 155(20) provided governmental immunity for school-sponsored athletic contests which were not interscholastic athletic contests. The Court held that the exemption did bar the action, because, although the law had originally only applied to injuries sustained in interscholastic contests (such as between two high school football teams), the legislature had amended the provision to apply also to “other athletic contest[s].” Id. at ¶ 9, 914 P.2d at 659. The Court held that § 155(20) “encompasses participation in or practice for any athletic or sports competition where participants strive for superiority or victory, whether interscholastic or not, sponsored or conducted by or on the property of the state or political subdivision.” Id. at ¶ 13, 914 P.2d at 660 (emphasis added). Importantly, the Court adopted the following definitions:

The word “athletic” is defined as “[o]f, pertaining to, or befitting athletics or athletes.” The American Heritage Dictionary [2nd College ed. 1985] at 138. “Athletics” is defined as “[a]thletic activities, competitive sports” or “[t]he principles or system of athletic exercises and training,” while the word “athlete” is primarily defined as “[o]ne who takes part in competitive sports.” Id. The word “contest” is defined as “[a] struggle for superiority or victory between rivals” or “[a] competition . . . .” Id. at 316.

Id. at ¶ 12, 914 P.2d at 659. The Court then stated:

Applying the above definitions to the facts of this case, we conclude that the phrase “athletic contest” is sufficiently broad to encompass a physical education class softball game. Clearly, softball is a competitive sport where participant/team members strive to defeat an opposing team.

Id.

¶8 In Evans v. Oaks Mission Public School, 1997 OK 97, 945 P.2d 492, the injured party was a high school student who injured his shoulder in a wrestling match during a physical education class. The student had previously played in interscholastic team sports at his school, but twice injured his shoulder, once during football practice and the other time during a pick-up basketball game. At the direction of his parents, the young man was to “sit out” his junior year in order to return to team sports his senior
year. However, he enrolled in a physical education class with his parents’ knowledge. The Oklahoma Supreme Court found that the case was controlled by Curtis. The Court ruled that § 155(20) did bar the action to recover for the student’s injury because it was unrefuted “(1) that the injury . . . occurred while the student was participating in a wrestling match, an athletic contest, during his physical education class, and (2) that the injury occurred on school property.” Id. at ¶ 9, 945 P.2d at 494.

¶9 As in Curtis and Evans, Student was injured during a physical education (i.e., weightlifting) class, and the injury occurred on school property. However, we must determine whether the athletic activity Student was participating in at the time of his injury constitutes an “athletic contest” pursuant to § 155(20). Hutts argues that because Student was not participating in (or practicing for) an athletic competition with opposing sides or teams striving for victory over one another, such as wrestling (as in Evans) or softball (as in Curtis), that Student was not participating in any “athletic contest” pursuant to § 155(20). We agree.

¶10 Student was not striving for victory or superiority over another classmate or classmates as in wrestling or softball, Student was not participating as part of a “powerlifting” team, and Student was not practicing for any future athletic competition. Instead, Student was attempting to increase his personal “maximum lift.” As quoted above, the Oklahoma Supreme Court in Curtis adopted a definition of “contest” requiring “[a] struggle for superiority or victory between rivals” or “[a] competition . . . .” Curtis at ¶ 12, 914 P.2d at 659 (emphasis added). Pursuant to this definition, the Court concluded that participation in a game of softball constitutes participation in an athletic contest because “softball is a competitive sport where participant/team members strive to defeat an opposing team.” Id.

¶11 Although Student was participating in a weightlifting exercise wherein he and his fellow students were striving to exceed past performances to attain new and superior personal bests, there was no competition between the students as occurred in Evans (wrestling) and Curtis (softball). Moreover, although § 155(20) applies where a student is “practicing [for] an “athletic contest,” it is undisputed that Student was not doing so. Therefore, we are constrained to find that Student was not practicing for or participating in an “athletic contest” as that term is defined in Curtis, and as it is applied in both Curtis and Evans. We decline to broaden the scope of § 155(20) beyond that delineated by the Oklahoma Supreme Court.

CONCLUSION

¶12 The Governmental Tort Claims Act (51 O.S.2001 §§ 151-200, and amendments thereto) is the exclusive remedy against a governmental entity in Oklahoma. Fuller v. Odom, 1987 OK 64, ¶ 4, 741 P.2d 449, 452. We reverse the trial court’s grant of summary judgment in favor of Western Heights, however, because Western Heights is not shielded from liability pursuant to 51 O.S.2001 § 155(20). Student was not participating in or practicing for an “athletic contest,” which the Oklahoma Supreme Court has defined as athletic activity involving a competition or a “struggle for superiority or victory between rivals.” Curtis at ¶ 12, 914 P.2d at 659 (emphasis added). We remand this case to the trial court for further proceedings.

¶13 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

1. This and the following facts are taken from Western Heights’ “STATEMENT OF UNDISPUTED, MATERIAL FACTS” in Tab 3 of the record, and Hutts’ “RESPONSE TO DEFENDANT’S ALLEGED STATEMENT OF UNDISPUTED MATERIAL FACTS” in Tab 4 of the record, unless otherwise indicated. The facts are undisputed.
2. Deposition of Student, p. 45.
3. See Deposition of Student, p. 32 (according to Student, he was taking the weightlifting class only for the purpose of fulfilling the physical education requirement); Deposition of Marcus L. Knight (the weightlifting teacher), pp. 36-37 (responded in the negative when asked whether the class was “for competition” or “for practice for any other sport”); Deposition of Jean M. Adams (principal of Western Heights), pp. 77-78 (when asked whether Student was participating in the weightlifting class as practice for another sport, Adams responded, “Not that I’m aware of.”)
5. The Court noted that “[s]tudents frequently suffer minor injuries from participation in athletic activity, while they seldom get hurt in their history or math classes. It appears that the legislature decided to change the degree of insulation granted to schools in the area of athletic activity . . . .” Id. at n.3.
6. We note that § 155(20) may apply where a student participates in identical activity but for a different purpose — i.e., where a student participates in a weightlifting class as “practice for” an “athletic contest” — even though that activity does not, by itself, constitute an “athletic contest.” See 51 O.S.2001 § 155(20).
7. The only recovery available in tort against a political subdivision must be found within the boundaries defined by the Governmental Tort Claims Act. Curtis at ¶ 4, 914 P.2d at 658.
ROBERT DICK BELL, CHIEF JUDGE:

¶1 Petitioner, Margaret Claborn, the surviving spouse of Cecil Claborn, deceased, seeks review of an order of the Three-Judge Panel of the Workers’ Compensation Court (Panel), which affirmed the decision of the trial court. The trial court denied Petitioner’s request for the statutory benefits in effect at the time of her husband’s death and awarded Petitioner the statutory benefits in effect at the time of her husband’s original injury. Finding no error in law, the Panel’s order is sustained.

¶2 Petitioner’s husband, Cecil Claborn, sustained an accidental injury arising out of and in the course of his employment on April 18, 1991. As a result of this work-related injury, Claimant was awarded permanent total disability (PTD) benefits on January 6, 1995. Claimant died on January 24, 2010, of causes unrelated to his original injury. Petitioner is Claimant’s widow and his sole statutory beneficiary.

¶3 Petitioner filed a revivor action in the original workers’ compensation action seeking statutory death benefits pursuant to the language of 85 O.S.Supp.2005 §48(2)(a), which was in effect at the time of her husband’s death. Respondent, Gale Drywall (Employer), requested that the benefits be limited to the law in effect at the time of Claimant’s injury. The trial court ordered the revivor and awarded Petitioner statutory benefits at the rate of $50.00 per week. This amount was determined pursuant to the version of §48(2)(a) in effect at the time of Petitioner’s husband’s original injury. The Panel affirmed the trial court’s determination. Petitioner now seeks review in this Court.

¶4 The issue on review concerns the applicable version of §48(2)(a). Is Petitioner entitled to the statutory benefits in existence at the time of her husband’s original injury or the statutory benefits in existence at the time of her husband’s death? Both parties concede this is a question of law. On questions of law, we exercise de novo review. Ibarra v. Hitch Farms, 2002 OK 41, ¶4, 48 P.3d 802, 803-04.

¶5 On the date of Claimant’s injury, §48(a)(2) provided:

If there is a surviving spouse, to such surviving spouse, fifty percent (50%) of the average weekly wages the deceased was earning, but in no event more than a maximum of $50.00 per week.

Section 48(2)(a) was amended by Laws 2005, 1st Ex. Sess., c.1, §26, eff. July 1, 2005. Thus, on the date of Claimant’s death, §48(2)(a) provided:

If there is a surviving spouse, to such surviving spouse, fifty percent (50%) of the average weekly income benefit that was or would have been payable for permanent total disability to the deceased for claims arising after the effective date of this act.

Petitioner argues the later version of §48(2)(a) should be applied to her case. As support, Petitioner cites 85 O.S.Supp.2007 §3.6(F) (renumbered as §3.6(G) by Laws 2010, c. 403, §1, eff. Nov. 1, 2010), which provides, in part: “benefits for death shall be determined by the law in effect at the time of death.” Petitioner argues §3.6(F) makes no distinction between benefits due where the death was related to the original injury and benefits due where the death was not related to the original injury.

¶6 Although Petitioner poses an interesting argument, her argument must be rejected. The instant case is a revivor action, not a death claim. A death claim involves a new benefit not previously available or in existence until the death occurs. In a revivor action, there is no new benefit or claim. Instead, the petitioner in a revivor action is simply attempting to continue (i.e. revive) previously awarded benefits. “Thus, an injury for which compensation had been awarded and paid prior to the amendment established the rights, liabilities and privileges of the parties under the law.” Inde-
pendent School Dist. No. 89 v. McReynolds, 1974 OK 136, ¶14, 528 P.2d 313, 316. Stated another way, “compensation for accidental injury always is determined by law in effect at the time of injury, and a provision of the Act giving a substantive rights does not operate retroactively.” Id. at ¶15, 528 P.2d at 316.

¶7 In order to accept Petitioner’s argument and apply the 2005 amendment to the instant case, this Court would have to “give her a substantive right which she did not possess prior thereto, and would be to change the obligation of the employer and impose upon it a liability which did not theretofore exist. Washabaugh v. Bartlett Collins Glass Co., 1936 OK 294, ¶6, 57 P2d 1162, 1164 (citation omitted). “This would be to give the amendment a retrospective construction.” Id. We decline to take such action. All rights and level of compensation were vested and established and were not subject to the 2005 amendment of §48(2)(a).

¶8 After reviewing the record, we conclude the trial court’s finding, which was affirmed by the Panel, is supported by case law and statutory authority. For the foregoing reasons, the Panel’s Order is sustained.

¶9 SUSTAINED.


2011 OK CIV APP 46

OKLAHOMA ATTORNEYS MUTUAL INSURANCE COMPANY, Plaintiff/Appellee, vs. STEPHEN CAPRON and CAPRON & EDWARDS, PLLC, Defendants/Appellants.

Case No. 108,792. March 4, 2011

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE P. THOMAS THORNBRUGH, TRIAL JUDGE

AFFIRMED PURSUANT TO SUPREME COURT RULE 1.202(d)

Stephen J. Capron, CAPRON & EDWARDS, PLLC, Tulsa, Oklahoma, for Appellants

Joseph R. Farris, Paula J. Quillin, FELDMAN, FRANDEN, WOODARD & FARRIS, Tulsa, Oklahoma, for Appellee

JANE P. WISEMAN, JUDGE:

¶1 Appellants Stephen Capron and the law firm of Capron & Edwards, PLLC (C&E) appeal the trial court’s entry of summary judgment against them in favor of Appellee Oklahoma Attorneys Mutual Insurance Company (OAMIC) in this declaratory judgment action. After reviewing the record and finding no reversible error, we find this case appropriate for summary affirmance as provided by Oklahoma Supreme Court Rule 1.202(d), 12 O.S.2001, ch. 15, app. 1, and we affirm.

BACKGROUND SUMMARY

¶2 This is an appeal from a final judgment in a declaratory judgment action filed by OAMIC, a lawyers’ professional liability insurance company, against Capron and C&E, asking the trial court to determine whether OAMIC owed a duty to defend and indemnify them, pursuant to a liability policy, in another case pending in Tulsa County, Case No. CJ-2009-4826.

¶3 In this latter case, as set forth more fully below, the law firm of Holden, P.C. d/b/a Holden Carr & Skeens sued Capron and C&E for claims arising from a third case, a 2004 personal injury lawsuit filed and tried in federal court in the Eastern District of Oklahoma, Case No. 04-Cv-96-KEW. Capron, then a member of the Holden law firm, represented the plaintiff, Samuel Edwards, who was injured in a workplace accident involving a rotary feeder machine used to process tea. Capron was the lead attorney, and the jury rendered a verdict in plaintiff Edwards’ favor in the amount of $1,500,000 on February 18, 2005. Four months after the trial while post-trial proceedings were pending, Capron resigned from the Holden firm and established C&E, a new firm with Michael Edwards. At the plaintiff Samuel Edwards’ request, the Holden firm transferred his file to C&E. Capron represented the plaintiff in post-trial proceedings, in settlement discussions, and on appeal.

¶4 C&E ultimately received $1,777,000 in the case on the plaintiff’s behalf. When it came time to divide the fee earned pursuant to the written Fee Contract with the client, C&E asked the Holden firm to submit documentation of the time it spent on the case so that it could determine how much Holden was owed. Holden responded by claiming entitlement to a contingent fee under ¶ A(3) of the Fee Agreement, rather than payment based on an hourly fee as provided in ¶ D of the contract.

¶5 Litigation then ensued in the trial court in the federal case to resolve the fee dispute; the trial court granted summary judgment in
Holden’s favor, holding that Holden was entitled to a fee pursuant to the contingent fee clause (¶ A(3)), not the termination of representation clause (¶ D) by which the fee would be calculated on an hourly basis. In an order and judgment issued May 20, 2009, the Tenth Circuit Court of Appeals reversed, finding that the unambiguous hourly fee provision in the Fee Agreement, drafted by Holden, governed based on the client’s termination of Holden’s representation. That order was not appealed and is now final.

¶6 On June 30, 2009, Holden filed suit in Tulsa County District Court, Case No. CJ-2009-4826, against Capron and C&E, asserting claims for breach of implied contract, breach of fiduciary duty, interference with contractual relations, fraud, negligence, and punitive damages arising out of this dispute over the fee earned in the Edwards case. In each claim for actual damages, Holden seeks in excess of $10,000 “consisting of, at the least, the difference between the contingency fee under the Edwards contract and the hourly fee” to be awarded in the federal case. This Tulsa County case is still pending.

¶7 OAMIC filed this declaratory judgment action against Capron and C&E on January 11, 2010, urging the trial court to find that OAMIC, as the insurer on C&E’s professional liability policy, had no duty to defend or indemnify its insureds, C&E and its shareholders and employees, in Tulsa County Case No. CJ-2009-4826 because the claims asserted against C&E in that lawsuit are excluded under the policy. Finding no coverage by the clear terms of the policy in question for any of the claims asserted against the insured, the trial court concluded that OAMIC has no duty to defend or indemnify Capron or C&E in Case No. CJ-2009-4826.

¶10 The trial court found that such fee disputes between lawyers do not constitute “professional services to others” and are not claims for which coverage is provided by a lawyer’s professional liability policy. Finding no coverage by the clear terms of the policy in question for any of the claims asserted against the insured, the trial court concluded that OAMIC has no duty to defend or indemnify Capron or C&E in Case No. CJ-2009-4826.

¶11 Having reviewed the record on appeal, we find no error in the trial court’s order and pursuant to Oklahoma Supreme Court Rule 1.202(d), 12 O.S.2001, ch. 15, app. 1, we affirm.

¶12 AFFIRMED UNDER RULE 1.202(d).

BARNES, P.J., and FISCHER, J., concur.

1. He is no relation to Michael Edwards, the lawyer in Capron & Edwards.

2. Plaintiff appealed the trial court’s entry of judgment against him as a matter of law on his punitive damages claim; the Tenth Circuit Court of Appeals affirmed.


A. Except as otherwise limited by law, Attorney’s fee to be paid by Client shall be calculated in accordance with the following:

b. In the event that damages in excess of $200,000 are recovered, a sum equal to fifty percent (50%) of those damages in excess of $200,000 will be Attorney’s fee in addition to the Attorney’s fee described in paragraph number one.

4. Paragraph D of the same Contract states in pertinent part: “If representation is terminated by Client or by Attorney for any reason, Attorney shall be entitled to compensation at the rate of $200.00 per
hour for all work performed by Attorney for Client, and at the rate of $100.00 per hour for all work performed by any paralegal for Client.”

5. This appeal is governed by and follows the procedure set forth in Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2010, ch. 15, app. 1, without appellate briefing.

6. The OAMIC policy at issue defines “Coverage” in Paragraph I:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages because of any claim . . . against the Insured . . . relating to the quality of legal services provided, arising out of any act or omission of the Insured in rendering or failing to render, professional services for others in the Insured’s capacity as a lawyer, and caused by the Insured . . . except as excluded . . . by . . . this policy. The term ‘money damages’ shall not be construed to mean the return, restitution, or disgorgement of fees paid to, claimed by or retained by any Insured.

2011 OK CIV APP 45

BANK OF COMMERCE, Plaintiff/Appellee, vs. BREAKERS, L.L.C., an Oklahoma Limited Liability Company; POINTE MARIN, L.L.C., an Oklahoma Limited Liability Company; HAROLD W. TOMPKINS, a/k/a HAL TOMPKINS, a/k/a HAROLD W. THOMKINS; RCB BANK, an Oklahoma Banking Corporation; VILLAS DEVELOPMENT, L.L.C., an Oklahoma Limited Liability Company; TULSA ENERGY CONTROL, INC., a Corporation; LIFESTYLES STORES, INC., a Corporation; MILL CREEK LUMBER & SUPPLY COMPANY, a Corporation; DAVIS CUSTOM PAINTING, INC., a Corporation; FULLER, CHLOUBER & FRIZZELL, L.L.P., an Oklahoma Limited Liability Partnership; and MARY JANE LAW, in her capacity as Treasurer of Delaware County, Oklahoma, Defendants, and MARVIN Y. JIN and SOOHYUN JIN, Husband and Wife; and BANK OF OKLAHOMA, N.A., Movants/Appellants.

