

THE Oklahoma Bar JOURNAL

Volume 81 ♦ No. 22 ♦ August 21, 2010



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- 26 **OBA Strategic Planning Subcommittee Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Deborah Reheard (918) 689-9281
- OBA Legal Intern Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- OBA Unauthorized Practice of Law Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deborah Reheard (918) 689-9281
- 27 **OBA Board of Governors Meeting**; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- OBA Awards Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Renée Hildebrant (405) 713-1423
- OBA Technology Committee/CLE Task Force Subcommittee**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Dirickson (580) 323-3456
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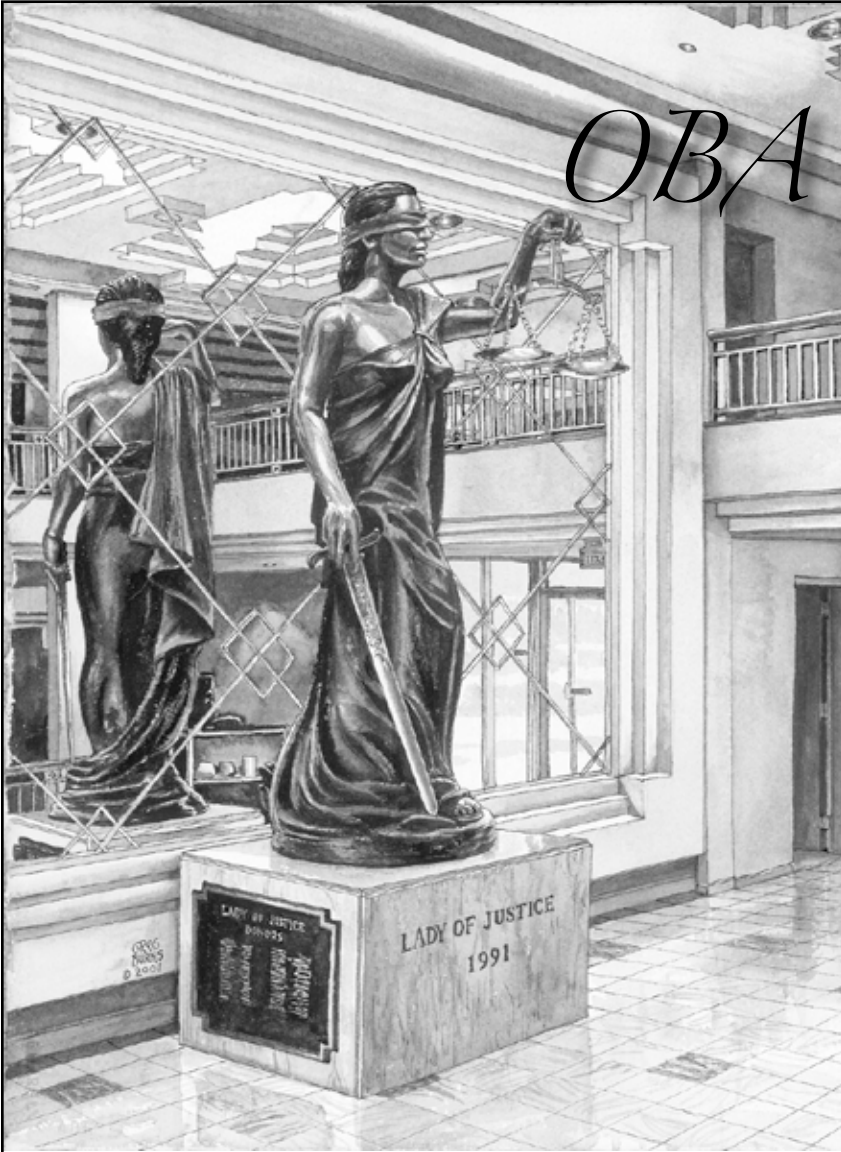
- 1 **OBA Women in Law Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renée DeMoss (918) 595-4800
- 3 **OBA Diversity Committee Meeting**; 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021
- 6 **OBA Closed** – Labor Day Observed
- 10 **OBA Communications Committee Meeting**; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Douglas Dodd (918) 591-5316

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Court of Criminal Appeals Opinions

2010 OK CR 19

JIMMY LEE BAKER, Appellant, v. STATE
OF OKLAHOMA, Appellee.

Case No. F-2009-528. June 23, 2010

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant, Jimmy Lee Baker, was tried by jury and convicted of Assault And Battery With A Dangerous Weapon After Two Or More Felony Convictions (Count II) (21 O.S.Supp.2006, § 645) and Malicious Injury To Property (Count III) (21 O.S.2001, § 1760) in the District Court of Bryan County, Case Number CF-2008-399.¹ The jury recommended as punishment life imprisonment in Count II and “fine and punishment” in Count III. The trial court sentenced according to the jury’s recommendation as to Count II and resolved the jury’s failure to recommend a definite punishment in Count III by imposing only costs. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant raises the following propositions of error in this appeal:

- I. Mr. Baker Was Denied A Fair Trial And Due Process Of Law By The Failure Of The State To Disclose, And The Failure Of Defense Counsel To Utilize, Available Impeachment Evidence Of The State’s Primary, Key Witness.
- II. Trial Counsel’s Abandonment Of Mr. Baker In The Sentencing Phase Of The Jury Trial Denied Mr. Baker The Effective Assistance Of Counsel And Resulted In An Excessive Sentence.
- III. The Trial Court Committed Fundamental Error In Not Instructing On The Definition Of A “Dangerous Weapon” And By Not Instructing On The Lesser Included Offense Of Simple Assault And Battery: And Mr. Baker Received Ineffective Assistance of Counsel When His Trial Counsel Failed To Request These Instructions.
- IV. The Trial Court Erred In Allowing Highly Prejudicial Testimony Regarding The Injuries Received By A Third Party, After The Charges Relating To That Party Had

Been Dismissed, Violating Mr. Baker’s Right To Be Tried And Convicted Upon Evidence Of The Crime Charged, Not Other Offenses.

¶3 After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief on Proposition I.

¶4 Simultaneous with the filing of his Brief-in-Chief, Appellant filed a Motion to Supplement the Record. We **GRANT** Appellant’s request to supplement the record as his motion is timely and the matters are properly admitted with his Motion for New Trial. Rule 3.11(B)(3)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009).

¶5 A review of the expanded record establishes that the State failed to disclose the victim’s pending drug charges, plea agreement, and prior felony conviction contrary to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Reversal is required because there is a reasonable probability that, had that evidence been disclosed to the defense, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3382, 87 L.Ed.2d 481 (1985). Evidence of a witness’s bias, credibility and motivation for testifying is always relevant. *Warner v. State*, 2006 OK CR 40, ¶ 30, 144 P.3d 838, 862; *Beck v. State*, 1991 OK CR 126, ¶¶ 12-13, 824 P.2d 385, 388-89. Ramirez was the victim and primary witness against Appellant. The entire case turned upon his credibility. Appellant’s defense at trial was to attack Ramirez’s credibility. Prior to trial, Appellant filed a very specific Motion for Discovery aimed at these purposes. The State’s response to Appellant’s motion was not forthcoming. The State attempted to keep relevant information from Appellant through the use of semantics or a play on words. The evidence that the State failed to disclose went directly to Ramirez’s bias, credibility and motivation for testifying. This Court has repeatedly held that a criminal trial is not a game of hide and seek. *Sadler v. State*, 1993 OK CR 2, ¶ 17, 846 P.2d 377, 383. Gamesmanship in discovery will not be

JIMMY LEE BAKER, Appellant, v. STATE OF OKLAHOMA, Appellee.

Case No. F-2009-528. August 17, 2010

ORDER TO PUBLISH

condoned. *Id.* The responsibility of a prosecutor as an officer of the court is to treat matters of this type with the seriousness that they deserve. An attorney representing the State is expected to fully comply with requests for discovery. If there is a question as to whether particular information should be revealed in response to a discovery motion, the prosecutor should present the question to the trial judge for determination. Rule 3.8(d), *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2008). As reversal is required on all counts, the remaining Propositions need not be addressed.

DECISION

¶6 The judgment and sentences of the trial court (Counts II - III) are **REVERSED AND REMANDED FOR NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Don J. Gutteridge, 3000 United Founders Blvd., Suite 208, Oklahoma City, OK 73112, Counsel for Appellant

Matt Stubblefield, Assistant District Attorney, 117 North Third Street, Durant, OK 74701, Counsel for the State

APPEARANCES ON APPEAL

Cindy Brown Danner, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

W.A. Drew Edmondson, Attorney General of Oklahoma, Stephanie Jackson, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, J.
C. JOHNSON, P.J.: CONCUR
A. JOHNSON, V.P.J.: CONCUR
LEWIS, J.: CONCUR

1. The jury acquitted Appellant of Count I, Burglary in the First Degree (21 O.S.2001, § 1431).

¶1 On July 20, 2010, Appellant, Jimmy Lee Baker, by and through his attorney of record, Cindy Brown Danner, filed a "Motion To Publish Opinion" in the above-styled case. Counsel asserts that publication of this Court's Summary Opinion herein (*Baker v. State*, Case No. F-2009-528 (Jun. 23, 2010; not for publication)) is warranted because she is unaware of any published case where this Court applied published law concerning the prosecution's duty to disclose a witness's pending charges, plea agreement and prior felony conviction. Upon review of the Motion and the Opinion, the Court finds the request is well taken and should be granted.

¶2 Appellant's Motion to Publish is **GRANTED**. The Clerk of this Court is hereby directed to designate the Summary Opinion attached hereto, issued June 23, 2010, as "For Publication."

¶3 IT IS SO ORDERED.

¶4 WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of August, 2010.

/s/CHARLES A. JOHNSON,
Presiding Judge

Not Participating
ARLENE JOHNSON,
Vice-Presiding Judge

/s/GARY L. LUMPKIN, Judge

/s/DAVID B. LEWIS, Judge

ATTEST:
/s/ Michael Richie
Clerk

THE OBA FAMILY LAW SECTION PRESENTS: THE MILITARY DIVORCE

The OBA Family Law Section is a Presumptive Oklahoma MCLE Provider. This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for **7.50 hours of mandatory CLE Credit and 0 hours Ethics.**

DATES & LOCATIONS:	Tulsa Friday, September 17, 2010 OSU - Tulsa Conference Center, Room 220 700 North Greenwood Avenue Tulsa, Oklahoma 74106 (Via Teleconference from OKC)	Oklahoma City Friday, September 17, 2010 Rose State College, Student Center 6420 S.E. 15 th Street (Raider Room) Midwest City, Oklahoma 73110 (Live presentation in OKC)
	Map: http://www.osu-tulsa.okstate.edu/campusmap.asp	Map: http://www.rose.edu/about/campusmap.asp

Cost: \$120 if received by 5 p.m. on Sept. 10, 2010. \$135 if received **after** Sept. 10, 2010. Cost of registration includes materials, lunch and Meet & Greet Reception. A \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date. **Please return form with payment to confirm attendance.**

The program speakers will appear live in Oklahoma City and the participants attending in the Tulsa location will be viewing the seminar by teleconference only.

Program Planner/Moderator Kimberly K. Hays, Tulsa

8:30 a.m.	Registration	<p><i>Meet & Greet Reception</i> September 17th 5 - 7 p.m. Petroleum Club of Oklahoma City 100 North Broadway Oklahoma City, OK 73102 <i>*Immediately following our CLE presentation the OBA FLS is hosting a Reception in honor of our speakers. Join us for this opportunity to talk with these experts. The Reception is included in the CLE registration.</i> <i>*Some Oklahoma Legislators will also be present to discuss interim studies related to family law.</i> Please indicate below if you intend to join us. ___ <i>Yes, I will attend the Reception</i> ___ <i>No, I will not attend the Reception</i></p>
9-10:10 a.m.	Servicemembers Civil Relief Act <i>Mark E. Sullivan- Raleigh, North Carolina</i>	
10:10-10:25 a.m.	Break	
10:25-11:15 a.m.	Military Support Issues: Regulations, LES, Garnishment of Military Pay <i>Jerry Edward Shiles- Oklahoma City, OK</i>	
11:15-12:25 p.m.	Military Pension Division: Representing the Servicemember <i>Mark E. Sullivan- Raleigh, North Carolina</i>	
12:25-1:05 p.m.	Lunch (Included with Registration Fee)	
1:05-2:15 p.m.	Military Pension Division: Representing the Military Spouse <i>Mark E. Sullivan- Raleigh, North Carolina</i>	
2:15-3:05 p.m.	Custody and Military Family Care Plans <i>Phil and Noel Tucker- Edmond, OK</i>	
3:05- 3:15 p.m.	Break	
3:15-4:05 p.m.	Child Support & the Military: UIFSA & Jurisdiction <i>Joe Booth- Lenexa, Kansas</i>	
4:05 p.m.	Adjourn	

Return Form and check payable to *OBA Family Law Section* to: Kimberly K. Hays, 248 West 16th Street, Tulsa, OK 74119; Fax (918) 592-4143. Questions: Contact Kimberly Hays at (918) 592-2800 or e-mail kimberlyhayslaw@aol.com.

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Court of Civil Appeals Opinions

2010 OK CIV APP 56

SISTER PATRICIA ANN MILLER,
Representative of the Carmelite Sisters of St.
Teresa, Plaintiff/Appellee, vs. KENNETH
RICHARD GONZALES, Defendant/
Appellant, and THE STATE OF
OKLAHOMA, Intervenor/Appellee.

Case No. 106,771. March 8, 2010

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE TOM A. LUCAS,
TRIAL JUDGE

AFFIRMED

Michael S. "Mickey" Homsey, Terry R. McMillan, HOMSEY & ASSOCIATES, Oklahoma City, Oklahoma, for Defendant/Appellant

Kevin Calvey, KEVIN J. CALVEY, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee

Scott D. Boughton, ASSISTANT ATTORNEY GENERAL, OKLAHOMA ATTORNEY GENERAL, LITIGATION SECTION, Oklahoma City, Oklahoma, for Intervenor/Appellee

DEBORAH B. BARNES, JUDGE:

¶1 This accelerated¹ appeal is brought to challenge the constitutionality of 11 O.S. Supp. 2008 § 22-115.1,² a statute enacted in 2008 that restricts the location of dog kennels in certain locations near schools or day care facilities. Appellant Kenneth Richard Gonzales (Gonzales) is the owner of an unlicensed dog kennel that is located within 2,500 feet of Villa Teresa Moore School, a school and day care facility operated by the Carmelite Sisters of St. Teresa, who are represented in this lawsuit by appellee Sister Patricia Ann Miller, as Representative of the Carmelite Sisters of St. Teresa (Representative).³

¶2 On June 18, 2008, about two weeks after § 22-115.1 became effective, Representative⁴ filed a petition, requesting temporary and permanent injunctive relief to prohibit Gonzales from operating his kennel and from having more than four dogs on his property in contravention of § 22-115.1. In response, Gonzales filed a "Response and Objection to Plaintiff's Application for Temporary Injunction, and Defendant's

Motion for Declaratory Judgment of Unconstitutionality of Title 11, Section 22-115.1."

¶3 The trial court allowed the State of Oklahoma (State) to intervene⁵ to respond to Gonzales's constitutional challenge. Gonzales, Representative and State each filed a motion for summary judgment. On November 12, 2008, the trial court entered its Order denying Gonzales's motion for summary judgment and granting the motions for summary judgment filed by Representative and State.

¶4 Gonzales filed a "Motion for New Trial and to Vacate Judgment" on November 21, 2008. By Order filed on January 23, 2009, the trial court denied Gonzales's "Motion for New Trial and to Vacate Judgment." From the November 12, 2008, Order and from the Order denying a new trial or vacation of the judgment, Gonzales appeals. After reviewing the record and applicable law, we find the trial court did not err and thus, we affirm.

MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

¶5 1. Gonzales operates a dog⁶ kennel within the city limits of Oklahoma City, Oklahoma, within Cleveland County, Oklahoma.⁷

2. Oklahoma City is a municipality with a population of more than three hundred thousand (300,000).⁸

3. Gonzales has 25 dogs in his dog kennel.⁹

4. Gonzales's dog kennel is located within 2,500 feet of Villa Teresa Moore School, a school and day care operated by Representative.¹⁰

5. Gonzales has no license to operate the kennel¹¹ and has been operating his kennel without a license since November 2005.¹²

6. Gonzales had initiated the license application process, but had not received a license prior to the enactment of 11 O.S. Supp. 2008 § 22-115.1.¹³

STANDARD OF REVIEW

¶6 Our standard of review for this appeal is as follows:

Summary process — a special pretrial procedural track pursued with the aid of

acceptable probative substitutes — is a search for undisputed material facts which, *sans* forensic combat, may be utilized in the judicial decision-making process. Summary relief is permissible where neither the material facts nor any inferences that may be drawn from uncontested facts are in dispute, and the law favors the movant's claim or liability-defeating defense. Only those evidentiary materials which eliminate from trial some or all fact issues on the merits of the claim or defense afford legitimate support for *nisi prius* resort to summary process for a claim's adjudication.

Summary relief issues stand before us for *de novo* review. All facts and inferences must be viewed in the light most favorable to the non-movant. Appellate tribunals bear the same affirmative duty as is borne by *nisi prius* courts to test for legal sufficiency all evidentiary material received in summary process in support of the relief sought by the movant. Only if the court should conclude there is no material fact (or inference) in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary relief in its favor. A trial court's denial of a motion for new trial is reviewed for abuse of discretion. Where as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness. Judicial discretion is abused when a trial court errs with respect to a pure, unmixed question of law.

Reeds v. Walker, 2006 OK 43, ¶¶ 8-9, 157 P.3d 100, 106-107. (Footnotes omitted.) See also Rule 13, Rules for District Courts of Oklahoma, 12 O.S. Supp. 2002, ch. 2, app.

¶7 An appellate court "will not disturb an order which grants or refuses an injunction unless there is a showing the trial court abused its discretion or that the judgment is clearly against the weight of the evidence or contrary to law." *House of Sight & Sound, Inc. v. Faulkner*, 1995 OK CIV APP 112, ¶ 5, 912 P.2d 357, 360, citing *Sharp v. 251st Street Landfill, Inc.*, 1991 OK 41, 810 P.2d 1270. And, this Court's review of a judgment denying declaratory relief is reviewable in the same manner as other judgments. 12 O.S.2001 § 1654. The trial court's judgment

raised an issue of law and is thus reviewable "under a *de novo* standard." *Cherokee Nation v. Nomura*, 2007 OK 40, ¶ 11, 160 P.3d 967, 972.

ANALYSIS

¶8 In the trial court's November 12, 2008, Order, the trial court found, in pertinent part, after hearing oral argument, considering testimony, and receiving additional authorities and suggested findings of facts and conclusions of law, as well as the parties' stipulations and briefs:

1. This Court has jurisdiction and venue pursuant to 11 O.S. 22-115.1.

2. 11 O.S. 22-115.1 is not unconstitutional.

3. 11 O.S. 22-115.1 specifically grants persons operating a school within 2500 feet of a dog kennel in Oklahoma City or Tulsa standing to seek a permanent injunction against a kennel in violation of 11 O.S. 22-115.1.

4. [Representative] is such a person to whom 11 O.S. 22-115.1 specifically grants standing to seek a permanent injunction.

5. [Representative] has standing to seek a permanent injunction against [Gonzales].

6. [Representative] does not need to show harm in order to be granted an injunction.

7. [Representative] must [show] only that [Gonzales] is in violation of 11 O.S. 22-115.1 in order to obtain an injunction.

8. [Gonzales] operates a dog kennel within the city limits of Oklahoma City.

9. [Gonzales's] kennel is within 2500 feet of Villa Teresa Moore School, a school and day care operated by [Representative].

10. [Gonzales's] kennel does not have a final kennel license.

11. Despite the fact that [Gonzales's] kennel has received certain variances and special exemptions from zoning laws, [Gonzales's] kennel has not completed all requirements to receive a license.

12. Because [Gonzales's] kennel does not have a final license, [Gonzales's] kennel is not exempted from application of 11 O.S. 22-115.1.

13. [Gonzales's] kennel is thus in violation of 11 O.S. 22-115.1.

14. Because [Gonzales's] kennel is in violation of 11 O.S. 22-115.1, 11 O.S. 22-115.1 provides that a permanent injunction must issue against [Gonzales], to prevent [Gonzales] from operating a dog kennel within 2500 feet of [Representative's] school.

15. The issue of attorneys' fees and costs is reserved.

WHEREFORE, [Representative's] Motion for Summary Judgment is GRANTED. [State's] Motion for Partial Summary Judgment is GRANTED. Judgment for [Representative] and against [Gonzales]. [Gonzales's] Motion for Declaratory Judgment of Unconstitutionality is DENIED. [Gonzales] is hereby permanently ENJOINED from operating a dog kennel within 2500 feet of Villa Teresa Moore School....

¶9 The issues on appeal, as stated by Gonzales, are as follows:

1. Whether the Cleveland County trial court erred in exercising jurisdiction in violation of the priority principle.
2. Whether the Cleveland County trial court erred in finding 11 O.S. Supp. 2008 § 22-115.1 constitutional.
3. Whether the Cleveland County trial court erred by not following a prior adjudicated finding of unconstitutionality by the Oklahoma County trial court. Errors include not finding *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) based upon the Oklahoma County trial court's finding of vested rights and unconstitutionality of 11 O.S. Supp. 2008 § 22-115.1.
4. Whether the Cleveland County trial court erred in not finding 11 O.S. Supp. 2008 § 22-115.1 unconstitutional by reason of:
 - a. being a special law;
 - b. violating equal protection;
 - c. being a taking without just compensation;
 - d. being an *ex post facto* law;
 - e. being a bill of attainder; and,
 - f. being a violation of Okla. Const. Art. 5, § 52 (as found by the Oklahoma County district court).

5. Whether the Cleveland County trial court erred by nullifying the agreed court order of August 17, 2007, in Case No. CJ-2006-9144, Oklahoma County.

6. Whether the Cleveland County trial court erred by finding that Representative has standing to prosecute this action, with no showing of irreparable injury, injury in fact, or the likelihood of injury.

7. Whether the Cleveland County trial court erred by granting a permanent injunction and closing Gonzales's kennel.

8. Whether the Cleveland County trial court erred by not utilizing the four criteria to establish the necessary findings for a permanent injunction.

9. Whether the Cleveland County trial court erred by granting summary judgment to Representative and State. Representative and State are not entitled to summary judgment as a matter of law.

10. Whether the Cleveland County trial court erred by not finding that Gonzales has completed all requirements of the August 17, 2007, agreed court order, and is exempt from application of 11 O.S. Supp. 2008 § 22-115.1. Whether the trial court further erred by ignoring the October 30, 2008, Oklahoma County order which makes findings that the August 17, 2007, order is in furtherance of a kennel license, and exempts Gonzales and his property from 11 O.S. Supp. 2008 § 22-115.1.

11. Whether the Cleveland County trial court erred in not granting Gonzales's Motion to Vacate and Motion for New Trial.¹⁴

I. Constitutional Claims

¶10 We begin with several separately enumerated issues raised by Gonzales in his appeal that attempt to raise constitutional challenges to 11 O.S. Supp. 2008 § 22-115.1. Our analysis must start with whether Gonzales has standing on appeal to challenge the constitutionality of 11 O.S. Supp. 2008 § 22-115.1.

¶11 Standing, which refers to a person's legal right to seek relief in a judicial forum, "*may be raised as an issue at any stage of the judicial process by any party or by the court sua sponte.*" *Hendrick v. Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1236.

(Footnote omitted.) An initial inquiry must reveal that: (1) an actual or threatened injury has occurred; (2) some relief for the harm can be given; and (3) the interest to be guarded is within a statutorily or constitutionally protected zone. *State of Oklahoma ex rel. Board of Regents v. McCloskey Brothers*, 2009 OK 90, ___ P.3d ___; *Hendrick v. Walters*, 1993 OK 162, 865 P.2d 1232; *State of Oklahoma ex rel. Cartwright v. Oklahoma Tax Commission*, 1982 OK 146, 653 P.2d 1230; *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 2, 639 P.2d 1233.

¶12 “When standing of a party is brought into issue, the focus is on the party seeking to get the complaint [here, the alleged unconstitutionality of 11 O.S. Supp. 2008 § 22-115.1] before the court, and not on the issues the party wishes to have adjudicated.” *State of Oklahoma ex rel. Board of Regents v. McCloskey Brothers*, 2009 OK 90 at ¶ 18. The question to be answered is whether the person bringing the constitutional challenge is a proper party to request adjudication of that issue and not whether the issue itself is justiciable.¹⁵ The “inquiry posed is whether the party . . . has a legally cognizable interest . . .” *Democratic Party of Oklahoma v. Estep*, 1982 OK 106, ¶ 7, 652 P.2d 271, 274.

¶13 To invoke a constitutional analysis of an act of the Legislature — here, 11 O.S. Supp. 2008 § 22-115.1 — this Court must be presented with a proper case in which the person complaining about the statute has been, or is about to be “denied some right or privilege to which he was lawfully entitled . . .” *City of Shawnee v. Taylor*, 1943 OK 11, ¶ 4, 132 P.2d 950, 952. (Emphasis added.) “In other words as a general rule the courts decide questions only when those urging them have an interest to protect . . .” *Id.* (Emphasis added.)

¶14 Gonzales has never operated his kennel lawfully — with a license. Although he applied for a license and took steps to satisfy licensing requirements prior to the enactment of § 22-115.1, the fact is he has never had a kennel license.¹⁶

¶15 Having had no license¹⁷ to operate his dog kennel, he cannot now be heard to argue that § 22-115.1 operates to deny him a right or privilege to which he was lawfully entitled. Gonzales has identified no right or privilege cloaked with constitutional protection.

¶16 Because of the physical location of Gonzales’s kennel within 2500 feet of Representative’s school, the effect of § 22-115.1 is to fore-

close the possibility that some day, Gonzales might receive a license to operate a kennel at that location. In the face of § 22-115.1, no license will issue because of the kennel’s proximity to Representative’s school. Although Gonzales may argue that the statute operates to deprive him of his property, all that he has lost is the ability to continue *using* his property in an *unlawful* manner for a dog kennel. Gonzales cites no law, and indeed, we have not found any, that finds the loss of an ability to operate unlawfully is the type of loss or denial contemplated as necessary to trigger a constitutional analysis.

¶17 Gonzales’s circumstances differ from those in *State of Oklahoma ex rel. Board of Examiners in Optometry v. Lawton*, 1974 OK 69, 523 P.2d 1064. In that declaratory judgment lawsuit brought by Lawton, a licensed optometrist, Lawton had been practicing optometry in a leased shopping center office since 1965. That same year, a retail optical outlet leased space in the same building on the opposite side of the hall from Lawton. In 1971, the Legislature passed a bill (59 O.S. 1971 § 594) which prohibited any optometrist from practicing “adjacent to or in such geographical proximity to a retail optical outlet.” Lawton filed his declaratory judgment lawsuit, claiming the Board of Examiners in Optometry were about to take action against him for violation of the new law. The trial court rejected the Board’s arguments that the controversy was “hypothetical,” which the Oklahoma Supreme Court upheld. A declaratory judgment action is meant to ascertain uncertain rights and can be used before any actual breach. “The fact that Lawton could be subjected to criminal prosecution and lose his license if he were found to be in violation of the statute certainly renders it a matter of justiciable controversy.” *Id.* at ¶ 9, 523 P.2d at 1066.¹⁸

¶18 In this case, however, there is no uncertainty as to Gonzales’s rights. He has none. He is not threatened with losing his license. He is not threatened with losing his ability to operate his kennel lawfully because he has never operated his kennel lawfully. Gonzales has not suffered an injury to a legally protected interest as contemplated by constitutional provisions. “Standing to prosecute an appeal must be predicated on that interest in the trial court’s decision which is *direct, immediate and substantial*. Conjecture or speculation . . . will not suffice . . .” *Creamer v. Bucy*, 1985 OK CIV APP 19, ¶ 4, 700 P.2d 668, 670, quoting *Underside v. Lath-*

rop, 1982 OK 57, 645 P.2d 514. Gonzales has not established that the legislation sought to be invalidated detrimentally affects his interest in a direct, immediate and substantial manner.¹⁹ He was operating a kennel unlawfully the day before the enactment of § 22-115.1, as well as the day after.²⁰

¶19 Gonzales argues that the August 17, 2007, order, entered in the Oklahoma County District Court case, CJ-2006-9144²¹ (the subject of Appeal No. 105,313), created in him a “vested right . . . to operate his kennel and receive all required permits and license necessary.”²² Gonzales cites *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 1968 OK 73, ¶ 23, 464 P.2d 748, 755, in support of this assertion. That case sets forth the definition of “vested right” as “the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute or by contract. Once created, it becomes absolute, and is protected from legislative invasion by Art. 5, Secs. 52 and 54 of our Constitution.”

¶20 Gonzales asserts, with a noted lack of accuracy, that the August 17, 2007, order itself establishes his “vested right.” The August 17, 2007, order,²³ the result of a settlement agreement between Gonzales and the Oklahoma City Board of Adjustment, states, in pertinent part, as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause is hereby settled in accordance with the agreement of the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a Special Exception . . . to . . . Chapter 59²⁴ of the Oklahoma City Municipal Code, 2002, for “Animal Sales and Services Kennels and Veterinary General” in the AA [Agricultural] District . . . be granted by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the prohibition of a freestanding dwelling on the same lot with any other principal use be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonza-

les’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required number of on-site parking spaces be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the parking and striping standards and required curbs be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required handicap spaces be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required 22 foot two-way drive aisle leading to a parking area be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required 10 foot driveway radius be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court directs [Gonzales] to take the following action:

1. [Gonzales] shall keep no more than 25 dogs on the property.
2. [Gonzales] shall not allow any dogs outside of the enclosed kennel between 7 p.m. and 7 a.m.
3. [Gonzales] shall completely enclose the entire property where the dogs are kept with an 8 ft. cedar fence, and consistently maintain the fence.
4. [Gonzales] may sell no dogs on the premises of the property.
5. [Gonzales] shall install a concrete footer along the entire perimeter of the 8 ft.

cedar stockade fence in the event a dog escapes from the property.

¶21 Contrary to Gonzales's assertions, the August 17, 2007, order, dealing simply with zoning ordinances and not kennel licensure, did not find that he is entitled to a license for his kennel nor grant such a license.²⁵ The August 17, 2007, order granted Gonzales's application for variances and a special exception to the City of Oklahoma City Zoning and Planning Code ordinances in Chapter 59 of the Oklahoma City Municipal Code. We reject Gonzales's argument that the August 17, 2007, order created a vested right in a kennel license or to operate his kennel without one.²⁶

¶22 "A 'vested right' is the power to do certain actions or possess certain things *lawfully*..." *Wilkerson v. City of Pauls Valley*, Oklahoma, 2001 OK CIV APP 66, ¶ 15, 24 P.3d 872, 876. (Emphasis added.) In *Wilkerson*, the plaintiff, who operated a mobile home park, appealed a zoning commission decision denying the plaintiff a variance from new flood prevention ordinances. The plaintiff claimed the ordinances were unconstitutional because they deprived him of a vested right, which would be protected from legislative invasion, except by due process of law. The Court rejected that argument, noting that the plaintiff had no "vested right" of continual nonconformance. Gonzales, like the plaintiff in *Wilkerson*, simply has no vested right, nor any right at all, to continue operating his kennel without a license. The enactment of § 22-115.1 did not deprive Gonzales of a vested right, there being no vested right in operating a kennel without a license. All the enactment of the statute did was to establish yet one more law that Gonzales was violating by operating his kennel without a license. There is no vested right, subject to constitutional protection, to continue operating a kennel without a license. Nor does any constitutionally protected vested right arise from one's merely being in pursuit of a license and engaging in an effort to satisfy all applicable requirements for licensure.

¶23 Because Gonzales has not, in fact, suffered injury to a legally protected interest by reason of § 22-115.1, he lacks standing to bring a constitutional challenge. *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 2, 639 P.2d 1233. Because we find Gonzales does not have standing to assert his constitutional claim, the question of the constitutionality of 11 O.S. Supp. 2008 § 22-115.1 is not one

this Court is required to decide at this time.²⁷ "This court will not pass upon the constitutionality of an act of the Legislature, nor of any of its provisions, until there is presented a proper case in which it is made to appear that the person complaining by reason thereof has been or is about to be denied some right or privilege to which he was lawfully entitled . . ." *Rath v. Maness*, 1970 OK 111, ¶ 19, 470 P.2d 1011, 1014. (Emphasis added.) We therefore decline to address whether the statute is, in fact, constitutional.

II. Effect of the October 2, 2008, Oklahoma County District Court's Ruling in Case No. CJ-2008-5282

¶24 Gonzales also claims the trial court erred in exercising jurisdiction in this case in violation of the "priority principle" for the reason that the district court in Oklahoma County, Case No. CJ-2008-5282 (Appeal No. 106,788) ruled that the statute was unconstitutional "as applied" to Gonzales prior to the trial court's ruling in this case that the statute was constitutional. Gonzales relies on the priority principle set forth in *Autry v. District Court of Muskogee County*, 1969 OK 159, 459 P.2d 865. Gonzales had raised this issue in the trial court on October 8, 2008, when he moved to vacate the trial court's November 12, 2008, ruling that found § 22-115.1 constitutional. According to Gonzales, the Oklahoma County District Court ruling that the statute was unconstitutional "as applied" to him²⁸ should govern, as being "first in time." We disagree.

¶25 In *Autry v. District Court of Muskogee County*, 1969 OK 159, 459 P.2d 865, the Oklahoma Supreme Court considered a divorce action in which the wife had sued for separate maintenance in Oklahoma County and a week later, the husband filed an action for divorce in Muskogee County. The Oklahoma Supreme Court cited the general rule that the exercise of concurrent jurisdiction is controlled by the principle of priority. However, the Court limited that general rule and principle in a way pertinent to the instant appeal, stating:

However, the priority principle is applicable *only when the cases involved are identical as to subject matter, parties, and relief sought*, and the identity as to subject matter, parties and relief sought must be such that a final adjudication of the case in the first court would, as *res judicata*, be a bar to further proceedings in the second court.

Autry, at ¶ 5, 459 P.2d at 867. (Citation omitted and emphasis added.)

We reject Gonzales's priority principle argument. There is no identity of parties between the instant appeal and the Oklahoma County case, No. CJ-2008-5282 (Appeal No. 106,788). Further, the Oklahoma County trial judge did not address all the constitutional challenges raised by Gonzales in that case that were again raised here. In the Oklahoma County case, filed on June 11, 2008, by Gonzales against State and the City of Oklahoma City, Gonzales requested a declaratory judgment that § 22-115.1 was unconstitutional and that injunctive relief against enforcement of the statute by State and Oklahoma City should be decreed. Representative was not a party to that lawsuit, the trial court having denied her motion to intervene. Her right to seek an injunction was not subject to, or limited by, the Oklahoma County case order filed on October 2, 2008.²⁹

III. Standing of Representative to Sue for Injunctive Relief

¶26 Gonzales argues on appeal that Representative "has no standing to prosecute this action, with no showing of irreparable injury, injury in fact, or the likelihood of injury."³⁰ We disagree.

¶27 The statute specifically provides for enforcement of it by any "person aggrieved in any way by noncompliance with said provisions." Enforcement may include a "civil suit for an injunction filed in the district court in the county where a noncompliant dog kennel is located."³¹ Representative filed this lawsuit in Cleveland County, where Gonzales's admittedly noncompliant, unlicensed kennel is located, and requested injunctive relief.

¶28 The Oklahoma Supreme Court, in *In the Matter of the Estate of Geller*, 1999 OK CIV APP 45, ¶ 11, 980 P.2d 665, 668, stated that "[a] party has standing either through a specific statute authorizing invocation of the judicial process or if she alleges a personal stake in the outcome of the controversy" Here, § 22-115.1, a specific statute, expressly authorizes Representative's invocation of the judicial process through prosecution of a civil injunction. Therefore, we reject Gonzales's argument that Representative lacked standing to bring this lawsuit.

IV. The Injunction

¶29 Gonzales complains that Representative did not show the irreparable harm or other criteria usually necessary to warrant the granting of injunctive relief, and thus the trial court erred by enjoining Gonzales from operating his kennel. We find this argument to be without merit as well. A violation of a state statute is an injury to the State and its citizens, and a continuing violation is an irreparable injury for which injunctive relief is available. *Western Heights Independent School District No. I-41 v. Avalon Retirement Centers, L.L.C.*, 2001 OK CIV APP 140, ¶ 13, 37 P.3d 962, 965. See also *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 2, 639 P.2d 1233.

CONCLUSION

¶30 Based on our review of the uncontroverted material facts and the applicable law, we find the trial court properly held Representative had standing to bring this lawsuit and request injunctive relief. Gonzales admits he is operating a kennel with 25 dogs within Cleveland County and within the city limits of Oklahoma City without a license and within 2500 feet of Representative's school. Those admissions establish Representative's right to injunctive relief without more.

¶31 We also find that Gonzales lacks standing to challenge the constitutionality of 11 O.S. Supp. 2008 § 22-115.1, given that he has no vested or other right, whether by virtue of the August 17, 2007, order, entered in Oklahoma County District Court Case No. CJ-2006-9144 (the subject of Appeal No. 105,313)³² or otherwise that entitles him to constitutional protection for unlawful operation of his unlicensed kennel. Without standing, Gonzales cannot be heard to challenge the trial court's ruling on the constitutionality of the statute.

¶32 Further, we find the October 2, 2008, Oklahoma County District Court's ruling in Case No. CJ-2008-5282 (Appeal No. 106,788) that the statute was "unconstitutional as applied" to Gonzales, does not control this Court's decision in the instant appeal. That ruling will be addressed in Appeal No. 106,788.

¶33 For all of the above reasons, we find the trial court's November 12, 2008, order granting Representative's and State's motions for summary judgment and denying Gonzales's motion for summary judgment, as well as the trial court's order, filed on January 23, 2009, deny-

ing Gonzales's "Motion for New Trial and to Vacate Judgment," should be, and hereby are, affirmed.

¶34 AFFIRMED.

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

1. Rule 1.36, Okla. Sup. Ct. Rules, 12 O.S. Supp. 2004, ch. 15, app. 1.
2. Title 11 O.S. Supp. 2008 § 22-115.1, provides as follows:

A. Upon the effective date of this act [June 4, 2008], no dog kennel shall be located within two thousand five hundred (2,500) feet of a public or private school or licensed day care facility in a municipality having a population of more than three hundred thousand (300,000). Provided, this prohibition shall not apply to a dog kennel that was lawfully in operation and in full compliance with all licensing, permitting and zoning requirements applicable to said kennel prior to the effective date of this act.

B. Upon the effective date of this act, no public officer or employee shall issue any type of license, permit, approval or consent for a dog kennel to be located within two thousand five hundred (2,500) feet of a public or private school or licensed day care facility in a municipality having a population of more than three hundred thousand (300,000).

C. Applications for a dog kennel license or for any governmental permit, approval or consent needed to authorize the lawful operation of a dog kennel that are pending on the effective date of this act shall be subject to the prohibitions set forth in subsections A and B of this section.

D. The provisions of subsections A and B of this section may be enforced by any public officer within whose jurisdiction a noncompliant dog kennel is located or by any other person aggrieved in any way by noncompliance with said provisions. Enforcement action may include a civil suit for an injunction filed in the district court in the county where a noncompliant dog kennel is located.

E. Any municipality is hereby authorized to enact an ordinance consistent with the provisions of this section and to enforce said ordinance by prosecution of violations in the municipal court, as provided by law.

F. For the purposes of this section, the term "dog kennel" means any place other than a federal, state or municipal facility, veterinary hospital or medical research institute, where more than four dogs beyond the age of six (6) months are kept, harbored, boarded, sheltered or bred.

3. The instant appeal (Cleveland County Dist. Ct. Case No. CJ-2008-1236-L) is one of four appeals before this Court — two from Cleveland County and two from Oklahoma County. Appeal No. 106,196, also from Cleveland County (Dist. Ct. Case No. CJ-2008-1236-L), is an appeal from the trial court's grant of a temporary injunction under 11 O.S. Supp. 2008 § 22-115.1(D). This Court's Opinion, filed on February 23, 2010, disposed of that appeal. Appeal No. 105,313 (Oklahoma County Dist. Ct. Case No. CJ-2006-9144) is an appeal brought by Representative, Jim Muse, Janet Muse, Dale Bliss, Cynthia Bliss, and Glen Orr from the trial court's order granting Gonzales certain zoning variances and a special zoning exception that had previously been denied by the Oklahoma City Board of Adjustment. The fourth case, Appeal No. 106,788 (Oklahoma County Dist. Ct. Case No. CJ-2008-5282) is brought by the State of Oklahoma and the City of Oklahoma City, alleging the trial court erred in finding the statute "unconstitutional as applied" to Gonzales.

4. The statute expressly gave Representative, as "any other person aggrieved in any way by noncompliance," the right to file this action in Cleveland County District Court and request injunctive relief.

5. Title 12 O.S. Supp. 2003 § 2024(D)(1) provides that the trial court shall permit State to intervene when "the constitutionality of any statute of this state affecting the public interest is drawn in question...."

6. Gonzales raises and shows internationally-recognized, champion registered American pit bull terriers (American Staffordshire terriers). Record (R.), at Tab 39, at pp. 68, 89, 90. Although there is considerable conflicting information in the record regarding the nature of the breed in general and Gonzales's dogs in particular, including unchallenged assertions that none of Gonzales's dogs has ever attacked or bitten any adult or child, none of these facts is material to our consideration of the statute at issue.

7. R., at Tab 24, p. 3.

8. It is undisputed that within Oklahoma, the municipalities with populations in excess of 300,000 are Tulsa and Oklahoma City.

9. Transcript (Tr.) of Gonzales's deposition, R., at Tab 12, attached as "Defendant's Exhibit 11," p. 55.

10. R., at Tab 3, p. 3.

11. Tr., at R., at Tab 12, attached as "Defendant's Exhibit 13," p. 77.

12. R., at Tab 40, attached transcript, pp. 43-44. The trial court stated: "So I guess what you're [counsel for Gonzales] saying is that without regard to when the argument started and all that, [Gonzales] had dogs — more than four dogs and had some kennels out there without a license before all this [litigation] started?" Counsel for Gonzales replied, "Correct. . . . The end of '05, like November of '05 is when we moved in." The trial court stated: "I guess another way to say that is he made these improvements knowing he didn't have a license." Counsel for Gonzales replied, "That is correct. And we got variances from the Board of Adjustment[t] for doing some improvements that were not permitted at the time."

13. R., at Tab 12, Tr., p. 77; Tab 24, p. 5.

14. As we stated in the Standard of Review section of this Opinion, our assessment of the trial court's exercise of discretion in denying Gonzales's "Motion for New Trial and to Vacate Judgment" rests on the propriety of the underlying grants of summary judgment. Thus, the propriety of the denial of the motion for new trial is encompassed within our *de novo* review of the correctness of the summary adjudications.