Case No. 108,461. March 18, 2011

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

HONORABLE ROBERT G. HANEY, JUDGE

AFFIRMED

Galen L. Brittingham, Marthanda J. Beckwith, ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD, & CARWILE, a Professional Corporation, Tulsa, Oklahoma, for Plaintiff/Appellee,

William McKee, Ken Yates, THE ROBINSON LAW FIRM, Tulsa, Oklahoma, for Movants/Appellants.

Kenneth L. Buettner, Judge:

¶2 Movants/Appellants Marvin Y. and Soohyun Jin (Jins) and Bank of Oklahoma (BOK) (collectively, Appellants) appeal from the trial court’s order denying their Motion to Intervene in a foreclosure action. Appellants acquired their interest in the property at issue in this case after lis pendens was recorded. As a result, Appellants’ interest is void as to the prevailing party in this case. Appellants have failed to prove the elements necessary for intervention of right and we find no abuse of discretion in the trial court’s denial of permissive intervention. We therefore affirm.

¶3 The record shows the Jins signed a Real Estate Sales Contract February 12, 2009, in which they agreed to purchase Lot 18 of the Villas at Shangri-La Resort from Villas Development, L.L.C. In May 2009, BOC and RCB each filed actions to foreclose on mortgages covering Lots 12-18 of the Villas at Shangri-La Resort. RCB named the Jins as Defendants in its Petition. BOC did not name Appellants as Defendants in its Petition.

¶4 BOC filed a Notice of pendency of Action against Lot 18 with the Delaware County Clerk May 26, 2009.

¶5 The district court consolidated the BOC and RCB cases November 4, 2009. Hearing on BOC’s and RCB’s summary judgment motions was held February 11, 2010, after which the trial court announced its finding that BOC’s mortgage had priority over RCB’s.

¶6 Before the court filed its Journal Entry, Appellants filed their Motion to Intervene April 7, 2010. Appellants asserted they were permitted to intervene of right under 12 O. S.2001 §2024(A).

¶7 BOC filed its Response and Objection to the Motion to Intervene May 7, 2010. BOC argued Appellants were estopped from asserting any interest in the property because their
purchase closed after the notice of *lis pendens* was recorded, and as a result, Appellants’ interest was void as to the prevailing party’s interest. BOC further contended that the trial court’s summary judgment decision, which found BOC’s mortgage had priority and which ordered the property sold to satisfy the judgment, had foreclosed any interest Appellants had in the property. BOC also argued that it served its Combined Answer and Cross-Petition on the Jins’ counsel and that they failed to answer and were therefore barred from intervening nine months later, after summary judgment had been decided. Lastly, BOC contended that if Appellants were allowed to intervene at all, they should intervene in cases then pending against the title insurer.\(^4\)

\(\text{¶8} \) Appellants filed a Reply May 21, 2010. The claimed that the *lis pendens* statute did not apply because the *lis pendens* was filed after they allegedly acquired an equitable interest in the property upon signing the purchase contract, in February 2009. Based on their contention that the *lis pendens* statute did not apply, Appellants claimed the summary judgment could not have foreclosed the Jins’ interest in Lot 18. Next, they contended that because they have an interest in Lot 18, they were entitled to intervene as of right.

\(\text{¶9} \) Following a June 2, 2010 hearing, the trial court issued its Order Denying Motion to Intervene June 30, 2010. Appellants sought a writ of mandamus from the Oklahoma Supreme Court which was denied June 28, 2010 in Case No. 108,396. Appellants then filed their Petition in Error. We review the denial of a motion to intervene as of right de novo. *State ex rel. Oklahoma Corp. Comm. v. McPherson*, 2010 OK 31, 232 P.3d 458, 466.\(^5\)

\(\text{¶10} \) Appellants sought to intervene as of right. The Oklahoma Pleading Code provides, in pertinent part:

**A. INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action:

1. When a statute confers an unconditional right to intervene; or
2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.

As noted by Appellants, Oklahoma cases have looked to the federal courts’ four part test for intervention by right: (1) timeliness; (2) proof of a significant, protectable property interest in the subject of the action; (3) a showing that the disposition of the case may impair or impede the movant’s ability to protect his interest; and (4) the existing parties may not adequately represent the movant’s interest. *Brown v. Patel*, 2007 OK 16, ¶17, 157 P.3d 117.

\(\text{¶11} \) Appellants argue their Motion to Intervene was timely because they were not joined in BOC’s case and they “were essentially ignored throughout that litigation.” Appellants complain that they were not joined or served in BOC’s case because BOC relied on its notice of *lis pendens*.

\(\text{¶12} \) Oklahoma’s *lis pendens* statute, 12 O.S.2001 §2004.2, provides (emphasis added):

- Upon the filing of a petition, the action is pending so as to charge third persons with notice of its pendency. While an action is pending, no third person shall acquire an interest in the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency

1. As to actions in either state or federal court involving real property, such notice shall be effective from and after the time that a notice of pendency of action, identifying the case and the court in which it is pending and giving the legal description of the land affected by the action, is filed of record in the office of the county clerk of the county wherein the land is situated; and
2. Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant or service by publication is commenced within one hundred twenty (120) days after the filing of the petition.

B. Except as to mechanics and materialman lien claimants, any interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency
of action, shall be void as against the prevailing party or parties to such action.

C. No person purporting to acquire or perfect an interest in real property in contravention of this section need be given notice of a sale upon execution or of hearing upon confirmation thereof.

Appellants contend that the *lis pendens* in this case did not affect their interest, based on their claim that they had an equitable interest in Lot 18 from the time they signed the purchase contract.

¶13 The authority on which Appellants rely is not supportive of their argument. Appellants cite *Alfrey v. Richardson*, 1951 OK 133, 231 P.2d 363, 204 Okla. 473, for the rule that a contract for the purchase of real property passes equitable title to the purchaser. However, while in *Alfrey* the court referred to a contract for purchase, the facts described clearly show that the purchaser actually had a contract for deed and had taken possession and built equity by making payments for a number of years. The authority cited in *Alfrey* similarly involves contracts for deeds with the buyer in possession and making payments. In this case, the Jins have not claimed they paid anything before the time of the *lis pendens*. The facts of *Alfrey* are sufficiently distinguishable to show its rule is simply not applicable in this case.

¶14 For similar reasons, we do not find support in Appellants’ cited case involving a tax certificate. See *Wells Fargo Credit Corp. v. Selby*, 2001 OK CIV APP 78, 26 P.3d 774. In that case, a party had purchased a tax certificate, by paying the taxes due, but the party did not obtain a tax deed until after *lis pendens* was filed by the bank seeking foreclosure. This court explained that due to the unique statutory scheme for obtaining a tax deed, *lis pendens* did not apply to bar a tax certificate from ripening into a tax deed. *Id.* at ¶13. In addition to the essential distinction that this case does not involve a special statutory scheme, we also note that in *Selby* the party had paid for the tax deed and necessarily had acquired an economic interest in the property before the *lis pendens*.

¶15 Appellants further rely on *First Mustang State Bank v. Garland Bloodworth*, Inc., 1991 OK 65, 825 P.2d 254, 257, as support for their claim that by an “equitable conversion” the Jins became the equitable owners of Lot 18 at the time they signed the contract for sale. The facts of that case are complicated, but they also are distinguishable from this case. In *First Mustang*, after a property owner entered a contract to sell the property, the seller executed a mortgage on the property to an attorney to secure payment of fees. The buyer, and a bank seeking to foreclose on other property of the seller, claimed that the seller could not make a valid mortgage on the property after entering a contract to sell the property, contending that the buyer had equitable title to the property after entering the purchase contract. The Oklahoma Supreme Court explained the equitable doctrine on which the bank and buyer relied:

The fiction of conversion adjusts rights and imposes equities, but it cannot change facts or work inequity ... [T]his amiable pretense must be confined by the impulses which inspire it to the persons in privity with the transaction. There is no equitable need for its extension to others. Strangers have nothing to do with the reason for its being and nothing to do with its operation. In the best defined case of equitable conversion the legal owner of the lands retains as to persons not in equitable relations to himself all the rights and duties which belong to his seisin.

*Id.* at 257-258. (Citations omitted). The Oklahoma Supreme Court held that the bank was not in privity between the seller and buyer and could not benefit from an equitable conversion. The court held, however, that the buyer and seller were in privity and that the seller’s mortgage to the attorney was effective subject to the buyer’s rights, noting “(i)t is for this situation that the courts of equity developed the doctrine to prevent inequities from occurring between the parties of a land sale contract.” *Id.*

¶16 In this case, the foreclosing banks were not in privity with Appellants. We find no support for Appellants’ contention that the Jins had an equitable interest, simply from signing a purchase contract, which protected them from application of the plain language of the *lis pendens* statute. The purchase contract shows that it was executory: it includes the buyer’s promise to purchase and the seller’s promise to sell, in the future after certain conditions were met. The contract further provides that the risk of loss remained on the seller until closing.

¶17 Appellants have offered no explanation of why they elected to close on the purchase and mortgage after the *lis pendens* was filed. Appellants obtained their interests in Lot 18
from a party to the pending foreclosure action, and they are therefore bound by the judgment rendered against their grantor. *Hart v. Pharaoh*, 1961 OK 45, 359 P.2d 1074, 1079. Indeed, as noted by Appellants, “all persons contemplating the acquisition of property are bound to take notice of an action involving the title, and will, on their peril, purchase the same from any of the parties to the suit.” *Thompson v. General Outdoor Advertising Co.*, 1944 OK 195, 151 P.2d 379, 384, 194 Okla. 300. The effect of that filing is that Appellants’ interest in the property is void as against the prevailing parties in the foreclosure action, based on the rule expressed in 12 O.S.2001 §2004.2(B):

(A)ny interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency of action, shall be void as against the prevailing party or parties to such action.

As a result, Appellants are unable to prove the third element of the test for intervention of right: “a showing that the disposition of the case may impair or impede the movant’s ability to protect his interest.”

¶18 Additionally, because Appellants were held to be on notice of the foreclosure proceedings, from the time of the *lis pendens* filing, we find their Motion to Intervene, filed nearly a year later, was untimely as a matter of law.

¶19 On *de novo* review, we find the Jins had no arguable interest in the property until after the *lis pendens* notice was filed. They acquired their interest after notice of proceedings against the property was properly recorded and they were held to be on notice. As a result, their interest in the property is void as to the prevailing party in the foreclosure case and could not be protected therefrom by intervention. The order denying the Motion to Intervene is AFFIRMED.

MITCHELL, P.J., and JOPLIN, J., concur.


2. RCB’s mortgage was granted by Villas, L.L.C.; BOC’s mortgage was granted by Breakers, L.L.C., a predecessor in title. Each bank sued its mortgagor as well as various other lienholders. More detailed facts are outlined in this court’s opinion in the companion appeal.

3. Appellants attached Ratcliff’s affidavit to their Reply to BOC’s Response to Motion to Intervene. Ratcliff stated in his affidavit that he represented the Jins in their purchase of Lot 18, but that he did not file an entry of appearance in the foreclosure suits and that the Jins were not personally served with summons in the foreclosure suits. Ratcliff further averred he did not assent to accept service on behalf of the Jins and lastly, “(n)either I nor my clients received a copy of the Motion for Summary Judgment” filed by BOC, nor notice of the hearing on summary judgment.

4. BOC asserted that RCB sued First American and Grand River in Case No. CJ-09-681 and that Villas sued First American, Lawyers Title, and Grand River in Case No-CJ-10-12.

5. In that case, the Oklahoma Supreme Court explained: Our Pleading Code adopts a procedure for intervention based upon a federal counterpart. *Brown v. Patel*, 2007 OK 16, ¶16, 157 P.3d 117, 123. Federal courts use an abuse-of-discretion standard when reviewing an order granting or denying permissive intervention. *Alameda Water & Sanitation District v. Brown*, 9 F.3d 88, 89-90 (10th Cir.1993) citing *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142, 64 S.Ct. 905, 908, 88 L.Ed. 1188 (1944). One federal court has explained that appellate review of an order deciding intervention of right is reviewed *de novo* when a pure issue of law is presented, findings of fact are reviewed for clear error, and abuse-of-discretion review is used if the trial court’s judicial discretion is involved. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-732 (D.C.Cir.2003). See also *Utah Assn. of Counties v. Clinton*, 255 F.3d 1246, 1249-1250 (10th Cir.2001) (“We generally review a district court’s ruling on the timeliness of a motion to intervene under an abuse of discretion standard.... When the court makes no findings regarding timeliness, however, we review this factor *de novo*.... We review de novo the court’s rulings on the three remaining requirements of Rule 24(a)(2).”). *Id.* at n. 11.

2011 OK CIV APP 42

ATKINSON, HASKINS, NELLIS, HOLEMAN, PHIPPS, BRITTINGHAM & GLADD, an Oklahoma Professional Corporation, Plaintiff/Appellee, vs. VECTOR SECURITIES, INC., an Oklahoma corporation; VECTOR PROPERTIES, INC.; and JAMES W. DILL, Defendants/Appellants.

Case No. 107,734. January 27, 2011

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DAMAN CANTRELL, TRIAL JUDGE

OPINION ON REHEARING

AFFIRMED

Galen L.Brittingham, Michael A. Simpson, ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE, Tulsa, Oklahoma, for Plaintiff/Appellee

Mark A. Craig, MORREL S Affa CRAIGE, P.C., Tulsa, Oklahoma, for Defendants/Appellants

DOUG GABBARD II, VICE CHIEF JUDGE:
James W. Dill (Dill), appeal the trial court’s grant of summary judgment in favor of Plaintiff, Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, based on Plaintiff’s assertion of offensive nonmutual collateral estoppel to establish that Defendants are alter egos of one another. We initially dismissed the appeal for untimely filing, but have granted rehearing in order to consider the case on its merits. On rehearing, we withdraw our previous opinion, substitute this one, and affirm the trial court’s judgment.

FACTS

¶2 In November 2002, Plaintiff, a Tulsa law firm, obtained a judgment against VecProp for $17,166.91, for breach of an agreement for legal services. It is undisputed that the judgment is final, and that Plaintiff has received less than $2,000 in payment. Plaintiff filed its original petition in this action in April 2004, naming VecSec as the only defendant, asserting that VecProp had fraudulently transferred assets to VecSec, and that such transfers were avoidable under Oklahoma’s Uniform Fraudulent Transfer Act, 24 O.S.2001 § 112 et seq. (UFTA). Plaintiff sought judgment against VecSec for the uncollected part of its judgment, attachment of the assets, and an injunction against further transfers. VecSec’s answer admitted Plaintiff’s judgment existed, but denied knowing whether the judgment remained unpaid. VecSec also denied the assets had been transferred in violation of UFTA.

¶3 In August 2006, Plaintiff amended its petition, adding VecProp and Dill as Defendants. The amended petition also added a third claim, “alter ego,” alleging that all Defendants were alter egos of each other and that Dill formed VecSec in 1980, but it remained inactive until sometime after Plaintiff’s 2002 judgment against VecProp. Plaintiff further claimed Dill “effectively resurrected the previously-dormant” VecSec, transferred VecProp’s business to VecSec, and began conducting VecProp’s business through VecSec; that VecSec and VecProp were mere instrumentalities of Dill and had been abused by him in order to avoid paying Plaintiff’s judgment and ensure a continued stream of personal income to himself; and that Dill and VecSec should also be deemed liable to Plaintiff on the judgment against VecProp.

¶4 Defendants answered the amended petition, denying liability and asserting, among other allegations, that the alter ego claim added by Plaintiff was “identical to the claims asserted” against Defendants in another case, Kingham v. Vector Properties, Inc., et al., Tulsa County Case No. CJ-2005-03237 (“the Kingham Suit”). Defendants asserted the Kingham Suit was tried in June 2006 in a two-day, non-jury trial “on the exact same factual and legal issues as the Plaintiff now seeks to add to this case;” that Plaintiff’s counsel had entered an appearance in the Kingham Suit; and that “Plaintiff could have, and should have sought to consolidate this case with the Kingham Suit for trial and saved the parties thousands of dollars in fees, but failed to do so.” (Emphasis added).

¶5 In July 2008, Plaintiff moved for summary judgment on its “alter ego” claim, asserting the doctrine of collateral estoppel, or issue preclusion. Attached to Plaintiff’s motion was a 29-page judgment entered in the Kingham Suit, making extensive factual findings concerning the alter ego theory asserted by Kingham against Dill, VecProp, and VecSec in that case.

¶6 The Kingham Suit judgment determined that Kingham had obtained a judgment against VecProp in 2002; that the judgment had not been satisfied; and that, shortly after Kingham’s judgment was entered, Dill “discontinued doing business” as VecProp and “reanimated the long dormant Vector Securities” in order to carry on VecProp’s business. The judgment listed numerous preferential transfers and other conduct illustrating abuses of VecProp and VecSec’s assets and corporate structure by Dill, who the court identified as “the defacto and unlimited control person” of VecProp and various other “shell” companies. The judgment concluded that, taking into consideration the factors delineated in Frazier v. Bryan Memorial Hospital Authority, 1989 OK 73, ¶ 16, 775 P.2d 281, 288, and focusing on the “degree of control exercised by” Dill, the three defendants “all acted as one sole proprietorship with regard to their insiders and their creditors,” and that they “are alter egos of each other.”

¶7 Defendants appealed the Kingham Suit judgment, but later voluntarily dismissed the appeal. In the trial court, they admitted the judgment in the Kingham Suit was final, but objected to Plaintiff’s reliance on it as conclusive of the alter ego issue in the instant case. Nevertheless, the trial court granted Plaintiff’s motion for summary judgment, finding Defendants were “collaterally estopped” from relitigating alter ego in the current case, and that VecSec and Dill were liable to Plaintiff for the
judgment against VecProp. Defendants lodged this appeal.2

STANDARD OF REVIEW

¶8 Under the doctrine of offensive nonmutual collateral estoppel, a plaintiff seeks “to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff.” Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 650 (1979). Whether a case meets the criteria to make offensive nonmutual collateral estoppel available for use by a court is subject to de novo review. Cities Serv. Co. v. Gulf Oil Corp., 1999 OK 14, ¶¶ 12 and 14, 980 P.2d 116, 124-25. However, a trial court’s application of the earlier decision — i.e., its determination of whether the defendant “had a full and fair opportunity to litigate the issue in the earlier proceeding” — is reviewed for abuse of discretion. Id. at ¶ 15, 980 P.2d at 125. (Emphasis omitted). Thus, “while the doctrine’s availability is reviewed de novo, the trial court’s application of the doctrine will be considered under the deferential abuse-of-discretion standard.” Id. at ¶ 12, 980 P.2d at 124.

¶9 Summary judgment always involves a determination of whether a factual dispute exists, and presents an issue of law. “[A] judicial determination that no material evidence exists in the trial court record to support a claim or defense is a determination of an issue of law that is reviewed de novo.” Christian v. Gray, 2003 OK 10, n. 21, 65 P.3d 591, 609 (citing Barker v. State Ins. Fund, 2001 OK 94, ¶ 7, 40 P.3d 463, 466). Christian notes that Barker also explains that a trial court’s determination based upon no disputed facts is reviewed using a de novo standard. Id.

ANALYSIS

¶10 The Oklahoma Supreme Court first recognized offensive nonmutual collateral estoppel in Lee v. Knight, 1989 OK 50, 771 P.2d 1003, when it allowed a plaintiff in a civil tort case to use a defendant’s criminal conviction to establish the defendant’s liability. Adopting the viewpoint of the Restatement (Second) of Judgments, the Court held that the conviction should be given “fully conclusive” effect to establish factual issues as to the defendant’s conduct which were “actually determined” in the prior proceeding. Lee at ¶¶ 8 and 11, 771 P.2d at 1005 & 1006.

¶11 Ten years later, in Cities Service Co. v. Gulf Oil Corp., the Court held that nonmutual collateral estoppel could be used offensively to preclude a defendant from relitigating defenses that had been rejected in an earlier federal class action and in an arbitration proceeding. The Court listed the criteria which an appeals court must analyze de novo to determine whether the doctrine is available in a particular matter:

Employment of this form of collateral estoppel requires: (1) the precluded issue be the same as that involved in the earlier action; (2) the issue was actually litigated; (3) it was determined by a final and valid decision; and (4) the determination was essential and necessary to the earlier result.

Id. at ¶ 14, 980 P.2d at 125.

¶12 As noted above, Defendants’ answer to Plaintiff’s amended petition admitted that the issues involved in both cases were identical in all material respects. Defendants also admitted that the Kingham Suit judgment was final, and did not dispute the terms or validity of that judgment. Review of the Kingham Suit judgment confirms that the primary — virtually, the only — issue that was the subject of that litigation was whether VecSec, VecProp, and Dill operated as alter egos of one another, an issue which the court in the Kingham Suit answered in the affirmative. Finally, such a finding was essential to a determination that Defendants should share equally in liability for Kingham’s unpaid judgments. Thus, the record demonstrates that all four requisites for the availability of offensive nonmutual collateral estoppel have been met.

¶13 In determining whether the doctrine has been correctly applied, the Court in Cities Service v. Gulf held that this issue also requires an analysis of whether the defendant had a “full and fair opportunity to litigate the issue in the earlier proceeding.” Id. at ¶ 15, 980 P.2d at 125. The Court listed the following factors that a trial court should consider in determining whether there was a “full and fair opportunity:”

(1) whether the defendant had ample incentive to litigate the issue fully in the earlier proceeding; (2) whether the judgment or order for which preclusive effect is sought is itself inconsistent with one or more earlier judgments in the defendant’s favor; and (3) whether the second action affords the defendant procedural opportunities unavailable in the first that could readily produce a different result. Other factors
which can be relevant include: (1) whether the current litigation’s legal demands are closely aligned in time and subject matter to those in the earlier proceedings; (2) whether the present litigation was clearly foreseeable to the defendant at the time of the earlier proceedings; and (3) whether in the first proceeding the defendant had sufficient opportunity to be heard on the issue. It is the trial court’s application of these criteria which are reviewed under an abuse-of-discretion standard.

Id. at ¶ 15, 980 P.2d at 125. (Footnotes omitted).

¶14 The first factor — concerning a defendant’s incentive to defend in the first action — also embraces a factor recognized by the Parklane Hosiery and Lee v. Knight courts going to whether the plaintiff could have joined in the earlier litigation. See Parklane, 439 U.S. at 329-31, 99 S. Ct. at 651-52; Lee, 1989 OK 50 at ¶¶ 9-10, 771 P.2d at 1005-06. As noted in Parklane Hosiery, “[t]he general rule should be that in cases where a plaintiff could easily have joined in the earlier action,” or where application of offensive estoppel would be unfair to a defendant, a trial judge should not allow its use. 439 U.S. at 331, 99 S. Ct. at 651-52.

¶15 Although the judgment in the instant case does not reflect an express finding that Defendants had a “full and fair opportunity” to litigate the alter ego issue in the earlier case, the record reflects that such was the case and supports the trial court’s decision to apply collateral estoppel. The 29-page Kingham Suit judgment reveals that Defendants vigorously resisted their creditor’s attempt to collect two judgments in the combined amount of more than $94,000. Although Defendants argued that Plaintiff should have intervened and joined as a plaintiff in the Kingham Suit because of the similarity in the two cases, Defendants did not contend that they had any less incentive to contest Kingham’s arguments than they would have if Plaintiff had joined in that suit. In fact, because the judgments involved in the Kingham Suit were considerably larger than Plaintiff’s judgment, the Kingham judgments posed a greater risk to Defendants than Plaintiff’s judgment. Defendants had ample incentive to defend the Kingham Suit, and the record reflects that they did so. See Parklane Hosiery, 439 U.S. at 330, 99 S. Ct. at 651.

¶16 Clearly, both suits are extremely similar. The judgments at issue in the Kingham Suit were obtained against VecProp in late 2002 and early 2003, at virtually the same time Plaintiff obtained its judgment against VecProp. As described in the Kingham Suit judgment, the conduct that amounted to alter ego behavior between and among the Defendant entities occurred during the same time period that Plaintiff was attempting to collect its judgment, and was motivated by the same cause — a breach of contract judgment held by an unpaid creditor. That Plaintiff would attempt to assert collateral estoppel was also clearly foreseeable, as Defendants were well aware that Plaintiff had obtained and was trying to collect its judgment.

¶17 Finally, neither party contends that the Kingham Suit judgment is inconsistent with any other judgments, or that any other judgments regarding this issue have been entered in Defendants’ favor. Nor are there any “procedural opportunities” that would be available to Defendants in this case that were not available in the earlier action.

¶18 In short, the relevant factors set forth in Cities Service v. Gulf as favoring application of collateral estoppel offensively are present in the case at bar. As stated by the Court therein:

Where the parties’ alignment and the raised legal and factual issues warrant and fairness to the parties is not compromised by the process, its application is appropriate.

It is indeed the proceeding’s substance and the degree of due process inherent in it, rather than its form, which is the court’s bellwether for the doctrine’s application.

1999 OK 14 at ¶ 17, 980 P.2d at 126. (Footnote omitted).

¶19 Furthermore, we reject Defendants’ argument that the doctrine is neither available nor appropriate to establish that Defendants were “alter egos” of each other in this case. As stated in Defendants’ trial court brief: “The complete absence of any alleged undisputed facts showing the Plaintiff is suffering some inequity, coupled with the fact that the determination of the central issue of the alleged ‘alter ego’ is always a question of fact are issues mandating denial” of summary judgment.

¶20 Defendants’ suggestion that collateral estoppel cannot apply to a determination of “alter ego” status solely because it is a “question of fact” misconstrues the doctrine. Collateral estoppel may apply to decided issues of law or of fact which were “actually litigated”
and resolved in an earlier proceeding. Restatement (Second) of Judgments § 27 (1982); see also Isokariari v. Hillcrest Med. Ctr., 33 P.3d 691, 2001 OK Civ APP 116. Indeed, § 59(5) of the Restatement specifically recognizes that the doctrine may be employed to establish the issue of “alter ego” in a proper case:

A judgment against a corporation that is found to be the alter ego of a stockholder or member of the corporation establishes personal liability of the latter only if he is given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment.

¶21 In fact, other jurisdictions have held that a litigated alter ego claim may be used offensively. For example, in In re Kilroy, 357 B.R 411 (Bankr. S.D. Tex. 2006), the bankruptcy court held that both Texas and Delaware law would estop a debtor from denying that a limited liability company was his alter ego after a Texas state court determined, in earlier litigation to which the debtor was a party, that the company was his alter ego. The court specifically rejected the debtor’s contention that a finding of alter ego could not be employed offensively by a nonmutual plaintiff as a matter of law, stating:

The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one.


¶22 We also reject the argument that the trial court improperly applied collateral estoppel because Plaintiff failed to show an “inequity” which was peculiar to Plaintiff. By this argument, Defendants essentially assert: (1) a showing of “inequity” is essential to prove “alter ego”; (2) because “inequity” to Plaintiff was not at issue in the Kingham Suit, the issue litigated here is not identical to the issue litigated in the Kingham Suit; and (3) therefore, issue preclusion cannot apply. We disagree.

¶23 We note, initially, that Defendants admitted in their trial court pleadings that the Kingham Suit involved “the exact same factual and legal issues” as Plaintiff added to its amended petition. Moreover, proof of alter ego liability in general does not mandate that inequity to a specific party be demonstrated to prove that one company or individual is an alter ego of another.

¶24 Oklahoma’s law of corporations recognizes that one corporation (or a shareholder) may be held liable for the acts of another if the other is determined to be merely an instrumentality or agent of the other corporation or shareholder. See Gilbert v. Sec. Fin. Corp. of Okla., Inc., 2006 OK 58, ¶ 22, 152 P3d 165, 175. In Gilbert, the Court stated that the factors relevant to determining alter ego hinge, not on inequity, but on control. The factors include:

1. whether the dominant corporation owns or subscribes to all the subservient corporation’s stock, (2) whether the dominant and subservient corporations have common directors and officers, (3) whether the dominant corporation provides financing to the subservient corporation, (4) whether the subservient corporation is grossly undercapitalized, (5) whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation, (6) whether most of the subservient corporation’s business is with the dominant corporation or the subservient corporation’s assets were conveyed from the dominant corporation, (7) whether the dominant corporation refers to the subservient corporation as a division or department, (8) whether the subservient corporation’s officers or directors follow the dominant corporation’s instructions, and (9) whether the corporations observe the legal formalities for keeping the entities separate.

Id. at ¶ 23, 152 P3d at 175.

¶25 We recognize that “alter ego” is an equitable concept, and, therefore, principles of equity necessarily come into play when deciding whether to find that an alter ego exists. However, case law does not suggest that a plaintiff who indisputably holds an uncollectible judgment against a corporate defendant must prove any other damage or “inequity” as a result of the corporate defendant’s failure to observe the corporate structure. Here, neither party disputes that Plaintiff has been unable to collect its judgment from VecProp, and the validity of that judgment is not challenged. To
the extent an inequity needs to be proven, Plaintiff has shown it.

CONCLUSION

¶26 Based on the record presented, we find that offensive nonmutual collateral estoppel was available in this case as a matter of law, and the trial court did not abuse its discretion in applying it to grant summary judgment in favor of Plaintiff. Its judgment is therefore affirmed.

¶27 AFFIRMED.

GOODMAN, P.J., conCURS, and RAPP, J., not participating.

1. Among its many factual and legal findings, the court in the Kingham Suit initially found that “Vector [Properties], Vector Securities, Mr. Dill and [various related shell companies] were operated as one sole proprietorship, the purpose of which was to maximize financial benefits to Mr. Dill, while simultaneously avoiding the debt he had caused Vector [Properties] to incur to Mr. Kingham;” that Dill had “transferred Vector [Properties] assets to himself and the [shell companies];” that Dill “is Vector [Properties] controlling shareholder, holding ninety percent of the shares issued thereby,” and “[w]hile he is a minority shareholder of Vector Securities, his wife, Brenda G. Dill . . . owns the majority of shares issued thereby;” that Dill “controlled and directed both Vectors on a defacto basis;” that “[b]oth the resuscitated Vector Securities and abandoned Vector [Properties] are involved in the same business of leasing, management, development and brokerage of commercial real estate;” that “Vector [Properties] was terminated in Oklahoma due to a Judgment obtained by a law firm” against it; that “[t]he business model employed by Mr. Dill for himself, Vector [Properties], Vector Securities and [the shell companies] mandates a conclusion that all of them are alter egos of each other;” that Dill’s “own testimony conclusively establishes that he, Vector [Properties] and Vector Securities are one and the same;” and that “[t]hese businesses use almost identical names, are both real estate related, are conducted by the same principals, have the same employees, are conducted out of the same office, and involve the investment and acquisition of commercial properties.”

2. Plaintiff’s initial motion was filed in July 2008 and was styled as a motion for “partial summary judgment.” The trial court granted the motion. Defendants’ attempted appeal from that order, in Case No.106,632, was dismissed on the Supreme Court’s own motion in February 2009 for lack of an appealable order. In its dismissal order, the Court instructed that Defendants would have the opportunity to seek review of the November 2008 order “in a timely and properly brought appeal” from disposition of Plaintiff’s remaining alternate theories of recovery. In October 2009, Plaintiff voluntarily dismissed its alternate theories of recovery, and the trial court entered an order specifying that the November 2008 judgment became final as of October 8, 2009. This appeal was filed on November 10, 2009. On May 20, 2010, we issued an opinion dismissing the appeal as untimely because the petition in error was not filed in compliance with 12 O.S. Supp. 2009 § 990A(B) and Supreme Court Rule 14(c), and it appeared that this Court lacked jurisdiction. Defendants thereafter filed a petition for rehearing that included evidence attesting that the petition in error was timely filed. We then granted rehearing and agreed to consider the appeal on its merits.

2011 OK CIV APP 48

DANIEL BEN TENNELL, Petitioner, vs. HORSEHEAD CORPORATION, ACE AMERICAN INSURANCE CO., and the WORKERS’ COMPENSATION COURT, Respondents.

Case No. 107,836. December 27, 2010

PROCEDING TO REVIEW AN ORDER OF A THREE-JUDGE PANEL OF THE WORKERS’ COMPENSATION COURT

SUSTAINED

Susan H. Jones, Richard S. Toon, Jr., Tulsa, Oklahoma, for Petitioner,

Donald A. Bullard, H. Lee Endicott, Bullard & Associates, Oklahoma City, Oklahoma, for Respondents.

Larry Joplin, Presiding Judge:

¶1 Petitioner Daniel Ben Tennell (Claimant) seeks review of an order of a three-judge panel of the Workers’ Compensation Court affirming the trial court’s decision to deny his claim. In this review proceeding, Claimant challenges the trial court’s order as lacking sufficient specificity to permit intelligent review, and the order of the three-judge panel as affected by errors of both fact and law.

¶2 Claimant alleged that he sustained an injury arising out of and in the course of his employment with Respondent Horsehead Corporation (Employer) when he slipped and fell. At his deposition, however, Claimant admitted that he suffered his complained-of injuries during an altercation with a co-employee. The co-employee testified that Claimant started the fight and that he asked Claimant not to report the fight out of fear of losing his job.

¶3 On consideration of the testimony, the trial court denied the claim:

[T]his is a fight case: claimant and a co-employee in an unwitnessed fight. Before addressing who may have been the aggressor, the Court would first note that the claimant and his combatant coemployee, whom he supervised, do not come before this Court with clean hands. Testimony by the parties in Court and in deposition establish that the claimant and his co-employee scuffled and claimant fell and allegedly injured his head, left elbow, eyes and suffered psychological overlay. Before a supervisor of the two combatants arrived on the scene, claimant and his co-employee combatant agreed to allege a slip and fall injury to save the job of the co-combatant, “because he needed his job and he had a kid.” (Paraphrased from testimony)

[B]enefits were issued on a Form 3 filed July 8, 2008, alleging that claimant “fell
onto floor.” Only at depositions did the parties to the fight admit the Form 3 was not correct.

Even considering testimony regarding a fight, the unwitnessed event leads to the conclusion of mutual combat: who started the fist fight or verbal words of aggression is “he said” vs. “he said.”

Neither party is credible based on outright misrepresentation of the claim. Regardless of any possible finding that claimant was a victim in the end, he lost all credibility by falsely filing a claim and receiving benefits.

It is therefore ordered that claimant’s claim for compensation be and the same hereby is denied.

On intra-court review, a three-judge panel unanimously affirmed the trial court’s order as neither against the clear weight of the evidence nor contrary to law.

¶4 In his first proposition, Claimant asserts the trial court’s order contains no specific finding of facts as to permit intelligent review. Particularly, Claimant complains the trial court failed to enter a finding on the ultimate fact concerning who was the aggressor in the fight with the co-employee. In his second proposition, Claimant asserts the evidence demonstrated the altercation arose out of the employment, that is, the fight arose when Claimant, a supervisor, directed the co-employee to perform a task.

¶5 Historically, in Workers’ Compensation cases, the appellate courts of this state have been confined to a review of the record to determine if the decision of the Workers’ Compensation Court was supported by any competent evidence. See, e.g., Parks v. Norman Municipal Hospital, 1984 OK 53, ¶9, 684 P.2d 548, 550. However, effective November 1, 2010, the Oklahoma Legislature amended §3.6 of title 85, O.S., to provide in pertinent part:

The Supreme Court [or Court of Civil Appeals] may modify, reverse, remand for hearing, or set aside the order or award of the Workers’ Compensation Court upon any of the following grounds:

1. The Court acted without or in excess of its powers;
2. The order or award was contrary to law;
3. The order or award was procured by fraud; or
4. The order or award was against the clear weight of the evidence.