15. *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952 (1968).

16. If Gonzales had been operating his kennel lawfully with a license, he would have been "grandfathered" in under § 22-115.1(A) and would have been allowed to continue his lawful operation.

17. A license is the "permission by competent authority to do an act which, without such permission, would be illegal...." *Black's Law Dictionary* 829 (5th ed. 1979). "A license gives to the licensee a special privilege not accorded to others and which the licensee otherwise would not enjoy." *Priddy v. City of Tulsa*, 1994 OK CR 63, ¶ 8, 882 P.2d 81, 83. See *Carl v. State of Oklahoma ex rel. Department of Public Safety*, 1995 OK CIV APP 147, 909 P.2d 1196 (driver has no "vested right" to issuance of driver's license and thus no constitutional right to modification of an order revoking that privilege), citing *Robertson v. State of Oklahoma ex rel. Lester*, 1972 OK 126, 501 P.2d 1099; *Brown Distributing Co., Inc. v. Oklahoma Alcoholic Beverage Control Board*, 1979 OK 101, 597 P.2d 324 (no vested property right in liquor store license and no constitutional protection); *Fernhoff v. Tahoe Regional Planning Agency*, 622 F. Supp. 121 (D.C. Nev. 1985) (land developer who never had a building permit never had a vested right against any zoning changes that might restrict his development of land); *Hannifin v. Morton*, 444 F.2d 200 (C.A.N.M. 1971) (person who had applied for issuance of mineral prospecting permits prior to promulgation of regulation imposing rental as a condition to permit issuance had not acquired any vested right under the Constitution protecting him from the payment of rental); *Schraier v. Hickel*, 419 F.2d 663 (C.A.D.C. 1969) (the filing of an application for an oil and gas lease that has not been granted is an "expectation" only and it does not give any right to a lease, nor create a legal interest).

18. In *Lawton*, the language of the new law was found to be unconstitutionally vague such that people of common intelligence would have to guess at the meaning and an injunction issued, prohibiting the Board from enforcing the statute.

19. "Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right." *McNeely v. United States*, 874 A.2d 371, 381 (D.C. 2005), quoting *Nicchia v. People of State of New York*, 254 U.S. 228 (1920), and finding a dog owner lacked standing to bring constitutional claim.

20. In fact, use of one's property to operate a licensed kennel can be constitutionally limited. In *City of La Marque v. Braskey*, 216 S.W.3d 861 (Ct. App. Texas 2007), the landowner who operated a state-licensed cat shelter sought injunctive relief, along with a declaratory judgment that the city's kennel location ordinance did not apply to her. The Texas Court of Appeals vacated and dismissed the appeal because the ordinance's restrictions on the landowner's use of her property as a cat shelter did not constitute a threat to a vested property right and thus the trial court did not have jurisdiction to hear the landowner's lawsuit. The court found that the law, prohibiting a kennel within 500 feet of a dwelling, school or church, only affected the way the landowner used her property, which was not an absolute right or a constitutionally protected right. The court did not reach the issue of the constitutionality of the penal ordinance itself. See also *Miller v. City of Arcadia*, 121 Cal. App. 660, 9 P.2d 587 (1932), wherein the trial court, affirmed on appeal, upheld the constitutionality of an ordinance limiting the number of dogs that could be kept within 250 feet of any human dwelling house, the result of which was to shut down the use of the property as a kennel.

21. This case was filed in the Oklahoma County District Court by Gonzales to appeal from the Oklahoma City Board of Adjustment's decision denying requested municipal zoning code variances regarding, for example, parking spaces, curbing, driveway dimensions and a

special zoning exception. The Oklahoma County District Court entered the August 17, 2007, order as part of the settlement of the appeal to the district court from the Board of Adjustment's denial.

22. R., at Tab 19, p. 7.

23. R., at Tab 3, "Defendant's Exhibit 4."

24. Chapter 59 of the Oklahoma City Municipal Code is that city's real property zoning code.

25. Because we reject that argument, we also find no merit in Gonzales's assertion on appeal that the Cleveland County trial court's order "nullified" the Oklahoma County District Court's August 17, 2007, order. Although a finding of constitutionality by the trial court may have rendered the August 17, 2007, zoning variances and special zoning exception ruling useless to Gonzales in a practical sense, it did not, in any legal sense, render the Oklahoma County August 17, 2007, order a "nullity" — of no legal force or effect.

26. While Gonzales may have complied, so far, with the trial court's directives in the August 17, 2007, order — keeping no more than 25 dogs, not allowing them outside the kennel between 7:00 p.m. and 7:00 a.m., enclosing the property with an eight foot cedar fence with a concrete footer, refraining from selling dogs on the premises, and maintaining the fence — contrary to Gonzales's assertions, the order does not state that compliance entitles Gonzales to a license; nor does the order grant a license or state what the requirements for a kennel license are. The order grants variances and a special exception to the zoning code. It does not address requirements for kennel licensure nor does it command the City of Oklahoma City to issue a kennel license to Gonzales.

27. Even if Gonzales had standing, his claim that § 22-115.1 is a constitutionally prohibited ex post facto law and/or a bill of attainder under Oklahoma Constitution, art. 2, § 15 is also without merit. For a statute to be a prohibited ex post facto law, it must have been enacted subsequent to the conduct to which it is being applied. *Gibson v. State of Oklahoma*, 2000 OK CR 14, 8 P.3d 883. Here, the statute is expressly not retroactive. It took effect only on passage. It specifically exempts kennels operating lawfully at the time of enactment. Second, a bill of attainder is a legislative act that inflicts punishment without a judicial trial. *Duncan v. Oklahoma Department of Corrections*, 2004 OK 58, 95 P.3d 1076. Bills of attainder are unconstitutional because they purport to mete out punishment for conduct which precedes the enactment of the legislation. In *the Matter of the Estate of Geller*, 1999 OK CIV APP 45, 980 P.2d 665. In *Geller*, a putative grandchild (claimant) born out of wedlock filed a petition for probate of the putative paternal grandmother's will. The Oklahoma Court of Civil Appeals held that, under *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 2, 639 P.2d 1233, the claimant did not have standing in the probate proceeding under 84 O.S.1991 § 215. The Court also rejected, among the claimant's other arguments, the argument that § 215 was unconstitutional as applied to her as an equal protection violation, an impermissible special law and that it denied her "vested right" to inherit as an ex post facto law and as a bill of attainder. The Court noted that the claimant had no "vested right" to inherit because the *prospect of inheritance* is not a vested right and because there is no punishment being inflicted on the claimant without a judicial trial. The Court further noted that having no vested right, the application of the law did not retrospectively affect her legal position and thus was not an ex post facto law. Rejecting the claim that the legislation was a bill of attainder, the Court said, "The Oklahoma Supreme Court also has recognized that a statute does not inflict punishment on an individual merely because it prevents him from doing what he otherwise could do in the absence of such statute." *Geller*, at ¶ 23, 980 P.2d at 671, citing *Golden v. Okfuskee County Election Bd.*, 1986 OK 57, 723 P.2d 982. See also *U.S. v. Lovett*, 328 U.S. 303, 324, 66 S.Ct. 1073, 1083 (1946), wherein the U.S. Supreme Court noted that "[t]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

We also note that Gonzales appears to rely on the word "prosecution" in § 22-115.1(E) as determining that the statute, which contains no fines or imprisonment provisions, is penal in nature. Civil, as well as criminal cases, can be referred to as being "prosecuted." See, e.g., *State of Oklahoma ex rel. Oklahoma Bar Association v. Southern*, 2005 OK 18, 114 P.3d 422 (attorney's resignation approved by Oklahoma Supreme Court based on attorney's "failure to prosecute" clients' cases alleging violation of federal civil employment discrimination laws.) In fact, Gonzales himself uses the term "prosecute" to refer to the instant civil action in Exhibit C to his Petition in Error — the sixth numbered issue raised.

28. The Oklahoma County District Court, in CJ-2008-5282, ruled that because it found the statute unconstitutional as applied to Gonzales under art. 5, § 52, it "does not reach, nor decide, the other six (6)

areas of constitutional attacks." Although that trial court decreed that the statute "does not apply to [Gonzales] or this property," it also decreed that "11 O.S. § 22-115.1 is otherwise constitutional."

29. For the same reasons, we reject Gonzales's argument that res judicata and/or issue preclusion apply. There are two forms of preclusion recognized by Oklahoma courts: claim preclusion (formerly referred to as res judicata) and issue preclusion (formerly referred to as collateral estoppel). Both require identity of parties. *Miller v. Miller*, 1998 OK 24, 956 P.2d 887.

30. See Gonzales's Petition in Error.

31. 11 O.S. Supp. 2008 § 22-115.1(D).

32. That ruling will be reviewed in Appeal No. 105,313.

2010 OK CIV APP 54

IN RE C.L.D., an allegedly deprived child under the age of 18 years. STATE OF OKLAHOMA, Petitioner/Appellee, vs. BENNIE LEE DUKE, JR., Respondent/Appellant.

Case No. 106,320. May 5, 2010

APPEAL FROM THE DISTRICT COURT OF JACKSON COUNTY, OKLAHOMA

HONORABLE DAVID BARNETT,
TRIAL JUDGE

AFFIRMED

John M. Wampler, DISTRICT ATTORNEY, Stephen Booker, ASSISTANT DISTRICT ATTORNEY, Altus, Oklahoma, for Petitioner/Appellee

Daniel E. McMahan, Altus, Oklahoma, for Respondent/Appellant

Rana Wycoff Womack, Altus, Oklahoma, for Minor Child

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 In this deprived child proceeding, natural father, Bennie L. Duke, Jr., appeals from an order of the district court granting a petition for kinship guardianship and appointing maternal grandmother and her husband as permanent guardians for his minor son CLD. Based on our review of the record on appeal and applicable law, we affirm the order.

BACKGROUND

¶2 In October 2004, 4-year-old CLD was taken into emergency custody by the Department of Human Services (DHS) on allegations against his natural parents Bennie Duke, Jr. (Father), and Stephanie Epperson (Mother) of sexual abuse, neglect and failure to protect. CLD was hospitalized on that date with an abrasion in the gluteal fold and anal leakage. The child was constipated, had severe diaper rash and dried feces on his buttocks. The child was also in need of dental care; one of the caps on his severely decayed upper teeth had fallen

out and had not been replaced. DHS had additional concerns for the child because Father's brother, Benjamin Duke (Uncle), had previous convictions for multiple counts of sodomy and lewd molestation involving minor children.¹ While CLD remained in emergency custody, he disclosed to the foster mother that Father and Uncle had "put their fingers up [my] butt."

¶3 On November 1, 2004, the State of Oklahoma filed a petition requesting that the district court adjudicate CLD deprived because the child did not have the proper parental care or guardianship and/or the home was an unfit place for him by reason of neglect, abuse, cruelty, or depravity on the part of his parents. The State alleged:

(1) on 10/18/04, [CLD] presented at Jackson County Memorial Hospital with an abrasion in the gluteal fold and anal leakage. [CLD] later stated that his father, Bennie Duke, and his uncle, Benjamin Duke, had stuck their fingers in his anus. (2) The mother, Stephanie Epperson, knew or should have known of the alleged abuse and failed to protect. (3) Both parents, Bennie Duke and Stephanie Epperson, have failed to provide adequate physical care for the child, to-wit: (a) on 10/18/04, there was a rash on his diaper area and dried feces on his buttocks, and (b) on 10/18/04, the parents had not yet sought attention for CLD's teeth, one of which had previously lost a cap.

¶4 After several continuances, CLD's adjudication hearing took place on April 8, 2005. Mother stipulated to the State's petition. Father stipulated to the allegations in the petition involving CLD's medical/dental condition, improper nutrition and the failure to prevent the child from being "near a person [Uncle] who had served . . . seven-to-ten years for multiple counts of child molestation." The district court adjudicated CLD deprived and ordered a hearing regarding entry of an Individualized Service Plan (ISP) for the parents.

¶5 On September 23, 2005, the district court entered a dispositional order that required Father to successfully complete a DHS treatment plan. This was an amended order that changed the requirements of the first DHS-proposed ISP.²

¶6 CLD continued to remain in DHS custody and, on November 24, 2005, pursuant to an Interstate Children's Placement Compact, and

after completion of a home study, DHS placed the child with maternal grandmother, Karlyn Miller, and her husband, Terry Miller (Grandparents), in Quinlan, Texas.

¶7 CLD had been in DHS custody for a period of 23 months when his attorney filed a Petition for Kinship Guardianship, in which Karlyn Miller joined. An amended petition was filed, in which Terry Miller joined, seeking determination that a kinship guardianship should be entered naming Grandparents guardians for CLD pursuant to 10 O.S. Supp. 2006 § 7003-5.5(C)(8). The State approved the kinship guardianship, but advised the district court that the State would pursue termination of parental rights if a kinship guardianship order was not entered.

¶8 The district court conducted a non-jury trial.³ At the time of trial, CLD had been residing with Grandparents for approximately 18 months. On the first day of trial, June 12, 2007, Mother filed her consent to the transfer of permanent care and custody of CLD to Grandparents.⁴ After the second day of trial, the district court granted the petition for kinship guardianship, appointing Grandparents as general guardians for the child and granting Father limited visitation. Father appeals.

STANDARD OF REVIEW

¶9 The petition for kinship guardianship, filed pursuant to 10 O.S. Supp. 2006 § 7003-5.5(C)(8), requires that the district court's determination be supported by the "clear and convincing" level of proof. *In re Guardianship of S.M.*, 2007 OK CIV APP 110, ¶ 13, 172 P.3d 244, 247. Our review on appeal must also demonstrate the presence of clear and convincing evidence to support the trial court's decision. *See In re S.B.C.*, 2002 OK 83, ¶ 7, 64 P.3d 1080, 1083 (holding that appellate review in a parental-bond-severance proceeding must be nothing less than the very same standard as that which is required in the trial courts).

ANALYSIS

I. The Required Statutory Findings

¶10 At the periodic review hearings following the adjudication of CLD as deprived, DHS consistently recommended termination of Father's parental rights. However, when Grandparents indicated their willingness to become permanent guardians of CLD, the State agreed to and supported Grandparents' peti-

tion, but reiterated that if the kinship guardianship did not proceed, the State would pursue termination of Father's parental rights.

¶11 Section 7003-5.5 sets forth the dispositional orders that the district court may enter following adjudication of a child as deprived.⁵ The procedure to be followed when a kinship relation is at issue is provided by statute:

When reunification of the family is not recommended or possible, as determined by the court, the court may order a child's permanent care and custody transferred to a kinship guardian subject to residual parental rights and responsibilities and subject to such orders of the court as deemed necessary for the health, safety or welfare of the child.

10 O.S. Supp. 2006 § 7003-5.5(C)(8)(a).

A petition for kinship guardianship shall allege, and the petitioner must prove by clear and convincing evidence, the following six elements:

- (1) the child is in the legal custody of the Department,
- (2) more than twelve (12) months have passed since the date of the dispositional order placing such child in the legal custody of the Department,
- (3) the parents of the child are presently and for the foreseeable future unable to provide proper and adequate care for the child,
- (4) the prospective kinship guardian consents to the appointment,
- (5) the child has resided with the kinship foster parent and there exists a loving and emotional tie between the child and the kinship foster parent, and
- (6) it would be in the best interests of the child for the petition to be granted.

Section 7003-5.5(C)(8)(c). "If, in a non-consensual proceeding, the trial court finds these elements have been proved with clear and convincing evidence, then the trial court is directed to grant the petition." *In re S.M.*, 2007 OK CIV APP 110at ¶ 13, 172 P.3d at 247 (citing section 7003-5.5(C)(8)(f)).

¶12 Father claims that the district court abused its discretion in denying him the right to regain custody of CLD after completion of the requirements of his ISP. The record shows

that Father did not complete individual counseling or participate in anger management classes. He did not keep monthly contact with the DHS caseworker or provide monthly rent and utility receipts to her. He was not consistent in visiting CLD. There was clear and convincing evidence, and the district court found, that Father had not completed all of the requirements of the ISP. Even if Father had completed all aspects of the ISP, that fact would not be determinative of Father's ability to provide proper and adequate care for CLD "for the foreseeable future." Section 7003-5.5(C)(8)(c). Just as failure to perform an ISP is not conclusive proof of the need to terminate parental rights, completion of an ISP does not automatically prove that the conditions that led to the deprived determination no longer exist. *See In re S.A.*, 2007 OK CIV APP 97, ¶ 12, 169 P.3d 730, 735. Neither the law nor the facts supports Father's argument regarding completion of his ISP.

¶13 Father also maintains that there is no evidence that he had not properly cared for CLD in the past. The record conclusively shows otherwise. The issues before the district court involved not only Father's past conduct, but also whether, in the future, he would be able to provide that level of care and protection needed by the child. Indeed, as indicated by comments from the bench, that was one of the primary concerns of the district court. *See In re Baby Girl L.*, 2002 OK 9, ¶ 23, 51 P.3d 544, 554-55 (noting that protection of children from harm is the foundation of Oklahoma parental-rights-termination law).

¶14 First, DHS child welfare specialist testified that, in her opinion, CLD would likely face emotional harm if removed from the long-term foster placement with Grandparents and returned to live with Father. Second, DHS was aware that Father had allowed Mother to reside with him when she had not completed the provisions of her ISP. Third, Mother and Father both maintained contact with convicted sex offender, Uncle. Fourth, DHS was justifiably concerned about CLD's future exposure to the risk of sexual abuse and Father's ability to provide a stable home free from the threat of sexual abuse. Father's evidentiary-based argument clearly fails.

II. Placement With Grandparents

¶15 In his second proposition of error, Father asserts that the district court's permanent

placement of CLD with Grandparents was an abuse of discretion. This argument is based solely on his contention that Grandmother failed to properly raise her own children.

¶16 CLD was initially placed with Grandparents in November 2005, after completion of a home study in cooperation with the State of Texas that included a background check and also provided details regarding Grandparents' financial situation, medical health, and fitness to care for CLD. Before DHS actually placed CLD with Grandparents, DHS informed Father of its intended foster care placement. Father agreed with the placement. By the time of trial, CLD had spent months thriving in Grandparents' home, and the State, DHS, and the child's attorney agreed that the kinship guardianship was appropriate. We find no merit to this proposition of error.

III. Father's Constitutional Claims

¶17 We acknowledge that "the relationship of parents to their children [is] a fundamental constitutionally protected right." *Murrell v. Cox*, 2009 OK 93, ¶ 24, 226 P.3d 692, 695 (citing *In re Chad S.*, 1978 OK 94, ¶ 12, 580 P.2d 983, 985). The Oklahoma Supreme Court has consistently held that "the right of a parent to the care, custody, companionship and management of his or her child is a fundamental right protected by the federal and state constitutions." *Id.* (citing *In re Grover*, 1984 OK 20, ¶ 9, 681 P.2d 81, 83). The parent's constitutional interests, however, are not the only constitutional rights at stake.

The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental and must hence be shielded with equal vigor and solicitude.

In re T.H.L., 1981 OK 103, ¶ 13, 636 P.2d 330, 334 (footnote omitted).

¶18 Although a permanent plan of legal guardianship certainly limits Father's care, control of and decision-making regarding CLD, the kinship guardianship ordered by the district court is not the equivalent of, and is less intrusive than, termination of Father's parental rights. With the kinship guardianship in place, he retains residual parental rights and responsibilities and limited visitation. Further, although it is

essentially a permanent placement for CLD, the continued fitness of Grandparents to serve as guardians is addressed in section 7003-5.5(C)(8)(h), which sets forth grounds for termination of the kinship guardianship.

¶19 Finally, Father argues that the district court was required to find, by clear and convincing evidence, that he was "unfit." Father insists that the record does not establish his "unfitness." However, such proof was not required before the district court could grant the petition for kinship guardianship. The authority cited by Father in support of this argument is not applicable under the circumstances of this case where a prior deprivation of custody occurred pursuant to a deprived child adjudication. See *In re S.M.*, 2007 OK CIV APP 110at ¶¶ 14-15, 172 P.3d at 247. Father's constitutional rights are protected by the statutory burden, imposed by section 7003-5.5(C)(8)(f), to prove by clear and convincing evidence the statutory elements of a section 7003-5.5(C)(8)(c) kinship guardianship.

IV. The Child's Best Interests

¶20 The evidence was that CLD thrived after he began living with Grandparents. At some point, CLD had been diagnosed with Attention Deficit Hyperactivity Disorder and Post Traumatic Stress Disorder. The DHS caseworker testified at trial that CLD showed remarkable improvement, both behaviorally and intellectually, since living with Grandparents. There were reports that, after visits with Mother and Father, CLD acted up at school, became aggressive with other children and started stuttering. When CLD first went to live with Grandparents, his developmental performance was in the low average level. However, while continuing to live with Grandparents, CLD's evaluation levels had improved to the point where he performed academically at grade level and no longer qualified for speech therapy and other special services at school.

¶21 Father demonstrated significant compliance, but not complete compliance, with the terms of the ISP. Father also testified that he was willing to care for CLD, support him, monitor his intellectual development and follow all recommendations of professionals providing services to him and CLD. Father's earnestness, however, does not necessarily equate to the ability to provide proper and adequate care for CLD.

¶22 Father received social security disability benefits of \$560 per month due to medical and mental conditions. His total income was approximately \$1,215 per month, including the salary he earned from working at a horse ranch. Father worked long hours, from 8:00 a.m., until 6:00 p.m., sometimes 6-7 days a week, while getting colts ready for sale. His job also required that, on occasion, he travel out of town, requiring overnight stays of up to 3 nights.