85 O.S. Supp. 2010 §3.6(C), amended by Laws 2010, SB 1973, ch. 403, §1, eff. November 1, 2010. By this provision, the legislature has now plainly and expressly authorized the Oklahoma appellate courts to “modify, reverse, remand for hearing, or set aside the order or award of the Workers’ Compensation Court” if the judgment is “against the clear weight of the evidence.” The question arises, however, concerning when the Oklahoma appellate courts may begin to apply the “clear weight of the evidence” standard.

¶6 Many states view the change in appellate standard of review as predominantly a change in “procedure,” and that the standard of review in effect at the time of either the filing of the claim, or the adjudication of the claim, or the decision on appeal, applies. See, e.g., Truckstops of America, Inc. v. Engram, 469 S.E.2d 425, 427-428 (Ga. App. 1996); Farrington v. Total Petroleum, Inc., 472 N.W.2d 60, 63-64 (Mich. App. 1991); Kinninger v. Industrial Claim Appeals Office of State of Colo., 759 P.2d 766, 767-768 (Colo. App. 1988); Armstrong v. Asten-Hill Co., 752 P.2d 312, 314-315 (Or. App. 1988); Pospisil’s Case, 525 N.E.2d 646, 647-648 (Mass. 1988); Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 58 (Minn. 1984). Other states view such a change in the standard of review as predominately a change in “substantive” law which cannot be applied retroactively, and that the law in effect at the time of the injury controls. Hazel’s Family Restaurants, Inc. v. Simmons, 781 So.2d 981, 982 (Ala. Civ. App. 2000); Alley v. Consolidation Coal Co., 699 S.W.2d 147, 148 (Tenn. 1985). Indeed, even in one of the “procedural” states, it has been held it “would be unfair and unjust to all parties concerned” to apply a different standard on rehearing than was in effect at the time of hearing. Steele v. North Dakota Workmen’s Compensation Bureau, 273 N.W.2d 692, 697 (N.D. 1978).

¶7 In Oklahoma, “[t]he general rule is that the law in effect at the time of an employee’s injury controls in workers’ compensation matters.” King Mfg. v. Meadows, 2005 OK 78, ¶11, 127 P.3d 584, 589. “A compensation claim is controlled by the laws in existence at the time
of injury and not by laws enacted thereafter.” Id. “The right of an employee to compensation arises from the contractual relationship existing between the employee and the employer on the date of injury.” Id. “The statutes then in force form a part of the contract and determine the substantive rights and obligations of the parties.” Id. “No subsequent amendment can operate retrospectively to affect in any way the rights and obligations which are fixed.” Id. Under this rule, the law in effect at the time of the injury clearly determines what standard of review applies.

¶8 However, we would reach the same result even if a change in the standard of review is viewed as a predominantly procedural change. That is to say, the applicable standard of review affects the manner in which a case may be tried: a case to be reviewed under the “any competent evidence standard” may well be tried differently if it will be reviewed under the “clear weight of the evidence” standard, and we believe it would be inherently unfair and unjust to subject a case tried under the “any competent evidence” appellate standard to “clear weight of the evidence” review.

¶9 We consequently hold appellate review in workers’ compensation cases is controlled by the standard of review in effect at the time of the injury. We therefore apply the “any competent evidence” standard to the decision of the Workers’ Compensation Court in the present case.

¶10 In this respect, the co-worker testified that Claimant started the fight. The testimony constitutes competent evidence to support a finding that Claimant was the aggressor.

¶11 It was also revealed that Claimant and his co-worker conspired to cover up the true etiology of the injuries. On this evidence, the trial court determined Claimant could not be believed, and denied the claim. The order of the trial court adequately explains the decision.

¶12 The order of the Workers’ Compensation Court is therefore SUSTAINED.

BELL, V.C.J., and MITCHELL, J., concur.

1. Law in effect on the date of appellate decision.
2. Law in effect on the date of filing of appeal.
3. Law in effect on the date of filing of appeal.
4. Law in effect on the date of filing of appeal.
5. Law in effect on date of appellate decision.
6. Effective date of amendment.

7. “The order of dismissal is dated 10 March 1977. The petition for rehearing was denied on 20 October 1977. The preponderance of evidence standard became effective 1 July 1977. This raises the question, does the preponderance of evidence standard on review apply to a claim which was heard and initially decided by the Bureau prior to the effective date? We think not. The case law developed as a result of the repeal of the de novo review statute is not in opposition to the conclusions reached herein. In fairness to all of the parties concerned, including the employer, we conclude that to apply a substantially different standard on appeal than the one under which the claim was initially considered and decided would be unfair and unjust to all parties concerned. We therefore conclude that because the preponderance of evidence standard of review was not in effect at the time the Bureau made its findings of fact it does not apply to this case as presently submitted even though the petition for rehearing was denied after the effective date of the preponderance of evidence standard. It necessarily follows that the substantial evidence standard on review applies to this claim as it is presently submitted.”

2011 OK CIV APP 39

CONCORDE RESOURCES CORPORATION, Plaintiff/Appellant, vs. KEPCO ENERGY, INC., WILLIAMS PRODUCTION MID-COINTEIN COMPANY, MAHALO ENERGY (USA), INC., Defendants/Appellees, PYLE, CAREY AND COLLIE, INC., SMITH, SMITH AND SMITH, a general partnership, and NANCY JACKSON DAWSON, Defendants.

Case No. 107,129. March 23, 2011

APPEAL FROM THE DISTRICT COURT OF MCINTOSH COUNTY, OKLAHOMA

HONORABLE THOMAS M. BARTHELD, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Donald W. Henson, Okmulgee, Oklahoma, for Plaintiff/Appellant, Concorde Resources Corporation
Gregory L. Mahaffey, Travis P. Brown, Raven V. McNeal-Noumane, MAHAFFEY & GORE, P.C., Oklahoma City, Oklahoma, for Defendant/Appellee, Kepco Energy, Inc.
Stephen W. Elliott, KLINE KLINE ELLIOTT & BRYANT, P.C., Oklahoma City, Oklahoma, for Defendant/Appellee, Mahalo Energy (USA), Inc. [now Redbud E & P, Inc.]
Mark Banner, Chace W. Daley, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C. Tulsa, Oklahoma, for Defendant/Appellee, Williams Production Mid-Continent Company

KEITH RAPP, JUDGE:

¶1 The plaintiff, Concorde Resources Corporation (Concorde), appeals an order granting summary judgment to the defendants, Kepco Energy, Inc. (Kepco), Williams Production Mid-
Continent Company (Williams), and Mahalo Energy (USA), Inc. (Mahalo), and to the defendants, Pyle, Carey & Collie, Inc. (PCC), Smith, Smith and Smith, a general partnership (Smith) and Nancy Jackson Dawson (Dawson). This appeal proceeds under the provisions of Okla. Sup. Ct. Rule 1.36, 12 O.S. Supp. 2010, ch. 15, app. 1.

**BACKGROUND**

¶2 PCC, Smith and Dawson, or their predecessors, had previously leased mineral rights to another party and a gas well was drilled in 1981, which was shut-in in 1982. The well was originally named Pyle #1 and renamed the Connors #1. Concorde acquired this lease (“Original Lease”) and in 1990, Concorde acquired new oil and gas leases from PCC, Smith and Dawson, or their predecessors in title (New Leases).

¶3 In 1990, Concorde deepened the well. From that time to 2008, Concorde did not perform any other activities in connection with the well and expended no funds for operation or maintenance of the well. From 1990 to July of 2008, Concorde sold no gas from Connors #1. Also, Concorde did no further exploration.

¶4 Concorde states, without contradiction, that there was no pipeline connection available until July 2008. Concorde states that annual shut-in royalties were paid or tendered from 1993 to 2007. Since July 2008, according to the appellate record, Concorde sold gas from the well in at least July, August and September of 2008, in an amount of approximately $24,000.00.

¶5 In 2006, Kepco, and in 2007, Williams and Mahalo acquired oil and gas leases to the same properties as leased by Concorde. This resulted in a lawsuit filed by Concorde to quiet title and to obtain damages against only Kepco, Williams and Mahalo. Kepco, Williams and Mahalo counterclaimed to adjudicate Concorde’s leases as expired and to quiet their respective titles.

¶6 Williams, alone, and Kepco and Mahalo, jointly, moved for summary judgment.

¶7 Williams first contended that the New Leases acquired by Concorde had expired by their own terms because Concorde had not commenced drilling or commenced reworking operations for an existing well, which Williams asserts is required by the New Leases. Concorde’s response is that its New Leases are for primary terms and the “continuous drilling” clause relates to the problem occurring when a lessor has begun drilling, but did not complete the operation before the primary term expired. Concorde argued that such clauses provide the opportunity to complete an operation notwithstanding expiration of the primary term.

¶8 All Appellees maintained that the New Leases expired because Concorde did not show that the only existing well was capable of producing in paying quantities. Concorde disputed this assertion. Concorde provided an affidavit that its employee checked the well over time and it always had pressure and the Appellees’ information about pressure was erroneous because the well was turned off when they checked it. Concorde also provided an early estimate of reserves. Concorde also maintained that sales of gas in 2008, demonstrated the well’s capability of production in paying quantities.

¶9 Last, all Appellees asserted that the New Leases were forfeited for breach of the Implied Covenant to Market for approximately seventeen years. Concorde argued that: (1) there was no pipeline or source to market the gas; (2) it was excused from the covenant by paying shut-in royalty; and (3) no demand was made by the lessees. The Appellees characterize a 1991 letter from Smith as a demand letter where Smith asked for a release if Concorde was not going to do any more work on the well. The Appellees also argued that a demand was not required because of the length of time involved.

¶10 The trial court granted summary judgment by order which was amended to include all trial court defendants. The original journal entry did not recite any findings or conclusions. Concorde appeals.

**STANDARD OF REVIEW**

¶11 Summary judgment is properly granted “when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Davis v. Leitner, 1989 OK 146, ¶ 9, 782 P.2d 924, 926. When reviewing the grant of summary judgment, this Court must view all inferences and conclusions to be drawn from the evidentiary materials in a light most favorable to the party opposing the motion. Id.

¶12 Although a trial court considers factual matters when deciding whether summary judgment is appropriate, its ultimate decision is purely legal: “whether one party is entitled to judgment as a matter of law because there are no
material disputed factual questions.” *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Therefore, the standard of review on appeal is *de novo.*

**ANALYSIS AND REVIEW**

**A. Whether The Well Drilled Under The Old Lease Will Hold The New Leases.**

¶13 As noted above, Concorde did not list the Old Lease as a basis for claiming any interest. Nevertheless, Concorde relies upon the fact that a well had been drilled under the Old Lease and was in place when it acquired its New Leases. Concorde maintains that this well was capable of producing in paying quantities and therefore satisfied the provisions of its New Leases so that the New Leases would remain in effect during the primary term “and as long thereafter as oil or gas, or either of them, is produced from said lease by the lessee.”

¶14 Williams, the proponent, cites no authority in its summary judgment motion for the proposition that an existing well cannot hold a new lease, if that well meets the criteria for holding a lease. Moreover, the function of a lease’s “continuous drilling clause,” such as the one in Concorde’s leases and referenced by Williams, is to allow completion of work commenced, but not finished, during the primary term. *Steinkuehler v. Hawkins Oil and Gas, Inc.*, 1986 OK CIV APP 9, ¶ 11, 728 P.2d 520, 522 (Rapp, J. Concurring).

¶15 Therefore, Williams argument on this point is rejected. In addition, this contention cannot form the basis for entry of summary judgment because Williams has not demonstrated that it is entitled to judgment as a matter of law, which is a requisite for summary judgment. Rule 13(e), Rules For District Courts, 12 O.S. Supp. 2010, 12 O.S. ch. 2, app.6

**B. Whether New Leases Expired For Not Being Capable Of Production In Paying Quantities.**

¶16 The New Leases contain habendum clauses that provide for secondary terms “as long thereafter as oil or gas, or either of them, is produced.” The terms “produced” and “produced in paying quantities” have substantially the same meaning. *Pack v. Santa Fe Minerals*, 1994 OK 23, ¶ 8, 869 P.2d 323, 326. The meaning of that phrase is set out in *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 9, 85 P.3d 830, 833.

In the state of Oklahoma, when the term “produced” is used in a “thereafter” provision of an habendum clause, its meaning is that of “production in paying quantities.” Production in paying quantities is a term defined by Oklahoma case law to mean “production of quantities of oil and gas sufficient to yield a profit to the lessee over operating expenses, even though the drilling costs or equipping costs are never recovered, and even if the undertaking as a whole may result in a loss to the lessee.” The phrase denotes a return in excess of “lifting expenses,” costs associated with lifting the oil from the ground after the well has been drilled (citations omitted).

¶17 At this juncture of the analysis, the focus is upon the ability of the well to produce in paying quantities rather than actual production. *Pack*, 1994 OK 23, ¶ 10, 869 P.2d at 327. Moreover, this focus is shaped by the summary judgment standard of review. Here, Williams, Kepco and Mahalo point to the total absence of production of any sort for seventeen years, together with their assessment of the physical condition of the equipment and lack of well pressure. Concorde disputes the Appellees’ characterization of the physical condition of the well equipment and maintains that the well did, in fact, have sufficient pressure. Concorde submitted its reserves estimate. Concorde also argued that the fact it produced and sold approximately $24,000.00 of gas in three months, in 2008, shows that the well was capable of production in paying quantities.

¶18 This Court concludes that there are questions of fact regarding the ability of the well to produce in paying quantities. Thus, summary judgment cannot stand on the ground that the well was incapable of producing in paying quantities and the Concorde leases, therefore, expired.

**C. Whether The New Leases May Be Cancelled For Breach Of The Implied Covenant To Market.**

¶19 Continuation of a lease where the well is capable of production in paying quantities is subject to any violation of the implied covenant to market or to any violation of other express conditions, such as a shut-in royalty clause. Thus, the capability of production alone, however, without a significant attempt to market the product, will not suffice to hold the lease because there is an implied covenant to market the product with due diligence. *Pack*, 1994 OK 23, ¶ 20, 869 P.2d at 329; *Danne v. Texaco Exploration and*
1\textsuperscript{1} Here, the Appellees have not asserted violation of a shut-in royalty clause.\textsuperscript{10} Smith, the only lessor shown in the appellate record as filing an answer, admits receipt of shut-in royalty. Concorde submitted its record showing tender of the shut-in royalty payments.

\textsuperscript{11} Thus, at this point, the case presents the question of whether the Appellees can prevail on summary judgment on their counterclaim on the breach of implied warranty to market theory. Appellees have the same burden as a plaintiff moving for summary judgment. In that regard, Appellees have shown a total absence of marketing for a seventeen year period. Concorde's response is twofold: There was no pipeline and no owner made demand during this period without production.\textsuperscript{11}

\textsuperscript{12} An action to cancel an oil and gas lease for breach of an implied covenant presents a case of equitable cognizance. Smith, 2004 OK 10, ¶ 8, 85 P.3d at 833; Crain v. Hill Resources, Inc., 1998 OK CIV APP 193, 972 P.2d 1179. In Crain, a case involving a trial on the merits, the Court provided the applicable criteria.


Crain, 1998 OK CIV APP 193, ¶ 4, 972 P.2d at 1181.

\textsuperscript{13} In Crain, the Court affirmed cancellation of the leases where the trial evidence demonstrated that the lessee did nothing for 14-15 years to market the gas from a well found to be capable of producing in paying quantities. In Crain, some of the lessees had made demand and the trial court found that the response was "meager at best and only for appearances" and excused the demand from the other lessors as being useless. However, the lessee did undertake efforts to market the gas after the demand was made.\textsuperscript{13}

\textsuperscript{14} The Crain Court analyzed the case under the equity standard of review because there had been a trial on the merits. Here, according to the summary judgment standard of review, this Court may not weigh the evidence and affirm the judgment of the trial court unless clearly against the weight of the evidence or contrary to law. The Crain Court concluded:

On the question of whether Lessees acted with reasonable diligence, this evidence, although uncontroverted, does not outweigh the sheer passage of time, i.e., 14 to 15 years, with no benefit to the Lessor.\textsuperscript{14} We hold the trial court's finding Lessees breached the implied covenant to market gas is not against the clear weight of the evidence.

Crain, 1998 OK CIV APP 193, ¶ 7, 972 P.2d at 1182.

\textsuperscript{15} A similar fact situation arose in an appeal of a summary judgment cancelling leases in Geyer Brothers Equipment Co. v. Standard Resources, L.L.C., 2006 OK CIV APP 92, P.3d. Geyer had acquired nine leases between 1982 and 1998. One shut-in gas well was on the property, completed in 1985. For purposes of summary judgment review, the well was found to be capable of producing in paying quantities. This brought the review to the issue of Geyer’s failure to market the gas.

\textsuperscript{16} Geyer had not marketed the gas. It claimed, as equitable considerations, that there was no pipeline and a dispute existed over which parties held valid leases. The Court found that the evidence established that Geyer had not actively attempted to market the gas or to secure a pipeline. The Geyer Opinion did acknowledge that the absence of a pipeline was an equitable consideration operating against the conclusion that Geyer breached the implied marketing covenant. Moreover, Geyer took no real steps to resolve the legal conflicts regarding which party held valid
leases. Thus, the length of time, almost twenty years, without reasonable efforts to market and resolve legal issues suffice to sustain summary judgment cancelling the leases.

¶27 A significant distinction between Crain and the case under review is the fact that a demand was made in Crain. Here, there is a dispute about whether the Smith letter constitutes a demand to market. Moreover, the summary judgment record does not contain materials from which it may be concluded that demand by the other lessors would be useless. Crain and the present case are reviewed according to markedly different standards of review.

¶28 Geyer and the present case also have significant differences. Here, the summary judgment materials of Williams, Mahalo and Kepco rely only upon the passage of time. In Geyer, the summary judgment materials affirmatively demonstrated that Geyer had not actively sought to market the gas or secure a pipeline.

¶29 Here, Concorde has presented an affidavit of its president stating that Concorde actively sought a market and a pipeline, but without providing specific details. Williams, Kepco and Mahalo argued that the conclusory nature of the affidavit did not suffice to demonstrate that an issue of fact exists. Buckner v. General Motors Corp., 1988 OK 73, ¶ 29, 760 P.2d 803, 812 (“Affidavits attached to a motion for summary judgment must set forth such facts as would be admissible in evidence rather than allegations of conclusory statements. Without showing that evidence is available, mere contentions and arguments cannot and will not make it true.”) The party responding to a motion for summary judgment has an obligation to present something which shows that when the date of trial arrives, he will have some proof to support his allegations. Benson v. Tkach, 2001 OK CIV APP 100, ¶ 13, 30 P.3d 402, 405 (A general statement in a summary judgment affidavit opening liability, without providing any information and without offering any reason for the conclusions, was not sufficient.)

¶30 Summary judgment provides a special pretrial procedural track to search for undisputed material facts and may be utilized in the judicial decision of whether their are fact issues to be decided after a trial. The procedure does not involve a full-scale trial and the search proceeds with the aid of acceptable probative substitutes. State ex rel. Fent v. State ex rel. Oklahoma Water Res. Bd., 2003 OK 29, 66 P.3d 432. When a moving party’s summary judgment materials show an absence of substantial controversy as to any material fact, the opposing party has the burden to specifically controvert the moving party’s showing with acceptable evidentiary material. Rule 13(b), Rules For District Courts, 12 O.S. Supp. 2010, ch. 2, app. When a response lacks specificity, the deciding court has no information from which it may conclude that there is a substantial controversy as to any material fact.

¶31 Here, Concorde has failed to demonstrate that it acted with any degree of reasonable diligence to market the gas. This means that Williams, Kepco and Mahalo are entitled to summary judgment on their claim of breach of the implied warranty to market the gas, unless Concorde has other defenses and fact issues exist as to those defenses.

¶32 Concorde affirmatively defended the breach of implied warranty to market claim. First, it argued that the claim is precluded because of the payment and acceptance of shut-in royalty by the lessors. Second, Concorde asserted that a demand to market is a necessary requisite and the lessors made no demand to market the gas.

¶33 Concorde has presented evidentiary materials showing payment or tender of shut-in royalty to the lessors over the years in question. Smith admitted receipt of the shut-in royalty payment.

¶34 Williams, Kepco and Mahalo did not address shut-in royalty payments in their motions for summary judgment. Williams filed a reply and characterized the payments as untimely and sporadic, but did not dispute the payment and receipt of the shut-in royalty by the lessors. Kepco and Mahalo also do not dispute the payment and receipt of the shut-in royalty. They only note that shut-in royalty payments are not relevant if the well is not capable of producing in paying quantities. Moreover, none of the Appellees dispute the fact that the leases here contain language authorizing shut-in royalty and equating such payments to production.

¶35 The lessors acceptance of the shut-in royalty benefits from Concorde before a cancellation action is brought works an estoppel to deny Concorde’s title when such benefits are accepted before the cancellation suit is commenced. Danne, 1994 OK CIV APP 138, ¶ 27, 883 P.2d at 218.
¶36 Concorde’s response presented evidentiary materials showing tender of payment and receipt of shut-in royalty. Appellees have the same responsibility, as did Concorde, to present evidentiary materials showing factual issues regarding payment of the shut-in royalty. Appellees have not met their burden to show that there are no issues of fact regarding Concorde’s defense based on payment of shut-in royalty to lessors other than Smith. Smith, having accepted shut-in royalty, is estopped from denying Concorde’s title. Id.

¶37 Next, whether the 1991 Smith letter constituted a demand to market gas is not clear. Moreover, there is no record here of any other lessor making demand at any time. As set out in Crain, reasonableness of the demand and compliance are questions of fact to be determined from the circumstances of each case and demand may be excused when it “would be a vain and useless thing.” Crain, 1998 OK CIV APP 193, ¶ 4, 972 P.2d at 1181.

¶38 Here, there are factual questions pertaining to all of the foregoing elements set out in Crain, regardless of whether the 1991 Smith letter is examined or whether the letter from counsel for Mahalo/Kepco is the subject of the demand.21 Moreover, there are issues of fact when considering the excused demand under Indian Territory Illuminating Oil Co., 1937 OK 253, 69 P.2d 624 (Syl. 2) (“Under a state of facts, however, where it is clear that lessee would not have complied with such demand until a judicial determination of the necessity therefor had been had, and where the lessee manifests a positive and definite intention not to comply with such demand, the lessor may immediately commence action against the lessee for cancellation of the lease without further notice.”). The factual issues about demand also preclude summary judgment as to the breach of implied warranty to market theory.

CONCLUSION

¶39 The Appellees seek to cancel Concorde’s New Leases either because they expired or because they are forfeited for breach of the implied warranty to market. There is an existing well, but no revenue was forthcoming for about seventeen years.

¶40 In order to hold the New Leases, Concorde must have production, which means production in paying quantities. Moreover, the threshold question is whether the well is capable of production. Under the summary judgment record and standard of review, there are factual issues regarding the capability of the well to produce in paying quantities during the seventeen-year period in question. Therefore, summary judgment does not apply on the theory of expiration because of failure to have a well capable of production.

¶41 Continuation of a lease where the well is capable of production in paying quantities is subject to any violation of the implied covenant to market. The lessee’s performance under the covenant is tested by a reasonable diligence standard. Concorde has not demonstrated any issue of fact regarding its lack of diligence to market in light of the seventeen years.

¶42 However, before a court of equity will grant a forfeiture, the lessor must demand the implied covenant be complied with and give reasonable time for compliance. In addition, payment and acceptance of shut-in royalty may excuse failure to market. Here, there are issues of fact regarding the existence of a demand, excused demand and, except as to Smith, the payment and acceptance of shut-in royalty.

¶43 Last, this Court notes that the record shows, without dispute, that in July, August and September of 2008, gas was sold with an approximate revenue of $24,000.00. The record stops at that point. The record does not reveal whether gas sales continued or whether royalty from sale was made and accepted by the lessors, or their successors, thereby raising issues of estoppel. The facts and the law applicable to this aspect of the case are for the trial court’s first instance resolution. Bivins v. State ex rel. Oklahoma Mem’l Hosp., 1996 OK 5, ¶ 19, 917 P.2d 456, 464.

¶44 Therefore, the trial court’s summary judgment, as clarified in its Order Nunc Pro Tunc, is reversed and the cause is remanded for further proceedings.

¶45 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GABBARD, V.C.J., and GOODMAN, P.J., concur.

1. PCC, Smith and Dawson are listed here as defendants only. Kepco, Williams and Mahalo are listed as appellees and when referenced here as a group will be denominated “Appellee.” By Order Nunc Pro Tunc, the trial court ruled that its judgment applied in favor of all trial court defendants, finding them to be aligned in interest. This specific ruling has not been appealed.

2. Concorde does not dispute its inactivity. See Concorde’s Brief In Response, Record, Tab 11, pp. 2-3.

3. Smith’s Answer in the lawsuit admits receipt of the shut-in royalty payment. Kepco, Williams and Mahalo did not dispute the fact of the payments.
4. In effect, these are akin to “top leases,” which are leases that take effect only if the pre-existing lease should expire or be terminated. See, Smith v. Marshall Oil Corp., 2004 OK 10, 85 P.3d 830 n.4.

5. Although Williams filed separately, the legal positions of all three moving parties coincide with each other as to two contentions.

6. Williams first contention appears to be addressed only to the New Leases. Williams surmises that Concorde officials must have believed that the original leases had expired because it acquired the New Leases. However, the record does not provide any materials to ascertain what may have been believed. This Court notes that all defendants listed the New Leases as a separate category of leases, which Williams named “Invalid Leases” and Kepco and Mahalo named “Expired Leases.” This Opinion will use “New Leases” to refer to the leases acquired by Concorde in 1990 and “Original Lease” for the lease acquired by Concorde. The defendants mentioned the Original Lease separately. However, this Court notes that in Interrogatory No. 2 propounded to Concorde, Concorde was asked to identify the lease or leases through which it claimed an interest. Record, Tab 9, Ex. 3. In response, Concorde listed only the New Leases. The Record on appeal is silent regarding the status of the 1981 lease acquired by Concorde.

7. Order Nunc Pro Tunc; Appellate Record. The trial ruled that the interests of FCC, Smith and Dawson were aligned with the interests of the remaining defendants. The ruling has not been appealed. This Court notes that the appellate record does not indicate any pleading by FCC or Dawson and that Smith asked for declaratory judgment regarding validity of the New Leases and the Appellees’ leases.


9. Many cases involving the application of the implied covenant to market include a fact situation where the well had produced and then production ceased for a period of time. Here, Concorde never produced any product for seventeen years. For purposes of this appeal, this Court finds no legal distinction and concludes that the implied covenant to market applies whether there has not been production from a well capable of production or whether there has been a cessation of production.

10. Appellees have also not argued any theory of breach of an implied covenant to develop the lease.

11. In 1991, Smith wrote Concorde advising that the lease was about to expire. Williams’ Motion For Summary Judgment, Ex. 6, Tab 1, Supplement to Record on Appeal. The letter continued:

We have not heard from you regarding the property. If no work has been accomplished on this site, will you please send us your release on same.

The Mahalo/Kepco motion for summary judgment includes an exchange of correspondence in March 2008, between counsel for Mahalo and counsel for Concorde. Mahalo’s counsel demanded that Concorde release the New Leases on the ground that they had expired. Mahalo/Kepco summary judgment motion. Record, Tab 10, Ex. C. The context of the demand letter indicates that the bases for expiration are non-production and failure to market the gas. It is undisputed that Concorde began marketing gas in July 2008.


13. This is similar to the present case where Mahalo’s counsel demanded releases in March of 2008 and marketing began in July 2008. However, the recitals of fact in Crain do not indicate that actual marketing and sales had occurred.

14. The reference to “this evidence” is to a series of letters, telephone calls and personal contacts by the lessee’s official after lessor’s demand to market the gas.

15. This is the OSCN citation. The West’s Pacific Reporter citation is: 2006 OK Civ App 924, 140 P.3d 563.


17. Effective November 1, 2009, the legislature enacted 12 O.S. Supp. 2009, § 2056. Section 2056(E) requires that the affidavit set out specific facts.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. The summary judgment motions in this case, and the trial court’s decision, all occurred before November 1, 2009.


20. See n. 4, at p. 4.

21. See n.10

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Associate District Judge
Twentieth Judicial District
Marshall County, Oklahoma

This vacancy is created by the retirement of the Honorable Richard Miller effective July 1, 2011.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the state of Oklahoma.

Application forms can be obtained online at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address no later than 5 p.m., Wednesday, May 25, 2011. If applications are mailed, they must be postmarked by midnight, May 25, 2011.

Allen M. Smallwood, Chairman
Oklahoma Judicial Nominating Commission
COURT OF CRIMINAL APPEALS
Thursday, April 21, 2011

F-2010-324 — On September 21, 2005, Appellant Charlie Patrick Flowal entered a guilty plea to the charge of Possession of a Controlled Dangerous Substance with Intent to Distribute, Within 1,000 Feet of a Public Park, in McClain County Case No. CF-2005-241. Appellant’s sentencing was deferred pending completion of the McClain County Drug Court Program. On June 16, 2009, the State filed a Second Application to Terminate Appellant from Drug Court participation. On March 10, 2010, Appellant’s participation in Drug Court was terminated and he was sentenced according to the terms of his plea agreement. From this judgment and sentence Appellant appeals. Appellant’s Drug Court termination is AFFIRMED. Opinion by: Smith, J.; A. Johnson, p.J. Concur; Lewis, V.P.J., Concur; Lumpkin, J. Concur in Results; C. Johnson, J. Concur.

F-2010-221 — Walter Scott Quade, Appellant, was tried by jury for the crime of Assault and Battery with a Dangerous Weapon, in Case No. CF-2005-4655, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Walter Scott Quade has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur; Smith, J., Concur.

Friday, April 22, 2011

F-2009-794 — Allen Eugene Bratcher, Appellant, was tried by jury for the crime of Lewd Molestation in Case No. CF-2007-786 in the District Court of Garfield County. The jury returned a verdict of guilty and recommended as punishment seventy years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Allen Eugene Bratcher has perfected his appeal. The judgment of the District Court is AFFIRMED. The sentence is MODIFIED to a term of imprisonment of thirty years. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., Concur in Results; Lumpkin, J., Concur in part and dissents in part; C. Johnson, J., Concur; Smith, J., Concur in part and dissents in part.

F-2010-465 — Appellant, Brandon Matthew Miller McCain, was tried by jury and convicted of Robbery With a Dangerous Weapon, After Former Conviction of Two or More Felonies in the District Court of Beckham County Case Number CF-2009-84. The jury recommended as punishment imprisonment for thirty (30) years. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; C. Johnson, J., Concur; Smith, J., Concur.

F-2010-138 — Dave Frank Cejka, Appellant, was tried by jury for the crimes of Lewd Acts with a Child (Count I), Indecent Proposals to a Child (Count II), and First Degree Rape by Instrumentation (Count III), after former conviction of two or more felonies in Case No. CF-2009-968, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment two terms of life imprisonment without the possibility of parole on Counts I and III, and two hundred (200) years imprisonment on Count II. The trial court sentenced accordingly. From this judgment and sentence Dave Frank Cejka has perfected his appeal. AFFIRMED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur in Results; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

F-2010-401 — Robby Dean Hole, Appellant, was tried by jury for the crime of Possession of Controlled Substance (Methamphetamine) after former conviction of a felony in Case No. CF-09-349, in the District Court of Garfield County. The jury returned a verdict of guilty and recommended as punishment eight (8) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Robby Dean Hole has perfected his appeal. AFFIRMED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur in Results; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

C-2010-322 — Silvon Dane Kinter, Petitioner, pled guilty to Assault and Battery with a Deadly
Weapon with Intent to Kill in Case No. CF-2009-4744, in the District Court of Oklahoma County. Kinter was sentenced to twenty (20) years imprisonment with ten (10) years suspended. Kinter filed a timely motion to withdraw his plea. At the conclusion of a hearing held on March 31, 2010, Kinter’s motion to withdraw plea was denied. From this judgment and sentence Silvon Dane Kinter has perfected his Petition for Writ of Certiorari. The Petition for a Writ of Certiorari is GRANTED, and his conviction is VACATED. This case is hereby REMANDED for further proceedings consistent with this opinion. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Dissent; C. Johnson, J., Concur.

**Tuesday, May 3, 2011**

**F-2010-242** — Russell Lacey, Appellant, was tried by jury for the crime of Robbery with a Firearm, After Former Conviction of a Felony, in Case No. CF-2008-3144, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment and a $5,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Russell Lacey has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur; Smith, J., Concur.

**F-2010-170** — Tommy Joe Ford, Appellant, was tried by jury for the crime of Robbery with a Firearm in Case No. CF-2008-3144 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment and a $5,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Tommy Joe Ford has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur; Smith, J., Concur.

**COURT OF CIVIL APPEALS**

*(Division No. 1)*

**Friday, April 22, 2011**

**108,104** — In re the Marriage of: Melody Sue Kosechequetah, Now Figuera, Petitioner/Appellant, vs. Dustin Kosechequetah,Respondent/Appellee. Appeal from the District Court of Comanche County, Oklahoma. Honorable Keith Byron Aycock, Trial Judge. Appellee (Father) and Appellant (Mother) were divorced in 2007. Mother was awarded sole custody of the parties two children with visitation award-
ed to Father. In 2009 Father filed a motion to modify custody and an application for contempt citation alleging Mother had numerous residential moves, several relationships and had changed children’s schools several times. He also alleged Mother denied him visitation. Mother responded seeking a citation for contempt against Father for failure to pay child support. The trial court overruled both applications for contempt and found there to be a permanent, material and substantial change of conditions and changed custody of the children to Father with Mother having standard visitation. Mother appeals. There is no transcript of the hearing but Mother and Father both filed narrative statements. The trial court adopted Father’s narrative statement. Considering the evidence as set out in the narrative statement, the court had ample evidence before it to make such a finding. We affirm the change of custody as ordered by the trial court. Mother’s motion for attorney fees is denied. AFFIRMED. Opinion by Hansen, J.; Hetherington, P.J., and Bell, C.J., concur.

**108,117** — Bank of America, N.A., Plaintiff/Appellee, vs. Jennifer D. Senn, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Roma M. McElwee, Trial Judge. Jennifer D. Senn (Debtor) appeals a trial court order sustaining summary adjudication in favor of Bank of America, N.A. (Creditor) on a credit card debt. Because the record presented to the trial court reveals disputed issues of material facts which preclude summary judgment, i.e., whether or not Debtor was ever an account holder and obligated by contract to Creditor, the order is reversed and remanded for further proceedings. REVERSED AND REMANDED. Opinion by Hetherington, P.J.; Hansen, J., and Mitchell, J. (sitting by designation), concur.

**108,296** — Countrywide Home Loans, Inc., Plaintiff/Appellant, vs. BancFirst, a State Banking Corporation, Defendant/Appellee, and Bobby L. Hinkle; Julia Hinkle; John Doe; Jane Doe; Logan County Treasurer and The Board of County Commissioners of Logan County, Defendants. Appeal from the District Court of Logan County, Oklahoma. Honorable Donald L. Worthington, Trial Judge. Appellant (Countrywide) seeks review of the trial court’s judgment foreclosing mortgages on the property of Defendants, Bobby L. Hinkle and Julia Hinkle, and finding the mortgage of Appellee, BancFirst, had priority over Countrywide’s mort-
gage. We affirm, holding (1) BancFirst’s mortgage retained its priority for future advances because it was obligated under its line of credit agreement to make future advances, and (2) Countrywide was ineligible for equitable relief because it was negligent in failing to obtain a release of BancFirst’s mortgage. The trial court’s judgment is AFFIRMED. Opinion by Hansen, J.; Hetherington, P.J., and Bell, C.J., concur.