¶23 The evidence shows that Father had never had the sole responsibility for CLD, and, as a result, he lacked experience in caring for him. Father, when asked how he would provide care for CLD during overnight trips, indicated that he had no “back-up” plan, and had no suitable family members to whom he could turn for help with CLD. Father believed that, when he had to travel out of town for his employer, he could find a day care center where he could leave CLD. Father had no license to drive, and was unable to drive because of vision problems that resulted from his diabetes. When asked how he would provide transportation for CLD, Father stated that he intended to do so by taxicab or by charter transit minibus. Where, as here, a parent has not had physical custody of a young child for a protracted period of time, testimony as to the effect of returning the child to the custody of the parent is probative of the child’s best interests.

¶24 In addition, Father had not provided support for CLD during the period the child was with Grandparents. Father testified that the reason he did not pay support was because there was no court order requiring him to do so.

¶25 Further, Father was still seeing Mother, who had failed to complete a substantial portion of her ISP and who had been diagnosed with severe psychological disorders. During the week before trial, a DHS social worker visited Father’s apartment and found Mother residing there. When questioned during the first day of trial regarding the circumstances of Mother’s presence in his home, Father testified that Mother had stayed with him for 3 or 4 days because he had emergency knee surgery, the doctor required someone to stay with him, and Mother was willing to help. Two months later, during the second trial day, Mother testified that she had stayed with Father for a period of 4 weeks following the knee surgery. She also testified that Uncle was at the home

every day during Father’s recuperation period. Mother claimed that Father still called her every day, and she saw him 3-4 times per week. As for this conflicting testimony, “the trial court heard the parties testify and observed their demeanor on the witness stand and is in better position to evaluate their testimony than is this court from an examination of the record of the testimony on these items.” *In re Guardianship of C.D.A.*, 2009 OK 47, ¶ 10, 212 P.3d 1207, 1210 (quoting *Gibson v. Dorris*, 1963 OK 235, ¶ 3, 386 P.2d 186, 187).

¶26 Father maintained that he would not ever allow CDL to be around Uncle. Father admitted, however, that he still maintained a relationship with Uncle, although he described the relationship as “[not] too strong.” Father testified that he only “occasionally” talked to Uncle, but when cross-examined he indicated that he probably talked to Uncle weekly. Father also testified: “Me and my mom, we talk a lot. . . . I mean, it ain’t like I’m going over there every day or anything. I mean, I call mom if [Uncle’s] over there and see if she’s seen him and I call his house but as far as going to his house, no.”

¶27 When Father was 19-years-old, he pled guilty and was convicted of lewd or indecent proposal or acts to a male child between the ages of 6-8 years.⁶ Father relinquished his parental rights to his older daughter from a previous relationship. The girl was removed from Father’s home in the wake of allegations that she had been abused by Uncle and one of Uncle’s friends.

¶28 Father blamed Uncle for the fact that both his children had been removed from him. He also blamed their mothers. And yet, even though Father blamed Mother and Uncle for DHS’s involvement with CLD, he turned to them when he needed help. He let Mother move into his home, and there was evidence that, when she was not living with Father, he still kept in constant contact with her. He recommended Mother, and she was hired to care for, a small child living in an apartment two doors down from Father. Perhaps one of the most troubling aspects of Father’s testimony concerned his knowledge that Mother had resumed her relationship and was “back with” Uncle.

CONCLUSION

¶29 The record contains clear and convincing evidence supporting the order for a kinship

guardianship. We find no error of law or abuse of discretion affecting the validity of the district court's order. The evidence herein establishes that CLD's best interests would be served by the kinship guardianship ordered by the district court. Accordingly, we affirm the district court's order appointing Grandparents as permanent guardians for CLD.

¶30 **AFFIRMED.**

WISEMAN, C.J., and BARNES, J., concur.

1. Mother and Father had divorced in May 2004, after Mother began a relationship with Uncle and moved into Uncle's home, taking CLD with her. There was some testimony that Mother claimed to be wearing an engagement ring given to her by Uncle. Father was aware of Uncle's lewd molestation convictions and claimed that he asked Mother to move back in with him so that CLD would not be around Uncle. He convinced Mother to move back in with him, and within approximately one month, DHS had taken custody of CLD.

2. At a hearing on April 20, 2005, Father objected to part of the first proposed ISP, arguing that it was based on hearsay, speculation and rank gossip regarding another of his children. This involved Father's 14-year-old daughter from a previous relationship, and a statement in the plan that "there is information available that [he] had sexually penetrated her." Father had agreed to termination of his parental rights to her and testified that he had not seen her since she was 4-years-old. Father also argued that all matters that did not directly relate to the stipulated items of failure to protect, provide proper medical care and nutrition should be omitted from the ISP. Father specifically objected to the requirement that he undergo a "psychosexual evaluation," on grounds that any sexual abuse allegations against him regarding CLD remained unsubstantiated and because there was nothing in the record to indicate the reliability of such testing when performed on a "mentally retarded person." A psychological evaluation performed on Father revealed that Father's full scale IQ of 66 placed him in the "mildly mentally retarded range of intellectual functioning." The district court entered a dispositional order changing the requirements of the first proposed ISP after Father filed an emergency writ in the Supreme Court. The writ was dismissed after the district court withdrew the first ISP.

3. The trial was conducted by the successor judge, who had been appointed by the Presiding Judge of the District Court on May 15, 2007, to replace the Honorable Clark Huey after Father requested Judge Huey's recusal. The trial proceeded over two days. The second day of trial took place on August 15, 2007.

4. Mother had failed to comply with most of the aspects of her ISP. The record contains evidence regarding her severe mental instability and continued association with Uncle.

5. Amended and renumbered as 10A O.S. § 1-4-706 by Laws 2009, HB 2028, ch. 233, § 248, emerg. eff. May 21, 2009.

6. The parties stipulated that, although Father was 19-years old at the time of the conviction, he had a mental age of 14½ years.

2010 OK CIV APP 61

NANCY FULLER HEBBLE and SUSAN FULLER MALEY, as Individuals; NANCY FULLER HEBBLE and SUSAN FULLER MALEY, as Co-Trustees of THOMAS R. FULLER TESTAMENT TRUST; WACHOVIA BANK, N.A., as Executor of the Estate and Trust of ELIZABETH FULLER GARDNER TRUST; and MARSHALL T. STEVES, Trustee of the DINGS TRUST AGENCY, Plaintiff/Appellees, vs. SHELL WESTERN

E & P, INC., and SHELL OIL COMPANY, Defendant/Appellants.

Case No. 106,470. December 18, 2009

APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY, OKLAHOMA

HONORABLE MICHAEL C. FLANAGAN, TRIAL JUDGE

AFFIRMED

Randall K. Calvert, CALVERT LAW FIRM, Oklahoma City, Oklahoma, and Clark O. Brewster, Guy A. Fortney, BREWSTER & De ANGELIS LAW FIRM, Tulsa, Oklahoma, for Plaintiff/Appellees,

Sharon T. Thomas, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C., Oklahoma City, Oklahoma, and R. Brad Miller, DURBIN, LARIMORE & BIALICK, Oklahoma City, Oklahoma, and Gregory A. McKenzie, GREGORY A. MCKENZIE, P.C., Edmond, Oklahoma, for Defendant/Appellants,

John N. Hermes, Gary W. Catron, Kristin M. Simpsen, McAFEE & TAFT, Oklahoma City, Oklahoma, for *Amicus Curiae*, Oklahoma State Chamber of Commerce and Industry, Inc.,

Mark D. Christiansen, CROWE & DUNLEVY, Oklahoma City, Oklahoma, for *Amicus Curiae*, The Oklahoma Independent Petroleum Association,

Brian R. Matula, Oklahoma City, Oklahoma, for *Amicus Curiae*, Chesapeake Energy Corp.,

Dennis C. Cameron, Bradley W. Welsh, GABLE & GOTWALS, Tulsa, Oklahoma, for *Amicus Curiae*, ConocoPhillips Company.

CAROL M. HANSEN, Presiding Judge:

¶1 Defendant/Appellants, Shell Western E & P, Inc. and Shell Oil Company (collectively Shell), seek review of the trial court's judgment based on a jury verdict in favor of Plaintiff/Appellees (Owners) for \$13,205,916.00 in actual damages and \$53,625,000.00 in punitive damages in Owners' action for underpayment of oil and gas proceeds. At issue is whether Owners's claims sounded in tort such that the statute of limitations was tolled until Owners learned of their loss. We hold Shell owed a fiduciary duty to Owners arising from its resort to the police powers of the state in unitizing oil and gas interests, and therefore, Owners timely brought a tort claim. We find no error of law in the conduct of trial and affirm.

¶2 Owners are the successors to a net profits interest reserved in a 1927 assignment of an oil and gas lease (Crews Lease) in Stephens and Carter Counties, Oklahoma.¹ Shell acquired the Crews Lease in 1948 and drilled wells on the lease through the 1950s, paying a share of the net profits to Owners or their predecessors. In 1964, the Oklahoma Corporation Commission (Commission) granted Shell's application to create a waterflood unit for secondary recovery in the Sims Sand, called the Brittain Sims Unit. The Commission's order adopted a unitization plan which designated Shell as the unit operator. The plan expressly addressed net profits interests:

Any net profits, net proceeds, or other interest of a similar nature, which is payable out of profits resulting from operations under the instrument creating such interest, shall be payable as provided in such instrument, except that as to the Unitized Formation underlying the lands covered thereby included in the Unit Area, such computations shall be based not upon actual production from and costs incurred in operations on such land, but instead upon that portion of the unit production and unit expense which is allocated to such lands under the terms hereof.

In 1970, the Commission created the Brittain Deese Unit for secondary recovery by waterflood in the Deese Sands. It again adopted a unitization plan designating Shell as operator and providing the same language quoted above regarding net profits interests.

¶3 In 1972, the Commission adopted an order establishing 80-acre drilling and spacing units for the development of oil from the Sycamore formation. The order provided in part:

4. That all royalty interests within any spacing unit shall be communitized and each royalty owner within any unit shall participate in the royalty from the well drilled thereon in the relation that the acreage owned by him bears to the total acreage in the unit.

5. That in the event there are divided or undivided interests within any unit and the parties are unable to agree on a plan for the development of the unit, then their rights and equities shall be adjudicated by the Commission as provided for by subsection d, Section 87.1; Title 52, OSA.

Shell was the operator of the Brittain Deep No. 2, a unit well in the Sycamore. According to Shell, the Brittain Deep No. 2 was not located on the Crews Lease but was in the same 80-acre drilling and spacing unit for the Sycamore, and therefore revenue and expenses from that well should have included in the net profits calculations for the Crews Lease.

¶4 In 1985, Shell sold its interest in the Crews Lease to Maynard Oil Company (Maynard). Shell admits it failed to pay Owners \$750,708.00 in net profits from 1973 through 1985. Over \$715,000.00 from the Brittain Deep No. 2 Well and the rest was from the Brittain Deese Waterflood Unit. Shell paid the net profits due from the Brittain Sims unit.

¶5 In 1995, Owners filed the suit below against Shell and Maynard, seeking actual and punitive damages under theories of fraud and breach of statutory and quasi-fiduciary duties. Maynard settled with Owners and was dismissed. Shell filed multiple motions for summary judgment on statute of limitations grounds, among others. The trial court denied summary judgment, ruling Shell as operator had a fiduciary or quasi-fiduciary duty to non-operators whose interests were unitized by Commission order. It ruled Shell's duties continued until repudiation by Shell and communication of the repudiation to Owners. It found there were issues of material fact preventing summary judgment on the statute of limitations defense to the breach of fiduciary claim. It also found there was an issue of material fact as to when Owners knew or should have known of Shell's alleged fraud, preventing summary judgment on the statute of limitations defense to Owners' fraud claim.

¶6 The parties tried the matter to a jury in May 2008. The trial court bifurcated the issues of liability and actual damages from the issue of punitive damages. The jury found for Owners on their claims for (1) false representation, nondisclosure or concealment, deceit, or constructive fraud, and (2) breach of fiduciary duty. It awarded actual damages in the amount of \$13,205,916.00. Prior to submitting the case to the jury at the second stage of trial, the trial court lifted the cap on punitive damages pursuant to the statute in effect at the time the case was filed, 23 O.S.1991 §9(A). The jury then awarded \$53,625,000.00 in punitive damages. The trial court entered judgment for Owners in the amount of \$66,830,916.00. It denied Shell's motions for judgment notwithstanding the ver-

dict and for remittitur or new trial. Shell appeals from these orders.

I

¶7 As a threshold matter, we must address Shell's contention the trial court erred in ruling Shell had a fiduciary duty to Owners and the statute of limitations did not begin to run on Owners' claim for breach of the fiduciary duty until Shell repudiated its fiduciary duty and communicated that repudiation to Owners. Shell asserts Owners' claims are contract-based and subject to the five-year limitations period of 12 O.S.Supp.2008 §95(A)(1).

¶8 In Oklahoma, oil and gas operators have no fiduciary duty to non-operators arising solely from contracts such as leases, communitization agreements, or joint operating agreements. *Howell v. Texaco Inc.* (*Howell*), 2004 OK 92, 112 P.3d 1154, 1160-1161, and *Tarrant v. Capstone Oil and Gas Co.* (*Tarrant*), 2008 OK CIV APP 17, 178 P.3d 866, 870-871. An operator's breach of duties under such agreements gives rise to a breach of contract claim, not a breach of fiduciary duty claim. *Tarrant*, 178 P.3d at 871.

¶9 However, the Oklahoma Supreme Court has "recognized the existence of a fiduciary duty owed by a unit to the royalty owners and lessees who are parties to the unitization agreement or subject to the order creating the unit. This is not a duty created by the lease agreement but rather by the unitization order and agreement." *Leck v. Continental Oil Co.* (*Leck*), 1989 OK 173, 800 P.2d 224, 229. After unitization, the leases no longer control. *Howell*, 112 P.3d at 1161. Instead, the parties' relationships are defined by statute and by Commission order. "The unit organization with its operator stands in a position similar to that of a trustee for all who are interested in the oil production either as lessees or royalty owners." *Young v. West Edmond Hunton Lime Unit*, 1954 OK 195, 275 P.2d 304, 309. The fiduciary duty of the unit operator arises not only from the creation of field-wide units for secondary recovery under 52 O.S.2001 §§287.1-287.15, but also from the creation of drilling and spacing units under 52 O.S.Supp.2007 §87.1. *E.g.*, *Leck*, 800 P.2d at 229. The critical factor is the resort to the police powers of the state on the part of a lessee in unitization proceedings which modify and amend existing legal rights. *Olansen v. Texaco Inc.*, 1978 OK 139, 587 P.2d 976, 985.

¶10 In the present case, Shell as the unit operator owed a fiduciary duty to Owners to

properly account for and distribute oil and gas proceeds from the units. As to the Brittain Deese unit, this duty clearly arose from the Commission order creating the unit and appointing Shell as unit operator. The situation as to the Brittain Deep No. 2 unit is less clear-cut. The Commission created the unit and ordered the royalty interests communitized, but it did not pool the working interests and appoint an operator. Shell became the operator pursuant to a joint operating agreement (JOA) between the working interest owners. Had Owners been parties to the JOA, we would not find a fiduciary duty. Owners were not parties to the JOA because the net profits interest, although carved out of the working interest, did not include the right to drill. The Brittain Deep No. 2 was not drilled on the Crews Lease; therefore Shell's duty to Owners arose from the Commission's exercise of its police power on the lessees' behalf. Owners' right to payment from the oil proceeds in the unit was communitized as royalty within the meaning of the term as used in §87.1 and the Commission's order.² Accordingly, Shell as the unit operator owed a fiduciary duty to Owners.

¶11 The trial court instructed the jury an action for breach of fiduciary duty must be brought within two years of the date Owners knew or should have been aware Shell repudiated its fiduciary duties to Owners. It defined repudiation as "a clear, express communication of rejection of the fiduciary duty." The instruction is correct but incomplete. The trial court based the instruction on the rationale of Justice Summers' opinion, concurring in result, in *Goodall v. Trigg Drilling Co., Inc.* (*Trigg*), 1997 OK 74, 944 P.2d 292, 297, in which he characterized the relationship between operator and royalty interest owner as quasi-fiduciary and cited *Becker v. State ex rel Dept. of Public Welfare*, 1957 OK 102, 312 P.2d 935, 942 for the proposition "the statute of limitations begins to run when a trustee repudiates the trust and such fact is brought to the knowledge of the beneficiary." However, both Summers and the majority recognized the running of the limitations period would be triggered by the interest owner's knowledge the operator owed the interest owner money. *Trigg*, 944 P.2d at 295 and 297.

¶12 In other words, the discovery rule applicable in tort cases applies to breach of fiduciary duty. The statute of limitations on Owners' claims for breach of fiduciary duty began to

run when they knew or, in the exercise of reasonable diligence, should have known of their injury. *Szczepka v. Weaver*, 1997 OK CIV APP 35, 942 P.2d 247, 249. Merely showing Owners knew the well was producing would not be sufficient to show they knew or should have known of their injury. Owners were not due payment until sales of oil and gas produced from the property had reimbursed the operator for the expenses of drilling, development and operation of the lease. This information was available only from Shell. Owners would not know Shell held proceeds belonging to them, and whether they were due payment, until they knew the amount of sales and expenses for the units.

¶13 Although the trial court did not instruct the jury on the discovery rule with regard to the breach of fiduciary duty claim, it did instruct on the discovery rule as to the statute of limitations on Owners' claim for false representation. The trial court presented the two claims to the jury as alternative theories of recovery for the same injury, and the jury found for Owners on both claims. In order to find for Owners on the false representation claim, the jury had to find Owners did not know Shell was not paying them their share of the net profits prior to a date two years before they filed their petition. Therefore, we are unable to find the jurors were misled and reached a different conclusion than they would have reached but for the incomplete instruction on the running of the limitation period for breach of fiduciary duty. *Cimarron Feeders, Inc. v. Tri-County Elec. Coop., Inc.*, 1991 OK 104, 818 P.2d 901, 902.

II

¶14 Shell's next contention is the trial court erred in failing to instruct the jury on the proper burden of proof for fraud. Owners assert Shell failed to preserve any error from the refusal to give Shell's requested instructions Nos. 36 and 38. We agree. The manner for objecting to jury instructions is set forth in 12 O.S.2001 §578:

A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to make objection thereto by dictating into the record in open court, out of the hearing of the jury, after the reading of all instructions, the number of the particular instruction that was

requested, refused and is excepted to, or the number of the particular instruction given by the court that is excepted to. Provided, further, that the court shall furnish copies of the instructions to the plaintiff and defendant prior to the time said instructions are given by the court.

At the jury instruction conference during the trial below, Shell's attorney dictated into the record the numbers of the jury instructions Shell requested, the trial court refused, and Shell excepted to. Shell did not include requested instructions Nos. 36 and 38 in its listing. After stating Shell's objections to the refused instructions, its attorney made a blanket exception to all of the instructions that were given. He did not make a blanket exception to the refused instructions. Based on this record, we do not find Shell made known to the trial court its objection to the refusal to give Shell's requested instructions 36 and 38. The burden of proof instruction the trial court gave was Oklahoma Uniform Jury Instruction — Civil No. 3.1, which was Shell's requested instruction No. 8. We find no fundamental error.

¶15 Shell also argues the jury's verdict is unsupported by any evidence each Owner relied on Shell's misrepresentation. In order to preserve a challenge to the sufficiency of the evidence, a party must move for directed verdict at the close of all the evidence and before the issues are submitted to the jury. *Drouillard v. Jensen Const. Co. of Oklahoma, Inc.*, 1979 OK 126, 601 P.2d 92, 94. Shell waived any challenge to the sufficiency of the evidence by failing to do so.

¶16 Shell also challenges the use of a general verdict form. We find no abuse of discretion in the trial court's refusal to direct special findings. OKLA.CONST. ART. 7, §15.

III

¶17 Shell's next contention is the trial court erred in awarding prejudgment interest under the Production Revenue Standards Act (PRSA), 52 O.S.2001 §570.10 (§540 prior to renumbering by Laws 1992, c.190, §28). Shell argues (1) prejudgment interest may not be awarded because Owners waived their statutory claim by not submitting it to the jury, (2) a claim for interest under §570.10 is barred by the statute of limitations and the jury should have been instructed on that defense, and (3) the trial court improperly applied the statute retroactively.

¶18 The PRSA does not create a statutory claim. *Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, 961 P.2d 188, 191-194. Rather, it imposes standards for the treatment of proceeds from the sale of oil and gas production. e.g., §§570.4, 570.6, and 570.10. The Legislature expressly stated its intent the PRSA applies “to all producing wells, regardless of the date pooled, drilled or of the date of the underlying leases.” §570.3. Section 570.14 sets forth a five-year statute of limitations on actions brought pursuant to its provisions, but provides in subsection (D), “nothing shall create, limit or expand any statute of limitations applicable to production occurring prior to September 1, 1992.”

¶19 Section 570.10 provides in part,

A. All proceeds from the sale of production shall be regarded as separate and distinct from all other funds of any person receiving or holding the same until such time as such proceeds are paid to the owners legally entitled thereto. Any person holding revenue or proceeds from the sale of production shall hold such revenue or proceeds for the benefit of the owners legally entitled thereto. Nothing in this subsection shall create an express trust.