109,090 — Scott Sexton, Plaintiff/Appellant, vs. Kipp Reach Academy Charter School, Inc., a Corporation, Defendant/Appellee, and Tracy McDaniel, an Individual, and Does 1-10, inclusive, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Daniel L. Owens, Trial Judge. Appellant (Sexton) brought this action against Appellee (School) and Defendant (Principal) contending School conveyed a promise of employment to him for the upcoming school year supported by “consideration in the form of a salary,” issued him a faculty only cell phone, and enrolled him in a national teachers’ conference. He further relied on School’s promise by taking “steps to move his home from Indianapolis, Indiana, to Oklahoma City. Sexton alleges that upon learning about his sexual preference, Principal rescinded School’s offer of employment. The trial court found there was no contract of employment and dismissed the action with prejudice. Sexton appeals this determination. Because Sexton alleged School breached the contract by rescinding its offer of employment, and because he alleged monetary damages, his petition is legally sufficient to state a claim for breach of implied contract. The trial court’s judgment dismissing Sexton’s petition with prejudice is REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Hansen, J.; Hetherington, P.J., and Bell, C.J., concur.

Friday, April 29, 2011

105,949 — Melburn Short and Joni Short, Plaintiffs/Appellees, vs. Bob Rubin and Paula Anderson Rubin, Defendants/Appellants. Appeal from the District Court of Pontotoc County, Oklahoma. Honorable John D. Miller, Judge. Appellants (Tenants) appeal from the district court’s judgment in favor of Appellees (Landlords) in Landlords’ forcible entry and detainer action. Tenants contend the placing of the small claims affidavit under their apartment door did not satisfy 12 O.S. 2001 §1148.5A and nothing in the record indicates the summons was thereafter sent by certified mail to Tenants as required by the same statute. The evidence is undisputed that Landlords’ process server, after attempting to personally serve Tenants at their apartment, slid a copy of the small claims affidavit under Tenants’ apartment door. Tenants also acknowledge they received the affidavit on their return home and would not have received it any sooner had it been attached to the door. Tenants were afforded due process of law. AFFIRMED. Opinion by Bell, C.J.; Hetherington, P.J., concurs, and Hansen, J., dissents with opinion.

108,171 — Janet Renea Murphy, Plaintiff/Appellee, vs. State of Oklahoma ex rel., Department of Public Safety, Defendant/Appellant. Appeal from the District Court of Adair County, Oklahoma. Honorable L. Elizabeth Brown, Trial Judge. Appellee (Murphy) was charged in municipal court with intoxication and possession of controlled dangerous substance. She was found guilty and assessed a monetary fine. The conviction was reported to Appellant (DPS). Pursuant to 47 O.S. 2007 Supp. §6-205(A)(6), DPS revoked Murphy’s driving privileges for 6 months. Murphy appealed the revocation to the district court requesting modification to allow her to drive to and from school, rehabilitation treatment sessions and employment-related travel. The court ordered Murphy’s driver’s license not be revoked or suspended. DPS appeals the district court order contending the court lacked subject matter jurisdiction to vacate the order of revocation. The district court had no subject matter jurisdiction to hear Murphy’s appeal from a driver’s license revocation mandated by §6-205(A)(6). The district court’s order is reversed and remanded with directions to vacate the order and dismiss the attempted appeal. REVERSED AND REMANDED WITH DIRECTIONS. Opinion by Hansen, J.; Bell, C.J., concurs, and Hetherington, P.J., dissents with opinion.

108,223 — Dwight R.J. Lindquist, Chapter 7 Trustee, and Heather Apartments Limited Partnership, Substituted Plaintiff/Appellant, vs. The City of the Village, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable John L. Owens, Judge. Lindquist, Chapter 7 Bankruptcy Trustee (Trustee) of Heather Apartments Limited Partnership, is the Substituted Plaintiff/Appellant for the former Plaintiff (Partnership). Trustee seeks review of the trial
court’s order granting summary judgment to Defendant/Appellee (City) and sustaining City’s motion to dismiss Trustee’s inverse condemnation action. The court held summary judgment was warranted because the allegations and facts failed to show a taking, and dismissed the action on the ground Trustee lacked standing. We first hold the trial court erroneously granted summary judgment because the determination of an inverse condemnation taking is not susceptible to summary disposition. We also hold Fannie Mae, the first mortgagee of the Subject Property, acquired Partnership’s rights to any inverse condemnation action in two different ways: Through the judgment foreclosing Fannie Mae’s mortgage and by virtue of Fannie Mae’s standing as a mortgagee with an outstanding bankruptcy claim against Partnership of over $4 million. Trustee acquired Fannie Mae’s interest in the action via bankruptcy settlement. Thus, the trial court erred in dismissing this action on standing grounds. REVERSED AND REMANDED. Opinion by Bell, C.J.; Hetherington, P.J., and Hansen, J., concur.

108,686 — Ann Drummond Woolley; Ann Drummond Woolley, Trustee of the Walter Woolley, Jr. Revocable Trust Dated 6/9/88; and Ann Drummond Woolley, Trustee of the Ann Drummond Woolley Trust u/t/a Dated 11/30/98; Five Woolley, L.L.C.; and 7c Land & Minerals Company, Appellants, vs. The Corporation Commission of The State of Oklahoma, Composed of The Honorable Bob Anthony, Chairman, The Honorable Jeff Cloud, Vice Chairman; and The Honorable Dana L. Murphy, Commissioner; and Pontotoc Production Company, Inc., Appellees. Appeal from the Corporation Commission of The State of Oklahoma. Appellants (collectively Woolley) seek review of an order of the Oklahoma Corporation Commission (Commission) granting the application of Appellee (Pontotoc) to pool the McAlester and Hunton common sources of supply underling a drilling and spacing unit (Unit) in Pontotoc County. Woolley contends the order (1) refused to dismiss the application to pool the Hunton common source of supply, (2) allocated costs between the McAlester and Hunton common sources of supply, and (3) refused to allow Woolley to participate in force-pooled acreage obtained in two previous pooling orders where Woolley was not named as a party as a result of a title error. The pooling statute, 52 O.S.Supp. 2007 §87.1(e), authorizes pooling by the unit, not by the wellbore. A force-pooling order unitizes the working interest in the entire unit as to the named formations. The status of a single well in the unit does not affect the status of the unit; the spacing unit remains pooled until the pooling order ceases by its own terms to be of force and effect or until the last well in the unit is plugged and abandoned. The Commission regularly pursued its authority in hearing and ruling on Pontotoc’s application to pool Woolley’s interest in the Hunton. Whether Pontotoc had abandoned the Hunton formation was a question of fact on which the Commission’s ruling was supported by competent evidence Pontotoc intended to drill another unit well in the Hunton. We find no error in the Commission’s refusal to dismiss the application as to the Hunton. The Commission is authorized to decide disputes relative to the costs of drilling unit wells under pooling orders. The testimony of Pontotoc’s accounting witness is substantial evidence supporting the Commission’s allocation of costs in this case. We find no error. The sharing of acreage acquired from those who decline to participate in a well is an equitable right of the participants in the well. The right flows from the pooling order although it is not expressly established by the pooling order. Rather, it is established by the election to participate in the well. Pontotoc cannot equitably claim the right to Woolley’s share of the force-pooled acreage vested in itself under the original pooling order by virtue of its own mistake in believing it owned Woolley’s working interest. The Commission erred as a matter of law in refusing to allow Woolley to share in force-pooled acreage upon her election to participate in the Well. We affirm as to the first two issues, and reverse and remand as to the third issue. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Hansen, J.; Hetherington, P.J., conurs in part and dissents in part with opinion, and Bell, C.J., concur.

108,979 — Ramon Borja Ramos, Jr., Petitioner, vs. Salvation Army; The Workers’ Compensation Court; and American Zurich Insurance Company, Respondents. Proceeding to Review An Order of a Three-Judge Panel of The Workers’ Compensation Court. Petitioner (Claimant) seeks review of an order of a three-judge panel of the Workers’ Compensation Court (Panel), which affirmed the order of the trial court. The trial court found Claimant’s injury was not compensable because Claimant was unable to prove by a preponderance of the evidence that his illegal use of drugs was not the
proximate cause of an accident on May 14, 2010. Employer’s evidence demonstrated Claimant’s injury occurred when he was using illegal drugs. Although Claimant denied his use of illegal drugs and that drugs caused his fall, the trial court did not find his testimony to be credible. We hold competent evidence supported the conclusion that Claimant failed to sustain his burden of showing with a preponderance of the evidence that his illegal drug use was not the proximate cause of his injury. SUSTAINED. Opinion by Bell, C.J.; Hetherington, P.J., and Hansen, J., concur.

(Division No. 2) Thursday, April 21, 2011

107,614 — Michelle Lea McKiddy, Plaintiff/Appellee, v. Warren Bernard Alarkin, Defendant/Appellant. Appeal from a journal entry of the District Court of Cleveland County, Hon. Jequita H. Napoli, Trial Judge. Defendant/Appellant (Father) appeals the trial court’s journal entry awarding attorney’s fees to Plaintiff/Appellee (Mother) in a child custody proceeding. The reasonableness of the amount of attorney’s fees is not at issue on appeal. However, Father argues that Mother is not entitled to the award. Because Father and Mother were never married and, hence, were never granted a decree of dissolution of marriage, annulment of a marriage, or legal separation, 43 O.S. Supp. 2003 § 110(E) (which gives the trial court discretion to award attorney’s fees based on a judicial balancing of the equities) is inapplicable to this case and cannot form the basis of an award of attorney’s fees to Mother. However, because (1) the record on appeal does not contain a transcript of the hearing on the motion for attorney’s fees, (2) other statutory provisions support the trial court’s award of attorney’s fees, and (3) the trial judge is presumed to be aware of these statutory provisions and its determination is presumed to be correct absent a record showing otherwise, we cannot conclude from the record that the trial court abused its discretion. We affirm the trial court’s journal entry awarding attorney’s fees. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, V.C.J., and Wiseman, J., concur.

108,681 — Tulsa Greenhouse, Inc. and Oklahoma Employers Safety Group (#75138), Petitioners, v. Deborah McDonald and The Workers’ Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of the Workers’ Compensation Court, Hon. Eric W. Quandt, Trial Judge. Petitioners appeal the three-judge panel’s order finding, among other things, that Deborah McDonald (Claimant) “sustained a change in physical condition for the worse,” and “sustained consequential injuries to [her] LEFT SHOULDER, RIGHT SHOULDER and RIGHT ELBOW.” Petitioners raise the following arguments on appeal: (1) that the order of the three-judge panel is in error because it lacks specific findings; (2) that the three-judge panel erred by finding that “continuing medical maintenance shall continue per the NOVEMBER 6, 2008 order”; and (3) that the order of the three-judge panel is not supported by objective medical evidence that demonstrates a consequential injury to Claimant’s left shoulder, right shoulder, and right arm (elbow). Based on our review of the facts and law, and for the reasons set forth in the Opinion, we reject Petitioners’ arguments. Therefore, we sustain the order of the three-judge panel. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, V.C.J., and Wiseman, J., concur.

107,797 — Mai Hoang Dang, Petitioner/Appellant, v. Nguyen Kim Phuc Nguyen, Respondent/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Barry L. Hafar, Trial Judge, granting joint custody of the parties’ minor child, awarding child support to Mother, and dividing the marital estate. Mother’s issues on appeal are whether the trial court’s decisions on the issues of child custody and division of marital property were clearly against the weight of the evidence or constitute an abuse of discretion. As to the issue of custody, we find Mother has failed to show the trial court abused its discretion in awarding primary custody to Father. The parties have equal parenting time, and the trial court correctly determined that the gender of Mother and child should not determine custody and that Mother was less likely to encourage a relationship with Father if she were to be awarded primary custody. The trial court then awarded joint custody, a decision which is not against the weight of the evidence as the parties appeared to be doing well with the joint custody arrangement under the temporary order. We next find the trial court’s decision awarding the house to Father as his separate property is supported by the evidence. We also find Mother failed to show the trial court abused its discretion in dividing the Premium Plus account. We decline to address Mother’s request for support alimony because she has failed to show that she raised this issue before the trial court. AFFIRMED. Opinion from the Court of Civil
Appears, Division II, by Wiseman, J.; Fischer, V.C.J., and Barnes, P.J., concur.

Friday, April 22, 2011

108,286 — Michelin North America, Inc., and Own Risk, Petitioners, v. Glenn Alan Payne and The Workers’ Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers’ Compensation Court, Hon. Mary A. Black, Trial Judge. Employer seeks review of an order of a three-judge panel, which after modification and correction by order nunc pro tunc, sustained the trial court’s order awarding medical treatment to Claimant for cumulative trauma injury to the knees. The single proposition of error in Employer’s brief in chief is that the three-judge panel “erred in affirming the trial court’s order as it is against the clear weight of the evidence.” Competing medical experts who have examined the same medical records, medical and employment history and medical test results can arrive at different conclusions and can have admissible opinions with varying probative value. Based on the totality of the evidence presented, the trial court could reasonably conclude Claimant sustained a compensable cumulative trauma injury to his knees. The trial court’s findings on questions of fact, affirmed by the three-judge panel, are conclusive unless unsupported by any competent evidence. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Fischer, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

Monday, April 25, 2011

108,234 — David A. Roccato, Petitioner, v. HSBC Beneficial and/or American International, Ltd., Zurich Insurance Company and The Workers’ Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers’ Compensation Court, Hon. William R. Foster, Trial Judge. Claimant seeks review of an order of a three-judge panel affirming the trial court’s finding that he did not sustain a compensable injury arising out of and in the course of his employment. The order was entered following proceedings held on remand from the Oklahoma Supreme Court. The order on review is not fatally flawed due to lack of specificity and satisfies the standard for a judicially reviewable decision. We find that the order is amply supported by competent evidence in the record. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Fischer, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

Tuesday, April 26, 2011

107,709 — Dennis Underside, Special Administrator of the Estate of Robert Lee Underside, Plaintiff/Appellee, v. Odette H. LeMay, Defendant/Appellant, and Oklahoma County Treasurer and Oklahoma County Board of County Commissioners, Defendants. Appeal from the District Court of Oklahoma County, Hon. Vicki L. Robertson, Trial Judge. Appellant, who cohabitated for over 30 years with the deceased, whose estate appears by and through Appellee, appeals from the trial court’s ruling after a nonjury trial, reaffirming a previous ruling that declared a quit claim deed void, determining ownership of certain real property and quieting title to it in Appellee. The evidence is uncontroverted that the deed form used for the quit claim deed did not actually exist until many years after the deed was alleged to have been dated and executed. The trial court also determined ownership of some personal property and ordered Appellant to return to Appellee certain items of personal property. In doing so, the trial court rejected Appellant’s “quasi partnership” theory of recovery for the reason that Appellant and the deceased were never married and that marriage had not been declared void. See Krauter v. Krauter, 1920 OK 249, 190 P. 1088, and Whitney v. Whitney, 1942 OK 268, 134 P.2d 357. Based on our review of the facts and applicable law, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, V.C.J., and Wiseman, J., concur.

Monday, May 2, 2011

108,709 — Curwood, Inc. and Fidelity & Guaranty Insurance Co., Petitioners, v. Kevin Ray Moore and The Workers’ Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of The Workers’ Compensation Court, Hon. H. Thomas Leonard, Trial Judge. Petitioners appeal from an order requiring them to provide Kevin Ray Moore (Claimant) with reasonable and necessary medical care to Claimant’s lumbar back, including surgery. Petitioners argue that (1) the cause of Claimant’s need for surgery is not employment-related and (2) the order is not supported by competent evidence. Based on our review of the facts and law, we find that a previous order determined the issue of causation and Petitioners’ first argument is barred by 85 O.S.2001 § 3.6(C) and the doctrine of claim preclusion. Regarding Petitioners’ second argument, we find that the order is supported by competent evidence. Therefore, we
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sustain the order of the three-judge panel. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, V.C.J., and Wiseman, J., concur.

(Division No. 3)
Friday, April 15, 2011

107,292 — In the Matter of the Guardianship of Tracy Delbert Stanfield. Loyde H. Warren, Appellant, vs. Mildred Stanfield, Guardian of the Estate of Tracy Delbert Stanfield, Appellee. Appeal from the District Court of Seminole County, Oklahoma. Honorable Timothy L. Olsen, Judge. Appellant (Warren) appeals from a trial court judgment which denied his Motion to Approve Representation Contract and Fee Amount on the basis that this request had not been approved by the court prior to payment, contrary to 30 O.S. 2001 §4-403(C), of the Oklahoma Guardianship and Conservatorship Act. Warren argues on appeal that the court’s ruling was arbitrary, Appellee (Guardian) was estopped by time delay, and estopped from contesting the contingency fee contract by payment and other conduct. Additionally, Warren asserts the contingency fee contract would have been approved had it actually been presented to the court for approval in 2001 and that the amount of the fees were reasonable. The statutory language in 30 O.S. §4-403 clearly and unequivocally requires court approval of compensation for attorneys for services rendered on behalf of the guardian of the ward “prior to payment.” The statute is silent as to any exceptions to this rule and the case law provides none. The law does not appear to give the court any discretion in this regard. Here, neither Warren nor the guardian sought court approval of Warren’s compensation arising from the contingency fee contract prior to the payment of fees pursuant thereto. Warren’s quest for after-the-fact approval of attorney fees, already paid and received by him, was therefore properly denied. This is not to say Warren is not, and could not be, entitled to any attorney fees from the ward’s estate. Such compensation must be predicated on a showing that Warren’s employment was necessary for the protection of the ward’s estate, Warren’s services were beneficial to the estate, and the amount sought is reasonable. The attorney fees received by Warren for which there was no prior approval will have to be reimbursed to the estate of the ward. AFFIRMED AND REMANDED FOR ANY ADDITIONAL PROCEEDINGS CONSISTENT HEREWITH. Opinion by Mitchell, P.J.; Joplin, J., and Buettner, J., concur.