B. Except as otherwise provided in this section:

1. Proceeds from the sale of oil or gas production from an oil or gas well shall be paid to persons legally entitled thereto:

a. commencing not later than six (6) months after the date of first sale, and

b. thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold.

...

D. 1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

From 1980 to 1989, the statute provided for interest of twelve percent per annum, without compounding. Laws 1980, c. 205, §1, and Laws 1989, c. 241, §1. Although the statute applies to all producing wells, it only alters rights and duties prospectively. *Teel v. Public Service Co. of Oklahoma*, 1985 OK 112, 767 P.2d 391, 399 (superseded by statute on other grounds). The prejudgment interest authorized by §570.10 constitutes a part of the judgment and is considered a part of the total liability recovered. *Fleet v. Sanguine, Ltd.*, 1993 OK 76, 854 P.2d 892, 899. Prior to the statute’s enactment, the general prejudgment interest statute applied, allowing six percent interest when damages were certain or capable of being made certain by calculation. 23 O.S.2001 §6 and 15 O.S.2001 §266.

¶20 Shell held production proceeds belonging to Owners. During the time it held those proceeds, the proceeds were regarded as separate and distinct from all other funds of Shell. The proceeds Shell held prior to 1980 were subject to prejudgment interest pursuant to 23 O.S.2001 §6. From 1980 to 1989 the proceeds were subject to interest provided by the version of §540 (§570.10) in effect at the time. When Shell continued to hold the proceeds after the effective date of the 1989 amendment, the proceeds were subject to the compounded interest rate of twelve percent in effect thereafter. The trial court’s instruction to the jury properly incorporated the applicable law on the awarding of prejudgment interest for each time period.

IV

¶21 Lastly, Shell contends the improper punitive damages award requires new trial or remittitur. It argues (1) punitive damages are not allowed for breach of contract, (2) punitive damages should have been capped because there was no evidence of evil intent, (3) punitive damages duplicated the penalty of prejudgment interest under §540 (§570.10), (4) prejudgment interest was not part of compensatory damages and should not have been considered in determining the amount of punitive damages, and (5) the punitive damages award was excessive and in violation of the U.S. Constitution.

¶22 As discussed in Part I above, Owners properly brought this action in tort and not in contract. As discussed in Part III above, prejudgment interest under the PRSA is part of

compensatory damages. Although prejudgment interest under §540 (§570.10) was characterized as penal in *Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶11, 854 P.2d 892, 899-900, and *McClain v. Ricks Exploration Co.*, 1994 OK CIV APP 76, ¶18, 894 P.2d 422, the Court in *Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, ¶17, 961 P.2d 188, recognized the Legislature abrogated that characterization by deleting the phrase “as a penalty” from the statute in 1985. Therefore, the imposition of prejudgment interest does not preclude a punitive damages award.

¶23 The trial court applied the punitive damage statute in effect at the time this case was filed, 23 O.S.1991 §9, which provided in part,

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

The trial court made the requisite finding on the record and out of the presence of the jury there was “clear and convincing evidence of fraud, non-disclosure, concealment, deceit,” and lifted the cap on punitive damages. It then submitted the question of punitive damages to the jury.

¶24 We review the trial court’s initial determination of the presence of clear and convincing evidence of fraud for error of law. *Rodebush By and Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241, 1247. The testimony of Shell’s division order analyst provided clear and convincing evidence Shell knew in 1988 it held oil proceeds belonging to

Owners. The testimony of Shell’s designated corporate representative is clear and convincing evidence (1) Shell knew Owners did not know about the proceeds, (2) Shell did not tell Owners about the proceeds, (3) Shell knew Owners relied on Shell’s operating statements, and (4) Shell intended to keep Owners’ proceeds based on its position the statute of limitations had run in 1987, two years after it sold the Crews Lease to Maynard. Based on this record, we hold the trial court did not err as a matter of law in its initial determination of the presence of clear and convincing evidence of fraud.

¶25 A grossly excessive punitive damage award violates the Fourteenth Amendment right to due process. *BMW of North America, Inc. v. Gore (Gore)*, 517 U.S. 559, 569, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809. In reviewing punitive damages for constitutionality, we must “consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585.

¶26 In the present case, the reprehensibility of Shell’s conduct is heightened by its intentional deceit of the interest owners whose oil proceeds it held for their benefit while it owed a fiduciary duty to those owners arising from its resort to the police powers of the state in unitizing oil and gas interests. The amount of the punitive damage award was slightly more than four times the amount of the actual damages awarded. We do not find this disparity unreasonable. The punitive damage award in this case compares favorably with that in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, where the jury awarded \$19,000.00 in actual damages arising from the defendant’s baseless claim on plaintiff’s oil and gas interests and \$10,000,000.00 in punitive damages. Proportionately, Shell has received a much lighter sanction.

¶27 For the foregoing reasons, the trial court’s judgment is AFFIRMED.

MITCHELL, C.J., and HETHERINGTON, J. (sitting by designation), concur.

1. The assignment provided in part, If said well produces oil or gas in paying quantities, then in that event the party of the second part, as an additional consideration for the assignment, agrees to carry the party of the first part for an undivided one-fourth (1/4) of the seven-eighths (7/8) working interest in said above described oil and gas mining lease; that is to say, the party of the second part shall advance all of the cost of drilling, development and operation necessary or convenient, and shall receive all of the oil and gas produced therefrom until the sales of oil and gas produced from said property shall have reimbursed the party of the second part for all monies so expended in the drilling, development and operation of said lease, including all cost of investment and expense necessary or incident to the proper development and operation of said property, and after the second party has been so reimbursed, then the party of the first part is to receive one-fourth (1/4) of the net profits derived by the party of the second part from said premises.

2. The treatment of a net profits interest as a royalty interest is consistent with the definition of royalty interest in the Production Revenue Standards Act, 52 O.S.2001 §570.2(6), as a "percentage interest in production or proceeds ... reserved or granted by a mineral interest owner exclusive of any interest defined as a working interest or subsequently created interest." It is not a "subsequently created interest" under §570.2(10) because the assignment reserving the interest did not specify the interest would not be communitized.

2010 OK CIV APP 57

**JOSEPH BART SWEET, Appellant, vs.
STATE OF OKLAHOMA ex rel.
DEPARTMENT OF HUMAN SERVICES
CHILD SUPPORT ENFORCEMENT,
Appellee, and BILLY R. KEMP, JR., Appellee,
and Vickie L. Cantrell, Custodial Parent.**

Case No.: 106,886. March 12, 2010

APPEAL FROM THE DISTRICT COURT OF
OKMULGEE COUNTY, OKLAHOMA

HONORABLE H. MICHAEL CLAVER,
JUDGE

REVERSED

Luke Gaither, Henryetta, Oklahoma, for Appellant,

Lou Ann Moudy, Henryetta, Oklahoma, for
Appellee Billy R. Kemp, Jr.¹

ROBERT DICK BELL, VICE-CHIEF JUDGE:

¶1 Joseph Bart Sweet, Appellant, appeals from the trial court's determination that he is the legal father of K.H.C., a minor child. For the reasons set forth below, we reverse.

¶2 In early March 2005, K.H.C. was born to Vickie Lynn Cantrell. Two or three days later, Sweet and Cantrell signed an Acknowledgment of Paternity (Form 209). The Oklahoma Department of Human Services (DHS) received the form on March 18, 2005. The form contained a notice that Sweet had the right to rescind the acknowledgment within sixty (60) days from the date of signing the form. Sweet was also listed as the child's father on a birth certificate issued by the Oklahoma Department

of Health, Division of Vital Records, on March 16, 2005.

¶3 On his own and without Cantrell's knowledge, Sweet took the child for a paternity test on May 16, 2005. The test results he received four days later showed Sweet was not K.H.C.'s biological father. On May 25, 2005, Sweet telephoned DHS, which only days earlier had opened a day-care and medical services case regarding K.H.C. Sweet could not recall the nature of his conversation. DHS records from May 27, 2005, indicate the agency received the DNA test results that excluded Sweet as K.H.C.'s biological father. DHS closed its case against Sweet the same day. Over an objection, a veteran employee of DHS was permitted to testify that her agency considered the genetic test results as a rescission of Sweet's Form 209 paternity acknowledgment. Cantrell informed Sweet of the case closure and Sweet thereafter had no more involvement or relationship with K.H.C. Records also show the Division of Vital Statistics was apprised of Sweet's DNA test results in June 2005.

¶4 Cantrell later provided DHS with information regarding two other potential fathers of K.H.C. On April 16, 2007, DHS filed a child support enforcement action against Appellee, Billy R. Kemp, Jr., and ordered him to submit to genetic testing. The subsequent DNA test, performed and concluded in the summer of 2007, established that Kemp is K.H.C.'s biological father. In April 2008, Cantrell revealed to DHS that she and Sweet had signed a Form 209 in 2005,² and DHS had no record of any written rescission. Even though DHS had been provided with genetic test results that excluded Sweet as K.H.C.'s father three years earlier, had closed its case against Sweet in 2005, and had since been provided with evidence establishing that Kemp is K.H.C.'s biological father, DHS added Sweet as a third-party defendant in its action against Kemp.

¶5 Trial was conducted in October 2008. Relying on 10 O.S. Supp. 2006 §§ 7700-307 and 7700-308, the trial court ruled Sweet failed to timely rescind his paternity acknowledgment or otherwise timely challenge his Form 209. Therefore, the trial court adjudicated Sweet as the legal father of K.H.C. From said judgment, Sweet appeals.

¶6 Section 7700-307(A)(1) provides in relevant part that "[a] signatory may sign a rescission of acknowledgment of paternity" within

"[s]ixty (60) days after the effective date of the acknowledgment." Section 7700-308(A) generally provides that a signatory of a paternity acknowledgment has two years to commence a proceeding to challenge the acknowledgment, which may be based only on "fraud, duress, or material mistake of fact." In the present case, Sweet never formally executed a rescission of the Form 209. Notwithstanding, the DHS employee who testified at trial said her office considered Sweet's genetic test results as a rescission of Sweet's paternity acknowledgment. It is also undisputed that Sweet never commenced any formal proceeding to challenge his acknowledgment of paternity. As Sweet understandably argues, he had no reason to believe he needed to take any further action with respect to Cantrell's child after May 2005, when DHS was provided with the genetic test results proving Sweet was not K.H.C.'s father and the agency closed its case against Sweet.

¶7 In *World Publ'n Co. v. Miller*, 2001 OK 49, 32 P.3d 829, the Supreme Court reiterated:

Legislative intent controls statutory interpretation. Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them.

Id. at ¶7, 32 P.3d at 832 (citations omitted). In *State ex rel. Bailey v. Powers*, 1977 OK 134, ¶6, 566 P.2d 454, 456, the Court held, "The sole purpose of the paternity statutes is to provide a judicial forum for a woman who has delivered a child out of wedlock." We believe the Uniform Parentage Act, 10 O.S. Supp. 2006 § 7700-101 *et seq.*, also has as its goals the establishment of the parent-child relationship and the provision of support for children born out of wedlock. With respect to §§ 7700-307 and 7700-308 specifically, the apparent aim of these statutes is to aid in the orderly administration of paternity proceedings by providing two different methods for disputing a paternity acknowledgment. Subsection 307 provides a direct way for an acknowledged father to repudiate his acknowledgment, while Subsection 308 furnishes a means for an acknowledged father to challenge his acknowledgment in an adversarial proceeding. Both subsections also have the underlying goal of providing notice to

both the state and to the mother of the putative father's repudiation of, or challenge to, his previously signed acknowledgment of paternity.

¶8 Under the unique facts of the present case, we hold the trial court erred in adjudicating Sweet as the legal father of K.H.C. Sweet's genetic test results established he is not the biological father of the child, the results were provided to DHS when the child was 82 days old, DHS files show the agency received the test results and the files contain a notation that Sweet is not K.H.C.'s biological father. Furthermore, a DHS employee testified the test results were considered by her agency as a rescission of Sweet's Form 209 and DHS closed its case against Sweet. Relieving Sweet of the support obligations for the child of another man under these circumstances would not defeat any of the purposes of the paternity statutes. Neither Cantrell nor her child have been denied a judicial forum for determining the identity of K.H.C.'s father. Moreover, DHS has identified K.H.C.'s biological father through DNA testing and he is presently before the court, thus the statutory goals of establishing a parent-child relationship for K.H.C. and providing for the child's support are also protected.

¶9 Our conclusion is bolstered by 10 O.S. Supp. 2006 § 7700-631 and 56 O.S. Supp. 2007 § 238.6B(G). Section 7700-631(4) states that during paternity hearings and adjudications, "a man excluded as the father of a child by genetic testing shall be adjudicated not to be the father of the child." Section 238.6B(G) provides in relevant part that if genetic testing conducted pursuant to DHS paternity and support proceedings "excludes a person from being a natural parent, the Department shall dismiss any pending court or administrative collection proceedings against the person." Sweet has been excluded — and Kemp has been identified — as the father of K.H.C. by genetic testing.

¶10 On the basis of the foregoing, we hold the trial court erred in adjudicating Sweet as the legal father of K.H.C. Accordingly, the judgment of the trial court is REVERSED.

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

1. Although attorneys for Appellee Department of Human Services filed an entry of appearance, they did not submit an appellate brief.

2. Cantrell previously indicated to DHS that no paternity acknowledgment had ever been executed.

CITY OF TULSA, TULSA COUNTY, STATE
OF OKLAHOMA, Appellee, vs. Cassandra
Faye Johnson a/k/a Cassandra Faye Williams,
Defendant, and PATTIE A. ROHLING,
Appellant.

Case No. 106,402. March 25, 2010

APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF TULSA, OKLAHOMA

HONORABLE DAN CRAWFORD,
MUNICIPAL JUDGE

REVERSED

David Shapiro, Assistant City Attorney, Tulsa,
Oklahoma, for Appellee,

Joseph T. Howard, Tulsa, Oklahoma, for Appellant.

ROBERT DICK BELL, VICE-CHIEF JUDGE:

¶1 Appellant, Pattie A. Rohling, a profes-
sional bail bond person, appeals from the
municipal court's judgment denying her
motion to exonerate bonds in four misdemean-
or criminal cases. For the reasons set forth
below, we reverse.

¶2 Appellant posted appearance bonds for
Defendant, Cassandra Faye Johnson a/k/a
Cassandra Faye Williams (Johnson), in four
traffic-related cases in Tulsa Municipal Court.
When Johnson failed to appear at her sched-
uled February 15, 2008, hearing, the bonds
were ordered forfeited and a bench warrant
was issued for Johnson's arrest. Appellant
made efforts but was unable to locate Johnson.
On May 5, 2008, Appellant made a written
request to the Tulsa County Sheriff's Office
(Sheriff) to enter Johnson's warrant informa-
tion into the National Crime Information Com-
puter (NCIC). Appellant maintains the Sheriff
did not honor her request within 14 business
days of receipt of the written request.

¶3 Based upon the Sheriff's alleged denial of
her NCIC request, Appellant filed the instant
motion to exonerate bonds pursuant to 59 O.S.
Supp. 2007 §1332(C)(4). Appended to her
motion was a copy of Appellant's written
NCIC request to the Sheriff which contained a
May 5, 2008, file stamp from the District Court
of Tulsa County. At the subsequent hearing, the
municipal judge indicated he had received
Appellant's motion with the NCIC request.
Appellant testified she made the written NCIC
request to the Sheriff and, although inarticu-

lately stated, testified that Johnson's warrant
information was never entered into the NCIC
system. The Appellee, City of Tulsa (City), pre-
sented no evidence. The municipal judge there-
after denied Appellant's motion on the ground
that she failed to present evidentiary support
for the motion. From said judgment, Appellant
appeals.

¶4 Title 59 O.S. Supp. 2008 §1332(C)(2) pro-
vides in general that a bond forfeiture must be
vacated and the bond exonerated when a
defendant is returned to custody, within ninety
(90) days of the forfeiture order, in the jurisdic-
tion where the forfeiture occurred. Subsection
(C)(3) defines the term "return to custody." The
provision at issue in this case, 59 O.S. Supp.
2007 §1332(C)(4), stated:

In addition to the provisions set forth in
paragraphs 2 and 3 of this subsection, the
bond shall be exonerated by operation of
law in any case in which:

- a. the bondsman has requested in writ-
ing of the sheriff's department in the
county where the forfeiture occurred
that the defendant be entered into the
computerized records of the National
Crime Information Center, and
- b. the request has not been honored
within fourteen (14) business days of the
receipt of the written request by the
department.

The Legislature has since combined the lan-
guage of subsection (C)(4)(a) with subsection
(C)(4)(b) in creating a new subsection (C)(4)(a),
and added a new subsection (C)(4)(b) that is
inapplicable here. *See* Laws 2008, c. 32, §1, eff.
Nov. 1, 2008.¹ The modification did not change
the substance of the statute: A bond shall be
exonerated where the bondsman makes a writ-
ten NCIC request to the sheriff which is not
honored within fourteen (14) business days of
the written request.

¶5 In *State v. Vaughn*, 2000 OK 63, ¶23, 11 P.3d
211, 216, the Court held, "The burden of show-
ing facts warranting relief from forfeiture is on
the party seeking such relief." Thus, in the
present case, Appellant was required to show
that she made a written NCIC request to the
Tulsa County Sheriff that was not honored
within fourteen (14) business days of her
request. Appellant's written NCIC request is
not at issue here. She attached her file-stamped
NCIC request to her motion to exonerate bonds,

the trial judge acknowledged receipt of the motion and the City did not dispute that the request was served on the Sheriff.

¶6 As for subsection (C)(4)(b), Appellant testified at the hearing that her NCIC request was never honored by the Sheriff. The City presented no evidence to contradict Appellant's claim. Title 12 O.S. 2001 §2402 states that "[a]ll relevant evidence is admissible" in court except as otherwise provided by law. Section 2401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The fact of consequence at issue here was whether the Sheriff honored Appellant's NCIC request. Appellant's testimony that the Sheriff did not honor that request tended to make the existence of that consequential fact "more probable . . . than it would [have been] without the evidence." Her testimony was, therefore, relevant to show the Sheriff failed to honor Appellant's NCIC request. This testimony, combined with Appellant's documentary evidence that showed she made a written NCIC request to the Sheriff, satisfied her burden of proving entitlement to relief.

¶7 On appeal, City cites the long settled law that the trier of fact in a law action is the sole arbiter of a witness' credibility and the weight to be given their testimony. *See Beams v. Step*, 1926 OK 205, ¶8, 244 P. 775. This being the rule, City argues the trial judge in this case was free to ignore Appellant's testimony in rejecting her motion. We disagree. An equally longstanding rule holds that the findings of a trial judge in an action of legal cognizance, sitting without a jury, are entitled to the same weight accorded a jury's verdict, and this Court's task on appeal is to determine whether such findings and judgment are supported by any evidence. *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶16, 981 P.2d 301, 307; *Epperson v. Halliburton Co.*, 1967 OK 212, ¶17, 434 P.2d 877, 881. Under this standard, the instant judgment must be reversed because the trial court's decision to deny Appellant's motion is supported by no evidence. The only evidence presented to the trial judge showed Appellant filed a written NCIC request with the Sheriff and the Sheriff failed to honor the same. Appellant is entitled to exoneration of her bonds.

¶8 REVERSED.

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

1. Title 59 O.S. Supp. 2008 §1332(C)(4) provides: In addition to the provisions set forth in paragraphs 2 and 3 of this subsection, the bond shall be exonerated by operation of law in any case in which:

a. the bondsman has requested in writing of the sheriff's department in the county where the forfeiture occurred that the defendant be entered into the computerized records of the National Crime Information Center, and the request has not been honored within fourteen (14) business days of the receipt of the written request by the department, or

b. the defendant has been arrested outside of this state and the court record shows the prosecuting attorney has declined to proceed with extradition.

ORDER

May 12, 2010

Appellant's Motion for Appeal-Related Attorney Fees, filed April 15, 2010, is DENIED.

Appellant's Motion to Tax Costs, also filed April 15, 2010, is GRANTED.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 12th day of May, 2010.

/s/ LARRY JOPLIN,
Presiding Judge

2010 OK CIV APP 58

**CHILCUTT DIRECT MARKETING, INC.,
an Oklahoma Corporation, Plaintiff/
Appellant, vs. A CARROLL
CORPORATION, an Oklahoma Corporation,
and JAMES D. HALL, JR., an Individual,
Defendants/Appellees.**

Case No. 106,961. May 7, 2010

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DANIEL L. OWENS,
TRIAL JUDGE

AFFIRMED

Timothy A. Heefner, James L. Gibbs, II,
GOOLSBY, PROCTOR, HEEFNER & GIBBS,
P.C., Oklahoma City, Oklahoma, for Plaintiff/
Appellant

Terry W. West, Bradley C. West, Gregg W.
Luther, THE WEST LAW FIRM, Shawnee,
Oklahoma, for Defendants/Appellees

DOUG GABBARD II, PRESIDING JUDGE:

¶1 Plaintiff, Chilcutt Direct Marketing, Inc. (CDM), appeals the trial court's denial of its motion for new trial following the court's overruling of its motion for an injunction under the

Trade Secrets Act. For the following reasons, we affirm.

FACTS

¶2 The parties involved in this appeal are two direct marketing companies that are competitors, CDM and Defendant A Carroll Corporation (ACC). Defendant James D. Hall, Jr., worked for CDM for 21 years. He resigned in 2006 to work for ACC, telling CDM he would be selling software programs to doctors. He received CDM's permission to keep a copy of his computerized Outlook Address Book and his cell phone number, both of which he said he needed to stay in contact with his friends. The address book contained contact information for approximately 775 CDM customers and business contacts, and had been compiled by CDM over a 25-year period.

¶3 Five days after Hall left CDM, ACC began doing business as "All That Marketing," in direct competition with CDM. Some CDM customers began placing orders with ACC. CDM requested that Defendants cease using the customer list, but its request was rejected.

¶4 CDM then sued ACC and Hall asserting that the customer list on Hall's Outlook Address Book was a trade secret which Defendants had misappropriated. CDM asserted theories of misappropriation of a trade secret, deceit-false representation, deceit-nondisclosure/concealment, and interference with a business relationship. It sought damages and a permanent injunction.

¶5 At trial, the evidence indicated that some of CDM's customers had been contacted by ACC and Hall, and had become ACC customers. Ultimately, the jury returned a verdict in favor of CDM, awarding \$75,000 in damages. The jury specifically found that ACC and Hall had misappropriated a trade secret by using the customer list, and that Hall was also liable for deceit.

¶6 Immediately following the verdict, CDM asked the trial court for a permanent injunction enjoining any use of the address book and any contact with the customers listed therein for a time certain. Defendants stipulated they would return all relevant information to CDM, and only keep Hall's personal information. The trial court verbally ordered Defendants to return the list, and stated it would set a briefing schedule to determine "whether or not the

defendant should be enjoined from contacting any of [CDM's] customers."

¶7 Thereafter, CDM filed a motion for injunctive relief pursuant to 78 O.S.2001 § 87. CDM sought either a prohibitive injunction preventing ACC and Hall from "continued misappropriation of a trade secret," or, alternately, a royalty injunction requiring the payment of a specified royalty for a time certain. ACC and Hall responded that both injunctions were unnecessary because they had returned the CDM customer list and purged it from their phones and computers.

¶8 The trial court overruled CDM's motion for an injunction. CDM then moved for a new trial, asserting an injunction was necessary to prevent Defendants from enjoying a commercial advantage due to their misappropriation.¹ The trial court also denied this motion. CDM appeals.

STANDARD OF REVIEW

¶9 An injunction is an "extraordinary remedy, and relief by this means is not to be lightly granted." *Amoco Prod. Co. v. Lindley*, 1980 OK 6, ¶ 50, 609 P.2d 733, 745. Generally, the right to injunctive relief must be established by clear and convincing evidence. *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶ 5, 925 P.2d 546, 549. The granting of a mandatory injunction is largely a matter for the trial court's discretion and depends upon a consideration of all the equities between the parties. *Kasner v. Reynolds*, 1954 OK 56, ¶ 25, 268 P.2d 864, 867. Similarly, a trial court's decision on a new trial motion is a matter reviewed for abuse of discretion, and will not be disturbed on appeal unless it clearly appears the court erred in "some pure simple question of law or acted arbitrarily." *Poteete v. MFA Mut. Ins. Co.*, 1974 OK 110, ¶ 24, 527 P.2d 18, 22.

ANALYSIS

¶10 Whether an employer may obtain an injunction prohibiting a former employee from using a list of the employer's customers has been the subject of frequent litigation over a number of years. In *Brenner v. Stavinsky*, 1939 OK 131, 88 P.2d 613, the Oklahoma Supreme Court addressed this question and stated:

It is generally held that, in the absence of a contract to the contrary, a former employee may upon entering the competitive field with his erstwhile employer,

either as the employee of another or on his own initiative, solicit the business of the latter's customers. . . . [A] contrary view would compel the employee "to give up all the friends and business acquaintances made during the previous employment" and "tend to destroy the freedom of employees and reduce them to a condition of industrial servitude." *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 117 A. 753; 23 A.L.R. 420. . . .

* * *

[A] list of customers built up through years of effort in a line of business where such a list constitutes an important asset of business is a species of property in the nature of or comparable to a trade secret, and that where an employee obtains such a list through confidence placed in him or surreptitiously, he may be restrained from using it. This court would be loath to say, however, that the use by a former employee of his memory independent of any compiled list could be restrained, in the absence of a contract to the contrary.

Id. at ¶¶ 10 & 16, 88 P.2d at 614, 615. In *Central Plastics Co. v. Goodson*, 1975 OK 71, 537 P.2d 330, the Oklahoma Supreme Court repeated the principle that "in the absence of an express prohibitory agreement, the employee may on a change of employment solicit such customers as long as he proceeds from his memory rather than by the unauthorized use of a list of customers." *Id.* at ¶ 21, 537 P.2d at 334. The Court stressed that equity does not protect names and addresses that are remembered or that are easily ascertainable by observation or by reference to directories.²

¶11 The case at bar was brought under the provisions of Oklahoma's Uniform Trade Secrets Act, 78 O.S.2001 §§ 85 through 94. The Act was adopted in 1986 and defines a "trade secret" as:

information, including a formula, pattern, compilation, program, device, method, technique or process, that: a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S.2001 § 86(4). Misappropriation of a trade secret includes, but is not limited to, disclosure or use of a trade secret of another without express or implied consent by a person who knew that his knowledge of the trade secret was acquired by improper means or under circumstances giving rise to a duty to maintain its secrecy or limit its use. 78 O.S.2001 § 86(2)(b).

¶12 The Act provides two basic remedies for misappropriation. First, a plaintiff is entitled to actual damages. Actual damages are authorized by 78 O.S. 2001 § 88, which provides:

Damages

A. Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

B. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made pursuant to the provisions of subsection A of this section.

Under this section, a plaintiff who finds it difficult to determine quantifiable damages for actual loss and unjust enrichment may elect to take a reasonable royalty as an alternative to the usual calculation of actual damages.

¶13 Second, a plaintiff may also be entitled to injunctive relief. That relief is set forth in § 87, which provides:

Injunctions — Court orders

A. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of

time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

B. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of a misappropriation that renders a prohibitive injunction inequitable.

C. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

¶14 In the present case, the jury concluded that CDM's written customer list was a trade secret, that Defendants' use thereof was a misappropriation of a trade secret as defined by the Act, and that CDM was entitled to \$75,000 in damages. The judgment entered in accordance with this verdict is now the law of the case.³ On appeal, CDM asserts that it was also entitled to injunctive relief in addition to actual damages. It asserts that although Defendants no longer have the list, they will continue to misappropriate it by using their knowledge of the information contained in the list to contact potential customers, and CDM is entitled to an injunction prohibiting such future use and to royalties.

¶15 Clearly, CDM is not entitled to additional royalties under § 88, because that injunction is merely an alternative method of granting actual damages "[i]n lieu of damages measured by any other methods," such as those for actual loss and unjust enrichment. Here, CDM elected to receive damages for actual loss and unjust enrichment, and, in fact, was awarded a \$75,000 judgment which is now final. Thus, CDM may only assert entitlement to injunctive relief under § 87 for Defendants' "future use" of the trade secret.

¶16 Under § 87(A), a prohibitive injunction banning the use of a trade secret (here, the Outlook Address Book or a written customer list) may only be granted upon a showing of actual or threatened misappropriation. In other words, a plaintiff has the burden of proving that a defendant is able to continue his or her misappropriation. Here, evidence was presented that Defendants had not only returned the written

customer list, but had also purged the list from their phones and computers. Furthermore, because the customer list contained the names of 775 CDM customers, it is unlikely that such a lengthy list could be memorized.⁴ By denying a prohibitive injunction, the trial court implicitly concluded⁵ that Defendants did not have access to the list and no longer had the ability to misappropriate the list. This conclusion is supported by the evidence. Although conflicting evidence was presented, we defer to the judgment of the trial court, which is in the best position to observe the behavior and demeanor of the witnesses and to gauge their credibility. *Mueggenborg v. Walling*, 1992 OK 121, 836 P.2d 112. Accordingly, we find no abuse of discretion in the trial court's refusal to grant a prohibitive injunction.

¶17 Under § 87(B), an injunction for future royalties may only be granted in "exceptional circumstances" where such an injunction is more appropriate than a prohibitive injunction. The section notes that such circumstances include, but are not limited to, "a material and prejudicial change of position prior to acquiring knowledge or reason to know of a misappropriation that renders a prohibitive injunction inequitable." Furthermore, a royalty injunction may only continue "for no longer than the period of time for which use could have been prohibited." The comment to § 2 of the Uniform Trade Secrets Act, from which § 87 was derived, further explains:

Section 2(b) deals with the special situation in which future use by a misappropriator will damage a trade secret owner but an injunction against future use nevertheless is inappropriate due to exceptional circumstances. Exceptional circumstances include the existence of an overriding public interest which requires the denial of a prohibitory injunction against future damaging use and a person's reasonable reliance upon acquisition of a misappropriated trade secret in good faith and without reason to know of its prior misappropriation that would be prejudiced by a prohibitory injunction against future damaging use.

¶18 Here, CDM failed to demonstrate any overriding public interest or other exceptional circumstance justifying a royalty injunction. More importantly, the granting of a royalty injunction is conditioned upon a misappropriator's future ability to use a trade secret upon payment of a reasonable royalty. See *Progressive*

Products, Inc. v. Swartz, 205 P.3d 766 (Kan. Ct. App. 2009)(review granted March 8, 2010). It is only an alternative to a prohibitive injunction; neither may be granted absent actual or threatened misappropriation. Here, the trial court implicitly determined that ACC no longer had the ability to misappropriate the written customer list. Accordingly, we find no abuse of discretion in the trial court's denial of CDM's motion for a royalty injunction.⁶

CONCLUSION

¶19 For all these reasons, the trial court's denial of CDM's motions for new trial and for injunction is hereby affirmed.

¶20 AFFIRMED.

GOODMAN, J., concurs, and RAPP, J., not participating.

1. CDM also asserted "irregularities" occurred in that one trial judge had presided over the trial, while another decided the injunction issue. This argument was not briefed on appeal, and, therefore, is treated as abandoned. See *State ex rel. Remy v. City of Norman*, 1981 OK 139, ¶ 12, 642 P.2d 219, 222.

2. The Court also established a set of five criteria that should be examined in determining whether there was unfair competition: "1. The information was confidential and not readily available to competitors; 2. The former employee solicited the customers of his former employer with the intent to injure him; 3. The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; 4. The business is such that a customer will ordinarily patronize only one concern; 5. Unless interfered with, the established business relationship between the customer and the former employer would normally continue." 1975 OK 71 at ¶ 23, 537 P.2d at 334.

3. According to OSCN records, a formal judgment on the jury verdict was entered on November 3, 2008, and was not appealed.

4. Defendants are not prohibited from using "memory independent of any compiled list" in contacting CDM customers. See *Brenner v. Stavinsky*, 1939 OK 139, 88 P.2d at 615.

5. A trial court's general decision is presumed to include a finding favorable to the successful party upon every fact necessary to support it. *Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476; *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683.

6. We find the cases cited by CDM distinguishable. *A&H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.*, 967 F. Supp. 1457 (E.D. Pa. 1997), remanded after review, 166 F.3d 197 (3d. Cir. 1999), was a trademark infringement case where a royalty injunction was awarded to A&H, the owner of the "The Miracle Suit" trademark, because Victoria's Secret intended to continue using the infringing mark on its swimwear. *Electronic Data Systems Corp. v. Heinemann*, 493 S.E.2d 132 (Ga. 1997), involved the granting of a royalty injunction because the defendants intended to continue using the misappropriated computer software trade secrets in their own products, and exceptional circumstances existed because of the public's interest in competition, the plaintiff's delay in bringing suit, and the adequacy of the royalty to protect the parties' respective interests. In the case at bar, the evidence indicated that ACC no longer has the ability to misappropriate the customer list.

2010 OK CIV APP 62

**KENNETH RICHARD GONZALES,
Plaintiff/Appellee, vs. THE STATE OF**

**OKLAHOMA and THE CITY OF
OKLAHOMA CITY, Defendants/Appellants.**

Case No. 106,788. March 31, 2010

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA SWINTON,
TRIAL JUDGE

**REVERSED, VACATED, AND REMANDED
WITH INSTRUCTIONS TO DISMISS**

Michael S. "Mickey" Homsey, Terry R. McMillan, HOMSEY & ASSOCIATES, Oklahoma City, Oklahoma, for Plaintiff/Appellee Kenneth Richard Gonzales

Kenneth Jordan, MUNICIPAL COUNSELOR and Timothy L. Weston, Matthew A. Collins, Susan D. Randall, ASSISTANT MUNICIPAL COUNSELORS, THE CITY OF OKLAHOMA CITY, for Defendant/Appellant The City of Oklahoma City

Scott D. Boughton, ASSISTANT ATTORNEY GENERAL, OKLAHOMA ATTORNEY GENERAL LITIGATION SECTION, Oklahoma City, Oklahoma, for Defendant/Appellant State of Oklahoma

DEBORAH B. BARNES, JUDGE:

¶1 This accelerated¹ appeal is brought by the State of Oklahoma (State) and the City of Oklahoma City (City) to challenge the trial court's ruling that 11 O.S. Supp. 2008 § 22-115.1,² a statute enacted in 2008, restricting the location of dog kennels near schools or licensed day care facilities, is unconstitutional as applied to appellee Kenneth Richard Gonzales (Gonzales). Gonzales owns an unlicensed dog kennel that is located within 2,500 feet of Villa Teresa Moore School, a school and day care facility operated by the Carmelite Sisters of St. Teresa.³

¶2 On June 11, 2008, Gonzales filed his "Petition for Injunction, Temporary Injunction, Temporary Restraining Order, and Declaratory Relief." Gonzales noted that five days earlier, the Governor of the State of Oklahoma signed into law SB-1754, codified as 11 O.S. Supp. 2008 § 22-115.1, the enforcement of which would prohibit Gonzales from operating his unlicensed dog kennel in its current location. Gonzales alleged that he had "sought" all required zoning and permits necessary to operate his kennel. As evidence of his efforts to obtain a license, Gonzales refers in his Petition to a court order, entered on August 17, 2007, in

Oklahoma County District Court (Case No. CJ-2006-9144),⁴ which granted him a special exception and some zoning variances under the Oklahoma City zoning code. Contrary to his assertions, however, nothing in the language of this order grants him a kennel license or even refers to kennel licensing.⁵ It is undisputed that Gonzales still lacked a building permit and thus had not been successful in obtaining a kennel license prior to the passage of this new statute.⁶

¶3 After a hearing on the matter, the trial court denied in part and granted in part Gonzales's request for a temporary restraining order, by order filed on July 1, 2008, which stated, in pertinent part:

1. That as to civil litigation in either Oklahoma County or Cleveland County to attempt to enforce Title 11, Section 22-115.1, the Court denies the motion for a temporary restraining order.

2. That, with regard to the use of law enforcement by The City, however, to attempt to enforce Title 11, Section 22-115.1, a temporary restraining order is appropriate because there is little guidance in the language of the statute as to whether or not there is proper authority to take other action, other than civil litigation for its enforcement. For that reason a temporary restraining order is appropriate with regard to the use of law enforcement against [Gonzales] as a means to attempt to enforce the statute.

3. That, accordingly, until further order of this Court to the contrary, the parties have agreed that the only enforcement mechanism used by The City of Oklahoma City to attempt to enforce the statute against [Gonzales] would be civil litigation for an injunction and not closing down [Gonzales's] kennel by means of law enforcement.

4. That the Court, by this order, is not enjoining The City of Oklahoma City from enacting an ordinance as contemplated by the statute.⁷

¶4 The parties filed their respective motions for summary judgment as to Gonzales's request for a declaratory judgment and for permanent injunctive relief. On October 2, 2008, the trial court ruled⁸ in favor of Gonzales, finding that because Gonzales had taken "legal actions" in pursuit of his acquisition of a kennel license,

the new statute was unconstitutional as applied to him under the Oklahoma Constitution, Art. 5, § 52.⁹ The trial court ordered a permanent injunction that prohibited State and City from enforcing § 22-115.1 against Gonzales. In all other respects, the trial court found the statute constitutional.

¶5 On October 10, 2008, City filed its "Motion to Vacate Judgment," asking that the trial court's October 2, 2008, ruling be vacated, and in the alternative, requesting a new trial. On October 17, 2008, State filed its "Motion to Vacate Judgment/Motion for New Trial." Each motion challenged the trial court's finding that 11 O.S. Supp. 2008 § 22-115.1 was unconstitutional as applied to Gonzales. The trial court denied those post-trial motions in an order¹⁰ filed on January 22, 2009, finding that the August 17, 2007, order¹¹ (filed in Oklahoma County District Court Case No. CJ-2006-9144), which granted certain zoning variances "gave [Gonzales] rights that are protected under the Oklahoma Constitution" and that application of the subsequently-enacted statute at issue to Gonzales would "violate Art. 5, § 52 of the Oklahoma Constitution." From the October 30, 2008, judgment in favor of Gonzales and the January 22, 2009, order, overruling the motions to vacate and/or grant a new trial, State and City appeal.

¶6 Based on our review of the uncontroverted material facts and the applicable law, we find the trial court's January 22, 2009, order, denying City's and State's motions to vacate/motions for new trial should be reversed, and we vacate the trial court's grant of summary judgment to Gonzales as contrary to law. We remand this case to the trial court with instructions to dismiss.

MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

¶7 1. Gonzales operates a dog¹² kennel within the city limits of Oklahoma City, Oklahoma, within Cleveland County, Oklahoma.¹³

2. Oklahoma City is a municipality with a population of more than three hundred thousand (300,000).¹⁴

3. Gonzales has 25 dogs in his dog kennel.¹⁵

4. Gonzales's dog kennel is located within 2,500 feet of Villa Teresa Moore School, a school and day care operated by Representative.¹⁶

5. For the purpose of qualifying for a kennel license, Gonzales initiated his building permit application process in April, 2006 and his zoning variance application process in 2005,¹⁷ but had not received a building permit, and thus had no kennel license, prior to the enactment of 11 O.S. Supp. 2008 § 22-115.1.¹⁸

STANDARD OF REVIEW

¶8 Our standard of review for this appeal is as follows:

Summary process — a special pretrial procedural track pursued with the aid of acceptable probative substitutes — is a search for undisputed material facts which, *sans* forensic combat, may be utilized in the judicial decision-making process. Summary relief is permissible where neither the material facts nor any inferences that may be drawn from uncontested facts are in dispute, and the law favors the movant's claim or liability-defeating defense. Only those evidentiary materials which eliminate from trial some or all fact issues on the merits of the claim or defense afford legitimate support for *nisi prius* resort to summary process for a claim's adjudication.

Summary relief issues stand before us for *de novo* review. All facts and inferences must be viewed in the light most favorable to the non-movant. Appellate tribunals bear the same affirmative duty as is borne by *nisi prius* courts to test for legal sufficiency all evidentiary material received in summary process in support of the relief sought by the movant. Only if the court should conclude there is no material fact (or inference) in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary relief in its favor. . . .

Reeds v. Walker, 2006 OK 43, ¶¶ 8-9, 157 P.3d 100, 106. (Footnotes omitted.) See also Rule 13, Rules for District Courts of Oklahoma, 12 O.S. Supp. 2002, ch. 2, app.

¶9 Both State's "Motion to Vacate Judgment/Motion for New Trial" and City's "Motion to Vacate Judgment," asking, in the alternative, for a new trial, were filed before the filing of the judgment on October 30, 2008, and are thus deemed to be filed within 10 days of that judgment. Because the motions seek reconsideration of a prior ruling, we treat both of them as motions for new trial. "A motion seeking

reconsideration, re-examination, rehearing or vacation of a judgment or final order, which is filed within 10 days of the day such decision was rendered, may be regarded as the functional equivalent of a new trial motion, no matter what its title." *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, ¶ 4, 681 P.2d 757, 758-759. (Footnote omitted.)

A trial court's denial of a motion for new trial is reviewed for abuse of discretion. Where as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness. Judicial discretion is abused when a trial court errs with respect to a pure, unmixed question of law.

Reeds v. Walker at ¶ 9, 157 P.3d at 106-107. (Footnotes omitted.)

¶10 An appellate court "will not disturb an order which grants or refuses an injunction unless there is a showing the trial court abused its discretion or that the judgment is clearly against the weight of the evidence or contrary to law." *House of Sight & Sound, Inc. v. Faulkner*, 1995 OK CIV APP 112, ¶ 5, 912 P.2d 357, 360, citing *Sharp v. 251st Street Landfill, Inc.*, 1991 OK 41, 810 P.2d 1270. The trial court's judgment raises an issue of law and is thus reviewable "under a *de novo* standard." *Cherokee Nation v. Nomura*, 2007 OK 40, ¶ 11, 160 P.3d 967, 972.

ANALYSIS

¶11 The issues raised on appeal by State and City, are as follows:

1. The trial court incorrectly found that the August 17, 2007, order filed in the Oklahoma County District Court Case No. CJ-2006-9144 granted Gonzales a vested right to operate his kennel despite his failure to obtain requisite building permits and a kennel license prior to the enactment of 11 O.S. Supp. 2008 § 22-115.1.

2. The trial court incorrectly ruled that 11 O.S. Supp. 2008 § 22-115.1 was unconstitutional as applied to Gonzales because the August 17, 2007, order filed in Oklahoma County District Court Case No. CJ-2006-9144, involved Board of Adjustment and Board of Appeal proceedings which are not

“special proceedings” to which Art. 5, § 52 applies.

3. The trial court should have denied Gonzales’s motion for summary judgment and granted State’s and City’s motions for summary judgment for the reason that 11 O.S. Supp. 2008 § 22-115.1 is neither an ex post facto law nor a bill of attainder and is a constitutional statute, rationally related to a legitimate government interest.