107,451 — Gerard W. Kolaski, Petitioner/Appellant, vs. State of Oklahoma, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Noma Gurich, Judge. Appellant appeals the trial court’s denial of his Motion for Expungement of his arrest record for the felony crime of Sexual Abuse of a Child. The court ruled that Kolaski was not eligible for an expungement because the criminal charges were not dismissed “on the merits.” While the dismissal granted “in the best interest of justice” might be suggestive of a merits determination, the record clearly reflects the true basis for the dismissal was a witness changing her story prior to the preliminary hearing. Notably, the dismissal was entered prior to any presentation of evidence in the case. The trial court had yet to consider the substantive merits of the case at the time of the dismissal. Thus, it can only be reasonably construed as a dismissal without prejudice. Further, counsel for Appellant conceded at the hearing on his Motion for Expungement that it is completely within the State’s discretion to refile this charge based upon the same allegations. If the charges may be refiled, the prior dismissal of those charges surely was not “on the merits.” The trial court’s Order Denying Petition for Expungement and Sealing of Records is AFFIRMED. Opinion by Mitchell, P.J.; Joplin, J., concurs; Buettner, J., dissents. 107,481 — In the Matter of the Construction of the Dorothy L. Shoot 2005 Revocable Trust Created Under Agreement Dated June 1 2005 by Dorothy L. Shoot and Charlotte Ream Cooper as Trustees as Amended July 14, 2005, and Approval of Actions of the Trustee. Dorothy L. Shoot 2005 Revocable Trust, Charlotte Ream Cooper as Trustee, Petitioner/Appellee, vs. James L. Shoot, William W. Shoot, Valerie Shoot, and Tiffany Shoot Clements, Respondents/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Vicki L. Robertson, Judge. Appellants, beneficiaries of Dorothy Shoot’s estate and various pourover trusts, seek review of the trial court’s July 31, 2009 order which found the services and billing of Trustee, Charlotte Ream Cooper (Cooper), and two attorneys, Kent Polley and John Trudgeon, were reasonable and necessary, permitting the amounts owing to be paid from the funds available in the trust. Cooper filed an action for trust accounting, court approval of trustee expenditures and request for attorney fees as the trustee of the Dorothy L. Shoot 2005 Revocable Trust. From the court’s order approving Cooper’s
accounting and permitting the requested attorney fees and costs, Appellants brought this appeal. In 2005, Cooper was retained by Dorothy Shoot as a financial affairs manager, to assist Shoot with assessing and organizing her personal financial information. Cooper’s role expanded to encompass overall care. She became Shoot’s geriatric care manager and trustee of the 2005 revocable trust. A judgment in equity will not be overturned on appeal unless the decision is clearly against the weight of the evidence. In their first proposition of error, Appellants assert that Cooper, as trustee, is only permitted to compensate herself for actions and services rendered in the benefit of the trust itself and not Dorothy Shoot personally, absent an agreement. The record contained evidence of an agreement between Cooper and Shoot for services at the $50.00/hour rate. Further, Shoot was the beneficiary of the trust during her lifetime, therefore, payments to Cooper for services rendered to Shoot were permissible under the terms of the trust itself. Next, Appellants claim that Cooper was not permitted, as a trustee, to serve or acquire a private interest in Shoot’s trust. Appellants have not shown how this legal authority prohibits Cooper from seeking payment for services she rendered to Shoot or the trust. In their fourth proposition of error, Appellants assert that once Dorothy Shoot was rendered incapacitated, Cooper could not properly claim she continued to have a $50.00/hour contract with Shoot. Because the guardianship court directed the existing trustee arrangement to remain for Shoot’s care and maintenance, we find no support for this proposition. Appellants’ fifth proposition of error asserts that Cooper cannot rely upon the advice of counsel as a defense to the challenge of reasonableness brought to contest her hourly fee rate. In addition to testifying she relied upon the advice of her attorney in charging her fee, Cooper also offered a fee expert who testified her fee was reasonable. Appellants did not demonstrate the trial court’s decision was against the clear weight of the evidence. In their final proposition of error, Appellants reassert that Cooper’s fees were inherently unreasonable and inflated, in effect violating her fiduciary duty to Shoot. 60 O.S. 2001 §175.48. Appellants did not show Cooper violated §175.48, since she charged Shoot an agreed upon fee. The order of the trial court is AFFIRMED. Opinion by Joplin, J.; Mitchell, P.J., and Buettner, J., concur.

107,669 — Elizabeth Marie-Renne Kolaski, Petitioner/Appellee, vs. State of Oklahoma, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Vicki L. Robertson, Judge. Appellant (State) appeals an Order Granting Petition for Expungement and Sealing of Appellee’s arrest record. The trial court ruled that Appellee was entitled to expungement because the criminal charges against her were dismissed “on the merits.” While the dismissal granted “in the best interest of justice” might be suggestive of a merits determination, the record clearly reflects the true basis for the dismissal was a witness changing her story prior to the preliminary hearing. Notably, the dismissal was entered prior to any presentation of evidence in the case. The trial court had yet to consider the substantive merits of the case at the time of the dismissal. Thus, it can only be reasonably construed as a dismissal without prejudice. Further, counsel for Appellee conceded at the expungement hearing that it is completely within the State’s discretion to refile this charge based upon the same allegations. If the charges may be refiled, the prior dismissal of those charges surely was not “on the merits.” We therefore reverse the trial court’s determination that Appellee’s dismissal was “on the merits.” Because Appellee did not meet the statutory criteria for expungement eligibility in 22 O.S. §18, the trial court erred in applying the balancing test for sealing records set forth in 22 O.S. §19(C). The trial court’s finding that the Oklahoma County District Court case number CF-2003-3089 was not dismissed within one year of the date of Appellee’s arrest is affirmed. In all other respects, the Order Granting Petition for Expungement and Sealing of Records is reversed and this case is remanded for any further proceedings necessitated hereby. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Mitchell, P.J.; Joplin, J., concur; Buettner, J., concurs in part and dissents in part.

Friday, April 29, 2011

104,430 — John H. Mahorney, Plaintiff/Appellant, vs. Capt. Gooch, Defendant/Appellee, and M. Bernhardt and D. Harris, Defendants. Appeal from the District Court of Blaine County, Oklahoma. Honorable Mark A. Moore, Judge. Appellant (Inmate) seeks review of an order granting summary judgment to Appellees (Correctional Facility Employees) in this action wherein Inmate alleged violation of his “constitutional right to smoke.” The trial court found that Inmate failed to exhaust his administrative remedies contrary to 57 O.S. Supp. 2006 §564, §566(A)(1) and §566.3(G)(2). Addi-
tionally, the court found Inmate failed to state a claim upon which relief could be granted because there is no constitutionally protected right to smoke. The trial court correctly concluded dismissal was appropriate for Inmate’s failure to exhaust administrative remedies in accordance with §564, §566(A)(1) and §566.3(G)(2). This case and this appeal are frivolous and qualify for inclusion in the court administrator’s registry as provided in 57 O.S. 2001 §566.2(B). AFFIRMED. Opinion by Mitchell, P.J.; Joplin, J., and Buettner, J., concur.

104,431 — John H. Mahorney, Plaintiff/Appellant, vs. Walter Hodges, Defendant/Appellee, and J. Green, Defendant. Appeal from the District Court of Blaine County, Oklahoma. Honorable Mark A. Moore, Judge. Appellant (Inmate) seeks review of an order granting summary judgment to Appellees (Correctional Facility Employees) in this action wherein Inmate alleged violation of his “constitutional right to smoke.” The trial court found that Inmate failed to exhaust his administrative remedies contrary to 57 O.S. Supp. 2006 §564, §566(A)(1) and §566.3(G)(2). Additionally, the court found Inmate failed to state a claim upon which relief could be granted because there is no constitutionally protected right to smoke. The trial court correctly concluded dismissal was appropriate for Inmate’s failure to exhaust administrative remedies in accordance with §564, §566(A)(1) and §566.3(G)(2). This case and this appeal are frivolous and qualify for inclusion in the court administrator’s registry as provided in 57 O.S. 2001 §566.2(B). AFFIRMED. Opinion by Mitchell, P.J.; Joplin, J., and Buettner, J., concur.

104,435 — John H. Mahorney, Plaintiff/Appellant, vs. B. Lorenz and D. Haworth, Defendants/Appellees. Appeal from the District Court of Blaine County, Oklahoma. Honorable Mark A. Moore, Judge. Appellant (Inmate) seeks review of an order granting summary judgment to Appellees (Correctional Facility Employees) in this action wherein Inmate alleged violation of his “constitutional right to smoke.” The trial court found that Inmate failed to exhaust his administrative remedies contrary to 57 O.S. Supp. 2006 §564, §566(A)(1) and §566.3(G)(2). Additionally, the court found Inmate failed to state a claim upon which relief could be granted because there is no constitutionally protected right to smoke. The trial court correctly concluded dismissal was appropriate for Inmate’s failure to exhaust administrative remedies in accordance with §564, §566(A)(1) and §566.3(G)(2). This case and this appeal are frivolous and qualify for inclusion in the court administrator’s registry as provided in 57 O.S. 2001 §566.2(B). AFFIRMED. Opinion by Mitchell, P.J.; Joplin, J., and Buettner, J., concur.

106,493 — Karen W. Heinicke, Petitioner, vs. Vogon International, Hartford Insurance Company of the Midwest, and The Workers’ Compensation Court, Respondents. Proceeding to Review an Order of The Workers’ Compensation Court. Honorable Cherri Farrar, Judge. Claimant seeks review of an order of the workers’ compensation trial court denying her motion to reopen on an alleged change of condition for the worse. In this proceeding, Claimant challenges the trial court’s order as lacking sufficient specificity to permit intelligent review. In denying the motion to reopen, the trial court expressly held “the claimant has not undergone a change of condition for the worse.” The trial court’s express finding of no change of condition for the worse is responsive to the issue presented, adequately explains the decision and provides an adequate basis for our review. Employer’s medical evidence is competent to support denial of the motion to reopen. SUSTAINED. Opinion by Joplin, J.; Mitchell, P.J., and Buettner, J., concur.

107,586 — Maxxum Construction, Inc., an Oklahoma corporation, Plaintiff/Appellant, vs. First Commercial Bank, an Oklahoma bank, Defendant/Appellee, Khoi Vu and My Do, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant Maxxum Construction, Inc. seeks review of the trial court’s post-judgment order granting attorney’s fees and costs to Defendant/Appellee First Commercial Bank, and challenges the trial court’s award as contrary to law. It is the underlying nature of the suit itself which determines the applicability of the labor or services provisions of 12 O.S. §936. The question is whether the damages arose directly from the providing of labor or services. In the present case, Maxxum asserted the equitable remedy of unjust enrichment to recover for unpaid labor and services rendered. Because the underlying nature of the action was one to recover damages arising directly from the provision of labor or services, §936 authorized an award of prevailing party attorney’s fees to Bank, having prevailed on Maxxum’s labor and services
claim. AFFIRMED. Opinion by Joplin, J.; Mitchell, P.J., and Buettner, J., concur.

108,015 — High Sierra Energy, L.P., a Delaware Limited Partnership, Plaintiff/Appellee, vs. Kellie A. Hull, an individual; Daniel Hull, an individual; Kyla Brown, an individual; Michael Miller, an individual; Dennis Robinson, an individual: Hull’s Environmental Services, Inc., an Oklahoma corporation; Oilfield Disposal Services, L.L.C., an Oklahoma limited liability company; Hull’s Oilfield, LLC, an Oklahoma limited liability company; and Arkoma Tanks, LLC, an Oklahoma limited liability company, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Noma D. Gurich, Judge. In a dispute arising out of a multi-million dollar purchase/sale of multiple companies, Appellants Kellie Hull, Daniel Hull, Kyla Brown, Michael Miller, Dennis Robinson (Individual Appellants) and Hull’s Environmental Services, Inc., Oilfield Disposal Services, L.L.C., Hull’s Oilfield, LLC, and Arkoma Tanks, LLC (Company Appellants) appeal the trial court’s interlocutory order denying their motion to compel arbitration and for stay of the action pursuant to 12 O.S. Supp. 2006 §1879(A). All Appellants contend the arbitration provision contained in the Purchase and Sale Agreement (PSA) entered into between Kellie Hull and Appellee (High Sierra) is applicable to all causes of action arising under or related to the PSA. Appellants contend, and we agree, that if Section 12.7 of the PSA is read as an exception to the arbitration provision in Section 12.14, which requires “all disputes” to be arbitrated, the arbitration clause would be rendered meaningless as it would remove all disputes from arbitration. The ambiguity must be resolved in favor of compelling arbitration of the claims against Kellie Hull. The next question is whether the non-signatory Appellants can compel arbitration of High Sierra’s claims. High Sierra’s allegations are “integranely related” to the PSA. High Sierra’s claims against Kellie Hull and the non-signatory Appellants are also substantially “intertwined” to warrant the application of equitable estoppel to compel arbitration. High Sierra’s claims over “substan-

tially interdependent and concerted misconduct” by both Kellie Hull and the non-signatory Appellants. Because we conclude the ambiguities contained in the PSA must be resolved in favor of arbitration and the claims against the Appellants are inherently insep-

108,129 — City of Midwest City, Petitioner, vs. Cynthia Anni Maddux and the Workers’ Compensation Court, Respondents. Proceeding to Review an Order of a three-Judge Panel of the Workers’ Compensation Court. Employer seeks review of an order of a three-judge panel of the Workers’ Compensation Court which affirmed the trial court’s order granting benefits to Claimant for injuries to her neck and shoulder. As to the award of PPD for the injury to Claimant’s right shoulder, Dr. McClure discerned a total of 44% permanent partial impairment. The mere difference in Dr. McClure’s rating and Dr. Munneke’s rating does not render Dr. McClure’s ratings excessive per se, and the Workers’ Compensation Court may grant an award within the range of disability established by the medical evidence. However, neither Dr. McClure nor Dr. Munneke expressed any opinion establishing the existence of permanent partial impairment on account of any “surgery — epidural steroid injection” to the neck. To the contrary, in fact, Dr. McClure discerned permanent partial impairment of 6% “for one injured disc without surgery,” and an epidural steroid injection is not considered a “surgical” procedure. Dr. McClure’s testimony, the sole evidence finding PPD for the neck injury, supports an award of only six (6) percent PPD for the one injured cervical disc. Employer seeks remand for entry of an order granting six percent PPD to the neck, and we hold such a remand is appropriate. That part of the order of the three-judge panel granting benefits for PPD to the right shoulder is SUSTAINED. That part of the order of the three-judge panel granting benefits for PPD to the neck is VACATED, and the cause REMANDED for entry of an order granting six percent PPD for the injury to Claimant’s neck. Opinion by Joplin, J.; Mitchell, P.J., and Buettner, J., concur.

108,186 — In the Matter of the Estate of Inez Nix, a/k/a Earnest Inez Nix, Deceased. Carlos A. Williamson, Petitioner/Appellant/Cross-Appellee, vs. The Oklahoma Department of Wildlife Conservation, Respondent/Appellee/Cross-Appellant. Appeal from the District Court of Grady County, Oklahoma. Honorable
The record reflects that as part of Authority’s Application to the Water Resources Board, Paddyakers were adjacent land owners to Griffith and they were sent a notice by certified mail of Authority’s intent. The notice was also published twice in a local newspaper. Despite such notice, Paddyakers remained silent until the filing of this action in 2009. The district court clearly is vested with authority to render a first-instance adjudication of title to the subject property. We hold the trial court erred in its dismissal of the matter for lack of subject matter jurisdiction. We note that statutes of limitations are inapplicable in quiet title actions because of the equitable character of the action. Whereas the quiet title action is not barred by limitations, the same cannot be said for the conversion and unjust enrichment claims. Our de novo review of the record supports the trial court’s dismissal of Paddyakers’ unjust enrichment and conversion claims on the basis of the running of the statute of limitations. However, the trial court erred in its determination that it was without subject matter jurisdiction over this quiet title action and in its dismissal of same. Thus, the April 5, 2010 Judgment Sustaining Motion to Dismiss is AFFIRMED IN PART, REVERSED IN PART AND REMANDED for further proceedings. Opinion by Mitchell, P.J.; Joplin, J., and Buettner, J., concur.

108,276 — Deyo Paddyaker and Donna Paddyaker, individuals, Plaintiffs / Appellants, vs. Juanita Griffith; and Newcastle Public Works Authority, Defendants/Appellees. Appeal from the District Court of McClain County, Oklahoma. Honorable Charles Gray, Judge. Appellants (Paddyakers), appeal an order dismissing their case pursuant to 12 O.S. 2001 §2012(B)(1) for lack of subject matter jurisdiction and on the applicable statute of limitations. Paddyakers allege that in 1987 Appellee, Griffith, wrongfully conveyed to Appellee, Newcastle Public Works Authority, water and easement rights belonging to the Paddyakers. The record reflects that as part of Authority’s Application to the Water Resources Board, Paddyakers were adjacent land owners to Griffith and they were sent a notice by certified mail of Authority’s intent. The notice was also published twice in a local newspaper. Despite such notice, Paddyakers remained silent until
108,656 — Sarah Harrell, Plaintiff/Appellant, vs. Great Plains Regional Medical Center, an Oklahoma Corporation, and J. Clifton Coffee, M.D., Defendants/Appellees. Appeal from the District Court of Beckham County, Oklahoma. Honorable Charles L. Goodwin, Judge. Plaintiff/Appellant Sarah Harrell appeals from summary judgment granted in favor of Defendants/Appellees Great Plains Regional Medical Center and J. Clifton Coffey, M.D. Harrell filed this medical negligence case asserting Dr. Coffey left a broken surgical needle under her skin during surgery and later tried unsuccessfully to remove it. The record on appeal shows no dispute of material fact on the issue of breach of the standard of care; accordingly, Appellees were entitled to judgment as a matter of law. We AFFIRM. Opinion by Buettner, J.; Mitchell, P.J., and Joplin, J., concur.

(Division No. 4) Monday, March 28, 2011

108,589 — Craig Rusco, individually and on behalf of all others similarly situated, Plaintiff/Appellant, vs. Saint Francis Health System, Inc., an Oklahoma corporation, Defendant/Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Mary F. Fitzgerald, Trial Judge, denying Plaintiff’s motion to certify a class action against Defendant Hospital. Plaintiff’s claim asserted that, in obtaining payment for medical bills incurred by patients who were accident victims, Defendant followed a policy of seeking payment from third-party tortfeasors rather than the patients’ health insurers so that Defendant could obtain full payment rather than the discounted amount it had agreed to accept from insurers. Plaintiff sought to certify two classes challenging this policy. The trial court found Plaintiff failed to meet the requirements of numerosity, typicality, commonality, and adequacy of representation as required by 12 O.S. Supp. 2010 § 2023(A). We disagree and find the evidence showed that Plaintiff met the statutory requirements for class certification. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Gabbard, V.C.J.; Goodman, P.J., and Rapp, J., concur.