I. Standing is Required to Bring a Constitutional Challenge

¶12 Standing, which refers to a person’s legal right to seek relief in a judicial forum, “*may be raised as an issue at any stage of the judicial process by any party or by the court sua sponte.*” *Hendrick v. Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1236. (Footnote omitted.) An initial inquiry must reveal that: (1) an actual or threatened injury has occurred; (2) some relief for the harm can be given; and (3) the interest to be guarded is within a statutorily or constitutionally protected zone. *State of Oklahoma ex rel. Board of Regents v. McCloskey Brothers*, 2009 OK 90, ___ P.3d ___; *Hendrick v. Walters*, 1993 OK 162, 865 P.2d 1232; *State of Oklahoma ex rel. Cartwright v. Oklahoma Tax Commission*, 1982 OK 146, 653 P.2d 1230; *Independent School District No. 9 of Tulsa County v. Glass*, 1982 OK 2, 639 P.2d 1233. “When standing of a party is brought into issue, the focus is on the party seeking to get the complaint [here, the alleged unconstitutionality of 11 O.S. Supp. 2008 § 22-115.1] before the court, and not on the issues the party wishes to have adjudicated.” *State of Oklahoma ex rel. Board of Regents v. McCloskey Brothers*, 2009 OK 90 at ¶ 18. The question to be answered is whether the person bringing the constitutional challenge is a proper party to request adjudication of that issue and not whether the issue itself is justiciable.¹⁹ The “inquiry posed is whether the party . . . has a legally cognizable interest . . .” *Democratic Party of Oklahoma v. Estep*, 1982 OK 106, ¶ 7, 652 P.2d 271, 274.

II. Gonzales Has No Legally Cognizable Interest

¶13 To invoke a constitutional analysis of an act of the Legislature — here, 11 O.S. Supp. 2008 § 22-115.1 — this Court must be presented with a proper case in which the person complaining about the statute has been, or is about to be “denied some right or privilege to which he was lawfully entitled . . .” *City of Shawnee v. Taylor*, 1943 OK 11, ¶ 4, 132 P.2d 950, 952, quoting *Shinn v. Oklahoma City*, 1939 OK 29, 87 P.2d

136. (Emphasis added.) “In other words as a general rule the courts decide questions only when those urging them have *an interest to protect . . .*” *Id.* (Emphasis added.)

¶14 Gonzales has never operated his kennel in compliance with the kennel licensing laws. Although he applied for a license and took steps to satisfy licensing requirements prior to the enactment of § 22-115.1, the fact is he was never issued a kennel license.²⁰ Having no license to operate his dog kennel, Gonzales cannot now successfully argue that § 22-115.1 operates to deny him a right or privilege cloaked with constitutional protection. Although Gonzales argues that the statute operates to deprive him of his property, all that he has lost is the ability to *continue using* his property, in a *noncompliant, unlicensed manner*. Gonzales cites no law, and indeed, we have not found any, that finds that type of loss to be a type that triggers a constitutional analysis.

¶15 Gonzales’s circumstances differ from those in *State of Oklahoma ex rel. Board of Examiners in Optometry v. Lawton*, 1974 OK 69, 523 P.2d 1064. In that declaratory judgment lawsuit brought by Lawton, a licensed optometrist, Lawton had been practicing optometry in a leased shopping center office since 1965. That same year, a retail optical outlet leased space in the same building on the opposite side of the hall from Lawton. In 1971, the Legislature passed a bill (59 O.S.1971 § 594) which prohibited any optometrist from practicing “adjacent to or in such geographical proximity to a retail optical outlet.” Lawton filed his declaratory judgment lawsuit, claiming the Board of Examiners in Optometry were about to take action against him for violation of the new law. The trial court and the Oklahoma Supreme Court rejected the Board’s argument that the controversy was “hypothetical.” A declaratory judgment action is meant to ascertain uncertain rights and can be used before any actual breach. “The fact that Lawton could be subjected to criminal prosecution and lose his license if he were found to be in violation of the statute certainly renders it a matter of justiciable controversy.” *Id.* at ¶ 9, 523 P.2d at 1066.²¹ (Emphasis added.)

¶16 In this case, however, there is no uncertainty as to Gonzales’s rights. He has none. He is not threatened with losing his license. He is not threatened with losing his ability to operate his kennel lawfully because he has never operated his kennel in compliance with the licens-

ing laws. Gonzales has not suffered an injury to a legally protected interest as contemplated by constitutional provisions. “Standing to prosecute an appeal must be predicated on that interest in the trial court’s decision which is *direct, immediate and substantial*. Conjecture or speculation . . . will not suffice . . .” *Creamer v. Bucy*, 1985 OK CIV APP 19, ¶ 4, 700 P.2d 668, 670, quoting *Underside v. Lathrop*, 1982 OK 57, 645 P.2d 514. Because he had no license, Gonzales has not established that the legislation sought to be invalidated detrimentally affects his interest in a direct, immediate and substantial manner. He was operating a noncompliant kennel the day before the enactment of § 22-115.1, as well as the day after.

III. The August 17, 2007, Order Created No Vested Right in Operating a Kennel

¶17 Gonzales argues, and the trial court concluded, that the August 17, 2007, order, entered in the Oklahoma County District Court case, CJ-2006-9144²² (the subject of Appeal No. 105,313), created in him a vested right — a right worthy of constitutional protection — in a kennel license. Gonzales asserts that § 22-115.1 is unconstitutional as applied to him because he has had to “seek court redress for all permit and licensing issues”²³ and that these legal actions, taken in furtherance of his acquisition of a kennel license, appear to him like a series of “hoops” through which he must “jump.” Despite this complaint, the fact is, as expressed by his counsel, that issuance of a kennel license depends upon satisfying the building code portion of the application, as well as the zoning ordinance compliance portion of the application.²⁴ Gonzales argued in the district court:

As the Court is well aware we have been before this Court against the Board of Adjustmen[t]. We had settled the matter in August of 2007. We have since that time been attempting to obtain a permit and going through the different hoops that you have to jump through regarding [b]uilding permits, building codes, et cetera.

As far as the zoning goes we have — we believe we’re permitted. . . . We followed as to the letter of the law this ruling that the Court entered in August of ‘07

The one argument that we’ve had with the City is whether or not we were to have a handicap bathroom We ended up getting denied a handicap bathroom or denied

a variance on it [I]f we put in a handicap bathroom we’ll go get the permit²⁵

¶18 In Gonzales’s Supplemental Brief in Support of Motion for Summary Judgment,²⁶ he acknowledges that the “process” of obtaining the permits and kennel license, is still “ongoing.” He argues that because he has “taken all legal steps required to obtain the permits and license necessary for his private kennel,”²⁷ he has “a vested interest/property right,” to receive “the required permits and license.”²⁸

¶19 We reject the notion that the August 17, 2007, order created a vested right *in a kennel license* or any right of Gonzales to operate his kennel without a license. The August 17, 2007, order does not create a vested right or a basis for standing. The trial court erred as a matter of law in so finding.

¶20 The August 17, 2007, order,²⁹ states, in pertinent part, as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause is hereby settled in accordance with the agreement of the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a **Special Exception** . . . to . . . Chapter 59³⁰ of the Oklahoma City Municipal Code, 2002, for “Animal Sales and Services Kennels and Veterinary General” in the AA [Agricultural] District . . . be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the prohibition of a free-standing dwelling on the same lot with any other principal use be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required number of on-site parking spaces be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales’s] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the parking and striping

standards and required curbs be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales's] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required handicap spaces be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales's] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required 22 foot two-way drive aisle leading to a parking area be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Gonzales's] application for a variance . . . to . . . Chapter 59 of the Oklahoma City Municipal Code, 2002, concerning the required 10 foot driveway radius be **granted** by this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court directs [Gonzales] to take the following action:

1. [Gonzales] shall keep no more than 25 dogs on the property.
2. [Gonzales] shall not allow any dogs outside of the enclosed kennel between 7 p.m. and 7 a.m.
3. [Gonzales] shall completely enclose the entire property where the dogs are kept with an 8 ft. cedar fence, and consistently maintain the fence.
4. [Gonzales] may sell no dogs on the premises of the property.
5. [Gonzales] shall install a concrete footer along the entire perimeter of the 8 ft. cedar stockade fence in the event a dog escapes from the property.

¶21 Contrary to the trial court's findings and Gonzales's assertions, the August 17, 2007, order, dealing simply with zoning ordinances and not kennel licensure, did not find that Gonzales is entitled to a license for his kennel nor grant such a license. The August 17, 2007, order granted Gonzales's application for variances and a special exception to City's Zoning and Planning Code ordinances in Chapter 59 of the Oklahoma City Municipal Code. It does not command City to issue a kennel license to

Gonzales. All that the August 17, 2007, order does is establish Gonzales's right to have his dwelling, parking spaces, striping, curbs, handicap parking spaces, drive aisle and driveway radius be as they are and be consistent with, and allowed by, the zoning ordinances.

¶22 "A 'vested right' is the power to do certain actions or possess certain things *lawfully*...." *Wilkerson v. City of Pauls Valley, Oklahoma*, 2001 OK CIV APP 66, ¶ 15, 24 P.3d 872, 876. (Emphasis added.) In *Wilkerson*, the plaintiff, who operated a mobile home park, appealed a zoning commission decision denying the plaintiff a variance from a new flood prevention ordinance. The plaintiff claimed the ordinance was unconstitutional because it deprived him of a vested right, which would be protected from legislative invasion, except by due process of law. The Oklahoma Court of Civil Appeals rejected that argument, noting that the plaintiff had no "vested right" of continual nonconformance. Gonzales, like the plaintiff in *Wilkerson*, simply has no vested right,³¹ nor any right at all, to continue operating his kennel without a license.³²

¶23 In *In re McDonald's Corporation*, 146 Vt. 380, 505 A.2d 1202 (1985), McDonald's was interested in purchasing certain real property. Before buying it, McDonald's obtained a governmental environmental advisory opinion that a certain commercial permit was not required on the land McDonald's was seeking to purchase for construction of a restaurant. After McDonald's purchased the property, the neighbors filed a petition for a declaratory judgment, contending the permit was, indeed, necessary. While the litigation regarding the necessity of the permit went forward, McDonald's built its restaurant and operated it.

¶24 When the litigation completed, it was adjudged that McDonald's needed the permit. The Vermont Supreme Court rejected McDonald's estoppel argument because McDonald's knew the question of the permit was unsettled and in litigation when it decided to go forward and build the restaurant. The appellate court also rejected McDonald's vested rights argument, stating that McDonald's went forward at its own risk. Any "construction commenced by the developer prior to issuance of all the necessary permits and prior to a final judicial determination . . . is commenced at his peril."³³ The court further stated that "[l]ong ago Justice Holmes remarked: 'Men must turn square corners when they deal with the Government.'"

Id. (quoting *Rock Island, Arkansas & Louisiana R.R. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56 (1920)). “We find no departure from rectangular rectitude in this case.”³⁴

IV. Gonzales Had Not Satisfied All Kennel License Requirements

¶25 The August 17, 2007, order establishes Gonzales’s compliance with the zoning requirements, which is just one area of compliance that is prerequisite to being qualified to receive a kennel license. The order does not grant a kennel license, order issuance of one, or state, contrary to Gonzales’s assertions, that he “was eligible” for one.³⁵ When § 22-115.1 was enacted, Gonzales was merely in the process of obtaining prerequisites for kennel licensure — zoning approval and building permits.³⁶ That he obtained his zoning variances set forth in the August 17, 2007, order, is simply completion of one step toward kennel licensure.

¶26 City admits, and indeed the record shows, that by reason of the August 17, 2007, order, Gonzales obtained zoning approval³⁷ of the kennel. However, that order did not grant a building permit or any exceptions to building permit requirements. Nor did the order make any findings or rulings regarding compliance with building permit requirements or address the issuance or entitlement to a kennel license. In fact, the Board of Adjustment has no power to exempt anyone from complying with City’s building code³⁸ or to grant a kennel license.³⁹

¶27 No constitutionally-protected vested right arises from one’s merely being in pursuit of a license and engaging in an effort to satisfy all applicable requirements for licensure. Because Gonzales had no vested right to operate his kennel without a license, he has failed to establish his standing to challenge the constitutionality of the statute. Therefore, we need not take the analysis any further to reach the issue of whether the enactment of the statute violated Art. 5, § 52 of the Oklahoma Constitution⁴⁰ or any other provision of the Constitution.⁴¹

¶28 “This court will not pass upon the constitutionality of an act of the Legislature, nor of any of its provisions, until there is presented a proper case in which it is made to appear that the person complaining by reason thereof has been or is about to be denied some right or privilege to which he was lawfully entitled” *Rath v. Maness*, 1970 OK 111, ¶ 19, 470 P.2d 1011, 1014. (Emphasis added.) We, therefore, decline to address whether the statute is, in fact, consti-

tutional and further find that it was error for the trial court to make any findings as to the constitutionality of the statute at issue.

CONCLUSION

¶29 Based on our review of the uncontroverted material facts and the applicable law, we find Gonzales lacked standing to challenge the constitutionality of 11 O.S. Supp. 2008 § 22-115.1. The trial court’s denial of City’s and State’s motions to vacate/motions for new trial was erroneous; therefore, we reverse the trial court’s January 22, 2008, order and vacate the trial court’s October 30, 2008, judgment. We remand with instructions to dismiss this case.

¶30 REVERSED, VACATED, AND REMANDED WITH INSTRUCTIONS TO DISMISS.

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

1. Rule 1.36, Okla. Sup. Ct. Rules, 12 O.S. Supp. 2004, ch. 15, app. 1.

2. Title 11 O.S. Supp. 2008 § 22-115.1, provides as follows:

A. Upon the effective date of this act [June 4, 2008], no dog kennel shall be located within two thousand five hundred (2,500) feet of a public or private school or licensed day care facility in a municipality having a population of more than three hundred thousand (300,000). Provided, this prohibition shall not apply to a dog kennel that was lawfully in operation and in full compliance with all licensing, permitting and zoning requirements applicable to said kennel prior to the effective date of this act.

B. Upon the effective date of this act, no public officer or employee shall issue any type of license, permit, approval or consent for a dog kennel to be located within two thousand five hundred (2,500) feet of a public or private school or licensed day care facility in a municipality having a population of more than three hundred thousand (300,000).

C. Applications for a dog kennel license or for any governmental permit, approval or consent needed to authorize the lawful operation of a dog kennel that are pending on the effective date of this act shall be subject to the prohibitions set forth in subsections A and B of this section.

D. The provisions of subsections A and B of this section may be enforced by any public officer within whose jurisdiction a noncompliant dog kennel is located or by any other person aggrieved in any way by noncompliance with said provisions. Enforcement action may include a civil suit for an injunction filed in the district court in the county where a noncompliant dog kennel is located.

E. Any municipality is hereby authorized to enact an ordinance consistent with the provisions of this section and to enforce said ordinance by prosecution of violations in the municipal court, as provided by law.

F. For the purposes of this section, the term “dog kennel” means any place other than a federal, state or municipal facility, veterinary hospital or medical research institute, where more than four dogs beyond the age of six (6) months are kept, harbored, boarded, sheltered or bred.

3. In related litigation before this Court in Appeal No. 105,313, Villa Teresa Moore School appears as a litigant, by and through Sister Patricia Ann Miller, as Representative of the Carmelite Sisters of St. Teresa (Representative). This appeal (Oklahoma County Dist. Ct. Case No. CJ-2008-5282) is one of four appeals — two from Oklahoma County and two from Cleveland County. Appeal No. 105,313 (Oklahoma County Dist. Ct. Case No. CJ-2006-9144) is an appeal brought by Representative, Jim Muse, Janet Muse, Dale Bliss, Cynthia Bliss, and Glen Orr from the trial court’s order, denying their motion to intervene in the matter after the trial court entered an order granting Gonzales certain zoning variances and a special zoning exception that had previously been denied by the Oklahoma City Board of Adjustment. This Court’s Opinion in that case was issued on March 22, 2010. Appeal No. 106,196, from Cleveland County (Dist. Ct. Case No. CJ-2008-1236-L), is an appeal from the trial court’s grant of a temporary injunction in favor of Representative and against Gonzales under 11 O.S. Supp. 2008 § 22-115.1(D). That appeal was decided in this Court’s Opinion, filed on

February 23, 2010. The fourth case, Appeal No. 106,771, from that same Cleveland County District Court case, is an appeal from the trial court's grant of permanent injunctive relief on behalf of Representative, after a hearing on the merits under the same statute, found by the trial court to be constitutional. This Court's Opinion in that appeal was issued on March 8, 2010.

4. Record (R.), Tab 14, attached "Defendant's Exhibit 2." This order is the subject of Appeal No. 105,313.

5. Kennel licensing in Oklahoma City is under the authority of the City Treasurer, not the Zoning Board of Adjustment. See R., Tab 20, Exhibit 2, affidavit of Bob Ponkilla, City Treasurer for the City of Oklahoma City. Bob Ponkilla stated in his Affidavit, dated August 29, 2008, that one of his office's duties is to "oversee all licenses issued by the City of Oklahoma City, including kennel licenses." He further stated that "Kenneth Gonzales does not have a license to operate any kennel in the City of Oklahoma City" and that Gonzales "does not have a building permit on file for the dog kennel." Ponkilla stated, "Thus, Kenneth Gonzales is not in full compliance with all licensing, permitting and zoning requirements applicable to his kennel."

6. In fact, Gonzales admits (R., Tab 14, p. 1) that he has not obtained a permit to modify an existing restroom to meet "handicap requirements." In a September 11, 2008, order, of the trial court in CJ-2008-1786, the trial court denied Gonzales's appeal of the denial by the Oklahoma City Board of Appeals of a requested variance to the handicap accessible restroom "requirements established by the International Building Code 2003." R., Tab 15, attached Exhibit 1. The September 11, 2008, order has not been appealed.

7. R., Tab 8. On June 18, 2008, Representative filed a "Motion to Intervene and a Motion to Dismiss." In this motion, Representative alleged that she was entitled to intervene as a matter of right as someone the statute was aimed at protecting because Villa Teresa Moore School was located within 2,500 feet of Gonzales's dog kennel. She also alleged that Gonzales's Petition should be dismissed as filed in Oklahoma County, instead of in Cleveland County, as set forth in 11 O.S. Supp. 2008 § 22-115.1(D). Gonzales opposed the Motion. The docket sheet (R., Tab 24) indicates that on July 14, 2008, the trial court denied Representative's "Motion to Intervene" and denied, as moot, her "Motion to Dismiss."

8. The journal entry of judgment was filed on October 30, 2008. R., Tab 19.

9. This section of the Oklahoma Constitution provides: "The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

10. R., Tab 23.

11. R., Tab 14, attached "Defendant's Exhibit 2."

12. Gonzales breeds, raises, and shows internationally-recognized, champion registered American pit bull terriers (American Staffordshire terriers). R., Tab 10, at pp. 3-4, and attached "Plaintiff's Exhibit 4," pp. 89-97. Although there is considerable conflicting information in the record regarding the nature of the breed in general and Gonzales's dogs in particular, including unchallenged assertions that none of Gonzales's dogs has ever attacked or bitten any adult or child, none of these facts is material to our consideration of the statute at issue.

13. R., Tab 9, attached as "Plaintiff's Exhibit 2."

14. The parties do not dispute that Oklahoma City is a municipality with a population in excess of 300,000.

15. Transcript (Tr.) of Gonzales's testimony, R., Tab 10, attached as "Plaintiff's Exhibit 4," p. 55.

16. R., Tab 1, p. 2.

17. R., Tab 12, p. 2.

18. R., Tab 15, p. 1; Tab 13, attached as Exhibit 2.

19. *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952 (1968).

20. If Gonzales had been operating his kennel with a license, he would have been "grandfathered" in under § 22-115.1(A) and would have been allowed to continue his lawful operation.

21. In *Lawton*, the language of the new law was found to be unconstitutionally vague such that people of common intelligence would have to guess at the meaning of "geographical proximity." An injunction issued, prohibiting the Board from enforcing the statute.

22. R., Tab 14, attached "Defendant's Exhibit 2." This case was filed in the Oklahoma County District Court by Gonzales to appeal from the Oklahoma City Board of Adjustment's decision denying requested municipal code variances regarding, for example, parking spaces, curbing, driveway dimensions and a special zoning exception. The Oklahoma County District Court entered the August 17, 2007, order as part of the settlement of Gonzales's appeal to the District Court from the Board of Adjustment's denial.

23. Gonzales's "Response to Petition in Error," filed on February 11, 2009, in his Statement of the Case.

24. Indeed, in Gonzales's Petition for Injunction, Temporary Injunction, Temporary Restraining Order, and Declaratory Relief, he states that he "was advised that building permits were needed before the issuance of the kennel license." R., Tab 1, p. 3. Section C of 11 O.S. Supp. 2008 § 22-115.1 provides specifically for Gonzales's situation of having a pending application for kennel licensure at the time of the law's enactment: "Applications for a dog kennel license or for any governmental permit, approval or consent needed to authorize the lawful operation of a dog kennel that are pending on the effective date of this act shall be subject to [its] prohibitions . . ." (Emphasis added.) See also R., Tab 15, pp. 1-2 of "City of Oklahoma City's Response to Plaintiff's Motion for Writ of Mandamus," in which City states that on "April 21, 2006, Plaintiff applied for a building permit for a dog kennel and was given a list of requirements from City's public works department staff outlining the specific items that needed to be complied with (including handicapped accessible restrooms and access) before a building permit could be issued." Gonzales had filed a Writ of Mandamus, asking that City be commanded to issue a building permit (without handicap-compliant restrooms) and to issue his kennel license. R., Tab 14. Gonzales's initial building permit was denied because it did not meet handicap restroom requirements under the International Building Code 2003. R., Tab 15, p. 5, and the order denying Gonzales's appeal of the denial of the handicap restroom variance, attached as Exhibit 1 to Tab 15. This order was entered in Oklahoma County District Court Case CJ-2008-1786, not on appeal before this Court.