105,942 — Carolyn Joan Covel, Individually, and as Personal Representative of the Estate of H. K. Covel, Deceased, Tonni Covel, Toby Keith Covel, and Tracy Kaye Covel, Plaintiffs/Appellees, v. Elias A. and Pedro Rodriguez, d/b/a Rodriguez Transportes and Republic Western Insurance Company, an Arizona corporation, Defendants/Appellants. Appeal from Order of the District Court of McClain County, Hon. Candace L. Blalock, Trial Judge. Elias A. Rodriguez and Pedro Rodriguez, d/b/a Rodriguez Transportes, and Republic Western Insurance Company (Defendants) appeal the trial court’s denial of their motion for a new trial or motion for Judgment notwithstanding the jury’s verdict (N.O.V.) following an adverse jury verdict. On March 24, 2001, H. K. Covel (Covel) was speeding on Interstate 35 in McClain County when he lost control, crossed the 24-foot wide center median, went airborne, and collided, almost head-on, with a southbound passenger bus, belonging to Defendant Rodriguez Transportes, in its own lane of travel. Covel did not survive. After a jury trial, Plaintiffs were awarded $2.8 million dollars in actual damages and $5,000 in punitive damages. Defendants’ request for a new trial, Judgment N.O.V., and remittitur were denied, resulting in this appeal. A Judgment N.O.V. can only be granted if the trial court should have granted the motion for directed verdict at the close of all evidence. The Plaintiffs’ entire cause of action rests upon the allegation of negligence. Defendants maintain that causation fails as a matter of law. A party’s presentation of insufficient causation may be successfully challenged by a request for a directed verdict. The sufficiency of the evidence to show cause in fact presents a question of law for the court. Here, there is an absence of evidence of proximate cause. The Plaintiffs’ expert testimony, without the underlying scientific basis, is not evidence that will support a conclusion that the proximate cause fact exists. Plaintiffs wholly failed to establish the alleged negligence as the cause of the accident. Therefore, Plaintiffs failed to present a prima facie case, and Defendants were entitled to receive Judgment N.O.V. Therefore, the trial court erred in failing to sustain the motion for Judgment N.O.V. The judgment is reversed and the cause is remanded with instructions to entered Judgment N.O.V. for the Defendants. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, P.J., concur, and Gabbard, V.C.J., dissents.

Friday, April 1, 2011

107,204 — State of Oklahoma ex rel. Department of Transportation, Plaintiff/Appellant, v. Roger McCoun and Velma McCoun, Gregory
Mussman, Johnny Booth, and the Texas County Treasurer, Defendants/Appellees. Appeal from an order of the District Court of Texas County, Hon. Greg A. Zigler, Trial Judge. Oklahoma Department of Transportation (ODOT) appeals from the trial court’s May 14, 2009, journal entry of judgment, asserting the lower court erred in denying multiple requests for findings of facts and conclusions of law. We agree with ODOT that the trial court erred in one instance by failing to enter findings of fact and conclusions of law as to its award of fees and costs. The trial court’s May 14, 2009, journal entry of judgment is therefore reversed in part in accordance with this opinion and the matter remanded to the trial court with instructions to enter a new journal entry of judgment specifically setting forth its findings of fact and conclusions of law regarding the award of fees and costs. The opinion is affirmed in all other respects. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Gabbard, V.C.J., and Rapp, J., concur.

Tuesday, April 5, 2011

107,596 — Charles McClendon, an individual, Plaintiff/Appellant, v. Clint Trundle, an individual, Defendant/Appellee. Appeal from an Order of the District Court of Mayes County, Hon. Shawn S. Taylor, Trial Judge, entered after a jury verdict in favor of Defendant. McClendon’s challenge to the admission into evidence of a VHS video is rejected. The VHS video, a duplicate after the original was lost, contained relevant evidence leading to an explanation of the circumstances for the jury to consider in deciding whether Trundle faced a sudden emergency and acted reasonably. The video was properly admitted as a duplicate of a lost original. McClendon has not demonstrated that the trial court abused its discretion with regard to any prejudicial effect of the video. Therefore, no error has occurred as a result of the admission into evidence of the VHS video. McClendon’s claim of juror misconduct is not supported by the appellate record. The judgment of the trial court entered on the jury verdict is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Goodman, J., concur.

108,195 — Phillip Sneed, Petitioner/Appellant, v. Stephanie J. Sneed-Hayes, Respondent/Appellee. Appeal from an order of the District Court of Grady County, Hon. Timothy Brauer, Trial Judge, modifying Sneed’s child support. Pursuant to 43 O.S. Supp. 2010, § 118B, a child’s Social Security Benefit is income to the parent from whom the benefit was derived. Section 118B also provided that the Social Security benefit be credited against the obligor-parent’s child support obligation. This statute does not discriminate against persons similarly situated. Therefore, the trial court did not err by ruling that the Social Security benefits received by Sneed’s children due to his disability constitutes income to him for purposes of computing child support under the Guidelines. In order to insure the uniform operation of the statute and avoid unjust discrimination between different cases of the same kind, the multi-child provisions of the Guidelines apply. Thus, the trial court’s separate computation of child support was error. The judgment of the trial court is, therefore, affirmed in part and reversed in part and the cause is remanded for further proceedings. AFFIRMED IN PART AND REVERSED IN PART AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, V.C.J., and Goodman, P.J., concur.

107,549 — Calvin Mays Oilfield Services, Inc., Plaintiff/Appellee, v. Paul Busby d/b/a Busby Trucking, Defendant/Appellant. Appeal from an Order of the District Court of Logan County, Hon. Donald L. Worthington, Trial Judge, entering a money judgment in favor of plaintiff entered after a nonjury trial. The court ruled that Mays did not have a superior title to that of Busby because the Mays title came through a thief. The court further found that both parties suffered damages as a result of the theft. The court ruled that the repairs enhanced the value of the trailer and that, in equity, Mays was given judgment for that amount with a lien on the trailer. Busby appeals. Busby’s sole contention on appeal is that Mays, having taken title through the thief, could not recover the repair costs. The judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, V.C.J., and Goodman, P.J., concur.
108,561 — Mercy Memorial Health Center, Sisters of Mercy Health System St. Louis, Inc. (Own Risk #17461), Petitioners, v. Carmen Darnell and The Workers’ Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers’ Compensation Court, Hon. Mary A. Black, Trial Judge, affirming the workers’ compensation trial court’s decision finding Claimant permanently and totally disabled. Claimant’s testimony, combined with the medical expert’s report and the VRE report, provide competent evidence for the court’s conclusion that, due to her limitations, Claimant was not a candidate for retraining and was permanently totally disabled. The Order on Appeal Affirming the Decision of the Trial Court is sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, V.C.J., and Goodman, P.J., concur.

Tuesday, April 12, 2011

109,019 — Brandon Gurley, Plaintiff/Appellant, v. State of Oklahoma ex rel., Department of Transportation, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, granting summary judgment to the defendant, Oklahoma Department of Transportation. In order to apply res ipsa loquitur, a plaintiff must establish foundation facts by direct evidence. One such fact here is exclusive control by ODOT of the instrumentality causing the injury. Gurley’s response to ODOT’s summary judgment motion did not demonstrate any substantial conflict of evidence regarding this foundation fact. Therefore, the trial court did not err by granting summary judgment to ODOT. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, V.C.J., and Goodman, P.J., concur.

107,279 — Ray Bagwell, Richard Gathman, Bessie Gathman, David O’Hara, and Deborah O’Hara, Plaintiffs/Appellants, v. Tulsa County Board of Adjustment, Defendant/Appellee, and Anchor Stone Company, Intervenor. Anchor applied to TCBA for a special exception to conduct a sand dredging operation on property zoned “agricultural.” Perryman and Bagwell opposed the application in a hearing before TCBA. A decision of a Board of Adjustment in cases involving special exceptions carries with it a presumption of correctness. The Board’s decision will be accorded great weight and will not be disturbed on appeal after it has been affirmed by a district court, unless it is clearly arbitrary or erroneous. This Court cannot say, based upon the record, that TCBA acted in an arbitrary or capricious manner when it granted the Special Exception. This Court’s role does not include substitution of its judgment for that of TCBA, but rather to review the record to insure that TCBA acts in accordance with the law. Therefore, the trial court’s judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, P.J., and Barnes, J. (sitting by designation), concur.

Wednesday, April 27, 2011

108,452 — In the Matter of K.G.B., an Alleged Deprived Child. Shiloe S. Stewart, Appellant, v. State of Oklahoma, Appellee. Appeal from an order of the District Court of Woodward County, Oklahoma, Hon. Don A. Work, Trial Judge, terminating Mother’s parental rights in her minor child following a jury trial. The jury found Mother failed to correct the conditions which led to KGB’s deprived status, and she had a diagnosed cognitive disorder which rendered her incapable of adequately and appropriately exercising parental rights, duties, and responsibilities. The jury’s findings are supported by clear and convincing evidence. We reject Mother’s assertions of error to the contrary. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Gabbard, V.C.J. (before retirement), and Rapp, J., concur.

Thursday, April 28, 2011

108,068 — Katrina Wright, Plaintiff/Appellant, v. Capital West Securities, Inc., Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. Daniel L. Owens, Trial Judge. Wright appeals from an order granting Capital West Securities, Inc. (CWS) an attorney’s fee pursuant to 12 O.S. Supp. 2009, § 2011.1. Wright filed suit against CWS pursuant to Title VII alleging she was discriminated against on the basis of her gender. The trial court granted CWS’s motion to dismiss. CWS
thereafter filed a motion for an attorney’s fee and costs asserting Wright’s claims were frivolous. Wright sought to submit evidence in opposition to the motion, which the court denied, subsequently granting CWS an attorney’s fee in the amount of $7,340.00. We reverse, holding Wright should have been accorded the opportunity to present evidentiary material supporting her position that her claim was not frivolous even though it did not survive dismissal. REVERSED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Gabbard, V.C.J. (prior to retirement), and Rapp, J., concur.

Friday, April 29, 2011

107,907 — In the Matter of the Estate of: John Ellis Vaughan, Deceased. Mary Lou Palmer, Devisee/Appellant, v. Mark Everett Vaughan and Robert Lewis Vaughan, Co-Executors/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Jesse Harris, Trial Judge. The trial court petitioner, Mary Lou Palmer (Palmer), appeals an Order that denied her Motion To Vacate Void Orders and Judgment Order Allowing Final Account, Determining Heirs, Devises and Legatees and Final Decree of Distribution (Final Decree), entered in the Estate of John Ellis Vaughan, Deceased (Decedent). The Co-Personal Representatives are Mark Everett Vaughan and Robert Lewis Vaughan (Co-Personal Representatives). The Decedent died leaving a Will naming his sons as the Co-Personal Representatives. He made a specific bequest of a vehicle and a boat to Palmer, the Decedent’s long-time companion. In addition, he devised three real estate properties equally to the Co-Personal Representatives and Palmer. Palmer was also made a residuary beneficiary. It is undisputed that no notice issued personally to Palmer at any stage of the probate proceedings. Palmer filed in the probate action a motion to vacate the Order Determining Heirs and the Final Decree. The trial court ruled that the probate orders might be voidable for lack of notice to Palmer, but not void. A probate decree entered without proper notice is facially void. The probate court does not have jurisdiction to enter a valid decree of distribution or approve a final account without notice. Therefore, the probate orders here are facially void, not voidable. However, the fact that “Mary Palmer” received a $20,000.00 distribution in the estate, according to the final account, necessitates an inquiry into whether this recipient is the same as Appellant Palmer. If they are the same person, an additional inquiry is presented, that is: Did Appellant Palmer have actual notice of the probate proceedings, and, if so, is she not precluded from challenging the probate proceedings? Nevertheless, the trial court erred by its ruling that the probate orders were merely voidable. The facts must be developed before it may be finally determined that the probate Orders are in fact void as to Palmer. Therefore, the judgment of the trial court is reversed and the cause is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, V.C.J., conurs, and Goodman, P.J., dissents.

ORDERS DENYING REHEARING
(Division No. 1)
Friday, March 4, 2011

107,796 — The Howard Family Charitable Foundation, Inc.; Howard Investments, LLC; Robert E. Howard, II, an Individual; Marilyn Patricia Kelly, an Individual; Scott and Carlita Beauvais, Husband and Wife; Greg and Jill Castro, Husband and Wife; Jimmie M. Richardson, an Individual; Dennis Davis, an Individual; Don Koebelin, an Individual; Chris Fleming, an Individual; David Shear, an Individual; Brian Lorentz, an Individual; Ced Investments, LLC; David Hudiburg and Steve Hudiburg, as Trustees of the Paul Hudiburg 1997 Dynasty Trust; Steve Hudiburg, an Individual; Harry Patterson, an Individual; Bobby Masterson, an Individual; Hal Steinke, an Individual; Metropolitan Auto Dealers Association, a Trade Group; Peter and Crystal Hodges, Husband and Wife; Aaron London, an Individual; and Ken Wilkins, an Individual, plaintiffs/Appellants, vs. Mark S. Trimble, Individually; Phidippides Capital Management, LLC; MF Global, Inc.; and Archway Technology Partners, L.L.C., Defendants/Appellees. Defendants/Appellees’ Petition for Rehearing filed February 17, 2011 is DENIED.

Friday, March 25, 2011

108,631 — Jimmy Mills, Personal Representative of the Estate of Viola Mills, deceased, Plaintiff/Appellant, vs. Richard D. Laquer, individually and as trustee of Terry Lynn Mills Revocable Trust, Defendant/Appellee. Plaintiff/Appellant’s Petition for Rehearing filed March 10, 2011 is DENIED.
Thursday, April 14, 2011


107,387 (Cons. w/107,551 & Comp. w/106,698) — Justin Jones, Director of D.O.C.; Members of Board of Corrections; D.O.C. Medical Director of Dental; Debbie Morton, Director’s DESIGNEE of Grievances and Appeals; D.O.C. Director of Internal Affairs; Bobby Boone, Regional Director; Randall Workman, Warden, O.S.P.; Art Lightly, Deputy Warden, O.S.P.; Ms. M. Sexton, O.S.P. Policy and Procedures Officer; Ms. B. Greneway, O.S.P. Classification Supervisor; David Orman, O.S.P. Mailroom Supervisor; D. Cantrell, O.S.P. Maintenance Supervisor; B. Compton, O.S.P. Food Service Supervisor; Mr. Taylor, O.S.P. H-Unit Case Manager; Mr. Williams, O.S.P. H-Unit Sgt.; Mr. Barnhill, O.S.P. Col.; O.S.P. White Male Sgt., Defendant/Appellees. Plaintiff/Appellant’s Motion for Reconsideration (Rehearing) filed April 5, 2011 is DENIED.

Friday, April 22, 2011

107,506 — Robert Cornett, Plaintiff/Appellant, vs. Rhonda Carr; Glen Davis; and Dena Davis, Defendants/Appellees. Plaintiff/Appellant’s Petition for Rehearing filed January 26, 2011 is DENIED.

Friday, April 29, 2011

107,258 — Mortgage Electronic Registration Systems, Inc., Plaintiff/Appellee, vs. Alvin Wilson and Janice R. Wilson, Husband and Wife, Defendants/Appellants, Occupants of the Premises; Gerrol Adkins a/k/a Gerrol Asdkins; Deutsche Bank Trust Company Americas as Trustee f/k/a Bankers Trust Company as Trustee, Defendants. Defendants/Appellants’ Petition for Rehearing filed April 14, 2011 is DENIED.

(Division No. 2)

Wednesday, March 9, 2011

107,267 — Kassi Berry, Plaintiff/Appellee, v. Patricia Miller a/k/a Trish Miller, an individual and Close To Home, L.L.C. d/b/a The Ritz, an Oklahoma, limited liability company, Defendants/Appellants. Appellant’s Petition for Rehearing is hereby DENIED.

Friday, March 25, 2011


107,765 — T.K. Benson, Plaintiff/Appellant vs. Ron Parker and The Department of Corrections, Defendants/Appellees. Appellant’s Petition for Rehearing is hereby DENIED.

Thursday, April 14, 2011

107,312 — In Re: The Marriage of Teresa Lynn Machalica, Petitioner/Appellant, v. David Machalica, Respondent/Appellee. Appellant’s Petition for Re-Hearing is hereby DENIED.

(Division No. 3)

Friday, March 4, 2011

107,677 — Sandra Gurley-Rodgers, Plaintiff/Appellant, vs. Brookhaven West Condominium Owners’ Association, Inc., an Oklahoma corporation, Defendant/Appellee, and John Doe and Jane Doe, in their individual and personal capacities, Members of the Brookhaven Board of Directors, Defendants. Appellant’s Petition for Rehearing and Brief in Support, filed February 16, 2011, is DENIED.

Tuesday, April 19, 2011


Wednesday, April 27, 2011

107,727 — Simmons Industries and Simmons Foods, Own Risk #14803, Petitioners, vs. Jeffrey Allen O’Field and the Workers’ Compensation Court, Respondents. The Petition for Rehearing and Brief in Support, filed by Petitioners on April 19, 2011, is DENIED.

107,884 — Bob Rubin, Plaintiff/Appellant, vs. Michael Day, Defendant/Appellee. The Petition for Rehearing, filed by Plaintiff/Appellant on April 14, 2011, is DENIED.
Local Court Rules for Western District Court

Updated

The United States District Court, Western District of Oklahoma has updated the local court rules effective May 1, 2011.

There are several changes reflected in the 101-page document (pdf) which can be found on the Western District Court website at www.okwd.uscourts.gov.

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<tr>
<td>9:00</td>
<td>Registration and Continental Breakfast</td>
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<tr>
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<td>Everything You Do Not Know About Impeachment of Witnesses</td>
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**Networking Lunch (Included in Registration)**

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<td>Electronic Evidence: Foundations &amp; Admissibility</td>
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**Okc: Oklahoma Bar Center**

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**The Oklahoma Bar Journal**

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