25. Tab 25, Tr., June 12, 2008, at pp. 4-5.

26. R., Tab 12, p. 2.

27. *Id.*

28. *Id.*, p. 3.

29. R., Tab 14, attached "Defendant's Exhibit 2."

30. Chapter 59 of the Oklahoma City Municipal Code is that city's real property zoning code.

31. A license is the "permission by competent authority to do an act which, without such permission, would be illegal . . ." *Black's Law Dictionary* 829 (5th ed. 1979). "A license gives to the licensee a special privilege not accorded to others and which the licensee otherwise would not enjoy." *Priddy v. City of Tulsa*, 1994 OK CR 63, ¶ 8, 882 P.2d 81, 83. See *Carl v. State of Oklahoma ex rel. Department of Public Safety*, 1995 OK CIV APP 147, 909 P.2d 1196 (driver has no "vested right" to issuance of driver's license and thus no constitutional right to modification of an order revoking that privilege), citing *Robertson v. State of Oklahoma ex rel. Lester*, 1972 OK 126, 501 P.2d 1099; *Brown Distributing Co., Inc. v. Oklahoma Alcoholic Beverage Control Board*, 1979 OK 101, 597 P.2d 324 (no vested property right in liquor store license and no constitutional protection); *Fernhoff v. Tahoe Regional Planning Agency*, 622 F. Supp. 121 (D.C. Nev. 1985) (land developer who never had a building permit never had a vested right against any zoning changes that might restrict the development of his land); *Hannifin v. Morton*, 444 F.2d 200 (C.A.N.M. 1971) (person who had applied for issuance of mineral prospecting permits prior to promulgation of regulation imposing 25 cents per acre rental as a condition of permit issuance had not acquired any vested right under the Constitution protecting him from that payment); *Schraier v. Hickel*, 419 F.2d 663 (C.A.D.C. 1969) (the filing of an application for an oil and gas lease that has not been granted is an "expectation" only and it does not give any right to a lease, nor create a legal interest).

32. "Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right." *McNeely v. United States*, 874 A.2d 371, 381 (D.C. 2005), quoting *Nichia v. People of State of New York*, 254 U.S. 228, 41 S.Ct.103 (1920), and finding the dog owner lacked standing to bring a constitutional claim. In fact, use of one's property to operate a licensed kennel can be constitutionally limited. In *City of La Marque v. Braskey*, 216 S.W.3d 861 (Ct. App. Texas 2007), the landowner who operated a state-licensed cat shelter sought injunctive relief along with a declaratory judgment that the city's kennel location ordinance did not apply to her. The Texas Court of Appeals vacated and dismissed the appeal because the ordinance's restrictions on the landowner's use of her property as a cat shelter did not constitute a threat to a vested property right and thus the trial court did not have jurisdiction to hear the landowner's lawsuit. The court found that the law, prohibiting a kennel within 500 feet of a dwelling, school or church, only affected the way the landowner used her property, which was not an absolute right or a constitutionally protected right. The court did not reach the issue of the constitutionality of the penal ordinance itself. See also *Miller v. City of Arcadia*, 121 Cal. App. 660, 9 P.2d 587 (1932), wherein the trial court, affirmed on appeal, upheld the constitutionality of an ordinance limiting the number of dogs that

could be kept within 250 feet of any human dwelling house, the result of which was to shut down the use of the property as a kennel.

33. See *Preseault v. Wheel*, 132 Vt. 247, 315 A.2d 244 (1974).

34. See *In re McDonald's Corporation*, at 1205.

35. R., Tab 21, Transcript of October 2, 2008, hearing, p. 8, line 9.

36. Transcript of Proceedings of Temporary Restraining Order, June 12, 2008, at pp. 4-5.

37. The enactment of 11 O.S. Supp. 2008 § 22-115.1 did not invalidate that zoning approval order.

38. The Public Works Department is the enforcing agency for building permits under the City's Municipal Code. R., Tab 16, attached as Exhibit 1, at pp. 5 and 9.

39. Gonzales also argues that § 22-115.1 amends or destroys his rights under the August 17, 2007, order and thus violates Art. 5, § 52 of the Oklahoma Constitution. The right Gonzales has pursuant to that order is the right to have his current property configuration meet with zoning regulations. Nothing in the language of § 22-115.1 voids, much less mentions or refers to, the granted zoning variances. The trial court erroneously interpreted the August 17, 2007, order as granting a right to something other than zoning variances.

40. Gonzales cites *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 1968 OK 73, ¶ 23, 464 P.2d 748, 755, in support of this assertion. That case sets forth the definition of "vested right" as "the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute or by contract. Once created, it becomes absolute, and is protected from legislative invasion by Art. 5, Secs. 52 and 54 of our Constitution." (Emphasis added and citations omitted.)

41. Nor does this Court make any determination as to whether actual possession of a kennel license would be a "vested right" subject to constitutional protection.

2010 OK CIV APP 63

**K. PHIL FLEETWOOD, Plaintiff/Appellant,
v. CHEVRON U.S.A. PRODUCTION
COMPANY, and CHEVRON U.S.A. INC.,
Defendants/Appellees, CHESAPEAKE
OPERATING, INC.; LINDA
GOLDENSTERN; JOE MARKO
GOLDENSTERN; AMERADA HESS
CORPORATION; JAY ALLEN STOLPER;
SCOTT STOLPER, Trustee of the STOLPER
FAMILY TRUST DATED JANUARY 11, 1990;
ANDREW STOLPER, Trustee of the
STOLPER FAMILY TRUST DATED
JANUARY 22, 1992; and JORDAN
STOLPER, Trustee of the STOLPER FAMILY
TRUST DATED OCTOBER 25, 1996,
Defendants.**

Case No. 106,849. March 25, 2010

**APPEAL FROM THE DISTRICT COURT OF
GRADY COUNTY, OKLAHOMA**

**HONORABLE RICHARD G. VAN DYCK,
TRIAL JUDGE**

AFFIRMED

**Kent P. Sullivan, LEACH, SULLIVAN, SULLI-
VAN & WATKINS, L.L.P., Duncan, Oklahoma,
for Plaintiff/Appellant,**

**Richard B. Noulles, GABLE GOTWALS, Tulsa,
Oklahoma, for Defendant/Appellees,**

Wm. C. Hetherington, Jr., Judge:

¶1 K. Phil Fleetwood (Fleetwood) appeals the denial of judgment in his favor as to all Defendants¹ and the entry of judgment in favor of Chevron U.S.A. Production Company and Chevron U.S.A. Inc. (Chevron) on his claim attacking the validity of a Receiver Oil and Gas Lease (Receiver Lease). Fleetwood's challenge of the receivership is untimely. Consequently, the trial court order finding his interest is subject to the leasehold rights of Chevron is **AFFIRMED**.

FACTS

¶2 There is no dispute Bokma Oil Company was established as a Delaware corporation in 1919, or how, through various mineral conveyances, an undivided one-fourth interest in and to all oil, gas and other minerals in and under and produced from the N/E/4 of the S/W/4 of Section 33, Township 3 North, Range 5 West, I.M. Grady County, Oklahoma, (the Section 33 property) was transferred to Bokma by April 7, 1924. Bokma's Delaware corporate charter status became void and suspended on April 1, 1932, by that state due to non-payment of franchise taxes, and in conformity with Delaware's requirements January 1933.²

¶3 At the time of the suspension, Bokma had 140,000 shares of issued and outstanding stock. In the 1920s, Bokma was a Delaware Corporation primarily operated by B. Weis.³ According to his will, he died leaving two sons, LeRoy Weis and Richard Weis, who are the individuals through whom Fleetwood claims he obtained title by way of a 1998 Delaware corporate reinstatement proceeding and subsequent conveyances. The record before us indicates the original Bokma corporation had 250 shareholders, with LeRoy Weis owning approximately 1/10 of 1% of Bokma stock. Fleetwood later claims the surviving Weis brothers recalled that their father may have bought out all of the shareholders and obtained 100% of the stock prior to the corporation losing its corporate status.

¶4 In pooling proceedings before the Oklahoma Corporation Commission, LeRoy Weis filed an "Appearance and Answer Of LeRoy Weis on Behalf of Himself and All Stockholders of Bokma Oil Company, A Delaware Corporation, and Other Persons Claiming By, Through or Under Said Corporation" (1957 Appearance) on February 20, 1957. He asserts Bokma was no longer an existing corporation, Bokma had no officers or directors authorized to transact its business, and if there were still other share-

holders alive, they are scattered in various locations. He described the difficulty and expense of reinstating the corporate status in Delaware in compliance with the necessary reinstatement legal requirements and identified Bokma's principal stockholders as "B. Weis, R. Reich, M. Sabath and Rudolph Lederer, all of whom are deceased."⁴

¶5 The Receiver Lease was the result of a "Petition For Determination That Mineral Owner is Unlocatable, Authorization Of Sale Of Oil and Gas Lease and Appointment Of Receiver" filed against Bokma on July 22, 1994, by an individual with an interest in mineral acres underlying those held by Bokma (the Lease Suit). The Lease Suit petition sought an order determining Bokma was unlocatable, authorizing the sale of an oil and gas lease, and appointing a receiver for Bokma. The petition includes an assertion a third party is willing to purchase an oil and gas lease covering Bokma's interest "in the Subject Premises, less and except the Second and Third Bromide Sands," for a three year term with a 3/16ths royalty and \$150.00 per acre bonus payment, which is "consistent with other leasing activity in the area."

¶6 An August 18, 1994 Order in the Lease Suit, quieted title in the minerals and allowed for the leasing of the acreage by receiver for three years with a minimum bonus of \$152.00 per acre and a 3/16th royalty. The receiver leased the Bokma interest to Chesapeake Operating, Inc., which thereafter assigned a portion of its interest in one well and its interest to the base of the Viola formation to Chevron. Chevron was not a party to the receivership proceedings and its interest was acquired approximately two years before Fleetwood filed the instant action.

¶7 The record shows this litigation was filed by Fleetwood after Chevron had obtained interests and drilled wells and after LeRoy Weis's March 25, 1998 filing in Delaware of a "Certificate Of Renewal, Restoration Or Revival Of Certificate Of Incorporation" for Bokma and a "Written Consent of Stockholders of Bokma Oil Company" in which he alleged he and his brother Richard were the record owners of a majority of the Bokma stock. LeRoy Weis was able to obtain a reinstatement order based upon these representations.⁵

¶8 In an April 17, 1998 letter, Fleetwood confirms an agreement with LeRoy Weis pursuant to which, among other things, LeRoy Weis as

Bokma's president will sell Fleetwood its mineral interests in the Section 33 property which is leased to Chevron, and Fleetwood will reconvey a half interest in the Section 33 property mineral interests back to LeRoy Weis or his designate. Fleetwood agreed to attempt to negotiate "a more favorable oil and gas lease" for the minerals in the Section 33 property "and also attempt to release any deep mineral rights." Fleetwood then obtained a quit-claim deed for the acreage from Bokma through LeRoy Weis, acting as its president.⁶

¶9 Fleetwood filed the quit claim deed from Bokma of record in Grady County on April 27, 1998. He claims an ownership interest in one-half of all net royalties, bonuses, rentals and other benefits obtained from Bokma's former interest. This action by Fleetwood was filed December 15, 1998.

¶10 In his motion for summary judgment, Fleetwood argues the Receiver Lease conveyed no interest to Chevron, claiming the Lease Suit Order under which the receiver was appointed and the lease interest sold to Chevron were void. He argues publication notice was insufficient, failed to meet minimum due process, and was void for lack of subject matter jurisdiction because the Lease Suit plaintiff had failed to plead and prove a necessary element required by 52 O.S.2001 § 521, *et seq.*

¶11 Chevron's response and counter motion for summary judgment argues the receivership is not void because the judgment roll for that proceeding establishes the trial court had jurisdiction over Bokma and due process requirements were met. Chevron also argues Fleetwood's action was filed outside of the time allowed under 12 O.S.2001 §§ 1031 and 1038 and he may not collaterally attack the Lease Suit Order.

¶12 The Order appealed finds Chevron's interest is as an assignee of leasehold rights from the surface down to, but not below, the base of the Viola formation under a lease from the Receiver. The trial court entered an order pursuant to 12 O.S.2001 § 994 finding there is no just reason for delay in the filing of final judgment as to the claims between Fleetwood and Chevron, Fleetwood was not entitled to any relief on his claims against Chevron, and any interest Fleetwood holds is subject to Chevron's interest.

STANDARD OF REVIEW

¶13 In determining whether summary adjudication was appropriate, we must examine the pleadings, depositions, affidavits and other evidentiary materials submitted by the parties and affirm if there is no genuine issue as to any material fact and Chevron was entitled to judgment as a matter of law. *Perry v. Green*, 1970 OK 70, 468 P.2d 483. All inferences and conclusions to be drawn from the evidentiary materials must be viewed in a light most favorable to Plaintiff. *Ross v. City of Shawnee*, 1984 OK 43, 683 P.2d 535. We are limited to the issues actually presented below, as reflected by the record which was before the trial court rather than one that could have been assembled. *Frey v. Independence Fire and Casualty Company*, 1985 OK 25, 698 P.2d 17.

¶14 We review the trial court's grant of summary judgment *de novo* and, while viewing all evidentiary materials in the light most favorable to the nonmoving party, independently decide legal issues resolved by the trial court. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. "To prevail as the moving party on a motion for summary adjudication, one who defends against a claim by another must either (a) establish that there is no genuine issue of fact as to at least one essential component of the plaintiff's theory of recovery or (b) prove each essential element of an affirmative defense, showing in either case that, as a matter of law, the plaintiff has no viable cause of action." *Akin v. Missouri Pacific Railroad Co.*, 1998 OK 102, ¶9, 977 P.2d 1040, 1044.

ANALYSIS

¶15 The record is clear that Bokma lost its corporate status in Delaware in 1932 and its authorization to conduct business in Oklahoma in 1935. Fleetwood argues the 1994 receivership is invalid and void because the verified petition requesting the appointment lacks the assertion required by 52 O.S.2001 § 522(a)(5) "that the plaintiff has acquired or has good reason to believe that he can acquire operating rights covering all mineral interests other than the interest of said defendants in said tract or tracts." He contends this defect is apparent by inspection of the judgment roll in the receivership and the trial court, therefore, lacked both subject matter jurisdiction and the authority to render judgment. He also argues notice by publication was ineffective because either LeRoy Weis or Richard Weis should have been

found using Chicago area telephone books, and this would have led to information to notify Bokma.⁷

¶16 In support of its motion for summary judgment and to refute Fleetwood's claims of lack of effort in a search for contact information, Chevron presented portions of the deposition testimony of Jeff Williams, the landman who conducted the search for Bokma's contact information. His search, which he noted was conducted before the internet was available, included contacting Chicago area directory assistance and securing listings from Chicago area telephone books at the Oklahoma County Library for persons with the same last names of the four original corporate officers (Weis, Sabath, Reich, and Lederer), as identified by LeRoy Weis in the 1957 Appearance. Williams testified he called each person so identified but none of the persons contacted had information about Bokma or were identified as stockholders or heirs of a Bokma stockholder.

¶17 The plaintiff in the Lease Suit did not personally conduct a search, but the record contains evidence such a search was performed on her behalf. Service by mail was attempted but was unavailing. The trial court's order in the Lease Suit states it appointed a receiver after consideration of the record, the verified petition, "and the evidence presented at the time of the hearing on said petition."

¶18 The long-recognized rule is, as the Court stated in *Edwards v. Smith*, 1914 OK 342, ¶0, 142 P. 302, 42 Okl. 544, that "[a] judgment is not void in the legal sense for want of jurisdiction, unless its invalidity and want of jurisdiction appears on the record; it is voidable merely." We do not agree with the contention the judgment roll at issue here from the Lease Suit is tainted by a fatal defect because it fails to affirmatively show what active and diligent efforts were taken regarding service. *Bomford v. Socony Mobil Oil Co., Inc.*, 1968 OK 43, 440 P.2d 713. Unless a record affirmatively shows a want of jurisdiction, every fact not negated by that record is presumed in support of the judgment of a court of general jurisdiction, and "where the record of the court is silent upon the subject, it must be presumed in support of the proceedings that the court inquired into and found the existence of facts authorizing it to render the judgment which it did." *Bowling v. Merry*, 1923 OK 435, ¶0, 217 P. 404, 91 Okl. 176. Applying this rule to the judgment roll in the

Lease Suit, we conclude minimum due process standards were met in that proceeding and it was not void but, at best, voidable.

¶19 Chevron argues Fleetwood's attack on the judgment in the Lease Suit both is collateral and is untimely. An attack is collateral when it seeks "to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial." *Nilsen v. Ports of Call Oil Company*, 1985 OK 104, n. 5, 711 P.2d 98, 106. "Where a judgment forms a link in a litigant's chain of title, and the opposing party, plaintiff or defendant, in his pleadings, or by objecting to its introduction in evidence, assails its validity for defects in the record on which the judgment is based, the attack is collateral and not direct." *Pettis v. Johnston*, 1920 OK 224, ¶40, 190 P. 681, 694. In a collateral attack on a judgment, the court's inquiry may not extend beyond a determination whether the assailed judgment affirmatively disclosed a lack of jurisdiction and consequently is void on its face. *Farmers' Union Co-operative Royalty Company v. Woodward*, 1973 OK 128, 515 P.2d 1381. "Where extrinsic evidence is needed to show the jurisdiction's absence, the decision is not facially invalid although it may be declared voidable." *Ashikian v. State ex rel. Oklahoma Horse Racing Commission*, 2008 OK 64, 188 P.3d 148, 155. "A district court judgment or order is facially void if, on an inspection of the judgment roll, it is apparent that one or more of the requisite jurisdictional elements — that of the subject matter, *in personam* cognizance, or the court's power to render a particular decision — is shown to have been absent." *Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶10, 981 P.2d 1244, 1249. (Footnote omitted.)

¶20 The question Fleetwood presents is whether the failure to include the § 522(a)(5) affirmation in the verified petition in the Lease Suit poses a facial defect fatal to jurisdiction or whether it presents an irregularity in the course of obtaining judgment. We conclude the defect presents the latter, an "irregularity in obtaining a judgment or order."

¶21 Having so concluded, Fleetwood's action falls within the ambit of 12 O.S.2001 § 1031 (Third), regarding "mistake, neglect or omission of the clerk or *irregularity in obtaining a judgment or order*," (emphasis added), and an action to challenge such a judgment or order must be commenced within three years of the judgment.

12 O.S.2001 § 1038. Fleetwood's petition was not filed within this time limitation.

¶22 Fleetwood's December 15, 1998 Petition was a collateral attack on the August 18, 1994 judgment in the Lease Suit and, as a matter of law, the attack was untimely pursuant to § 1038 and § 1031(Third).⁸ The trial court order granting Chevron judgment and denying Fleetwood's requested relief is **AFFIRMED**.

BUETTNER, P.J., and HANSEN, J., concur.

1. Prior to entry of the order on appeal, Fleetwood dismissed with prejudice his claims against Jay Allen Stolper; Scott Stolper, Trustee of the Stolper Family Trust Dated January 11, 1990; Andrew Stolper, Trustee of the Stolper Family Trust Dated January 22, 1992; and Jordan Stolper, Trustee of the Stolper Family Trust Dated October 25, 1996. An assignment in late 1994 granted these individuals and trusts a 0.625% overriding royalty interest out of the interest of Defendants Linda Goldenstern and Joe Marko Goldenstern. Linda Goldenstern was the plaintiff in the 1994 receivership proceedings. According to Fleetwood, she also owns a 15% working interest from leases and/or assignments in 1957 and 1974.

2. According to the record, Bokma had registered to do business in Oklahoma as a foreign corporation on January 21, 1930, but that authorization was cancelled on May 20, 1935 by the Secretary of State of the State of Oklahoma.

3. There does not appear to be any dispute "B. Weis" is "Berthold Weis," who died in 1945. His 1939 will was probated and made dispositions of his property. His surviving wife, Fanny Weis, died on February 13, 1971.

4. According to a documents filed March 1, 1957 in the pooling proceedings, Bokma's fractional interest was 1.5625% in the entirety of Section 33, Township 3 North, Range 5 West in Grady County, Oklahoma and it is the only interest listed as "unleased."

5. Under 8 Del. Gen. Corp. L. § 312, renewal or revival of a corporation suspended or which became "inoperative for nonpayment of taxes," may be procured by filing a "Certificate Of Renewal, Restoration Or Revival." The statute provides the certificate must be "filed by authority of those who were directors or members of the governing body of the corporation at the time its certificate of incorporation expired or who were elected directors or members of the governing body of the corporation as provided in subsection (h) of this section." 8 Del. Gen. Corp. L. § 312(d)(6). Subsection (h) further provides that if there are no directors or officers of the corporation, "the stockholders may elect a full board of directors, as provided by the bylaws of the corporation, and the Board shall then elect such officers as are provided by law" Finally, 8 Del. Gen. Corp. § 216 allows, absent a provision in the certificate of incorporation or bylaws specifying the votes necessary for a quorum, that a majority of shares is required for a quorum and directors are to be elected by a plurality of the shares present in person or by proxy.

6. According to an Illinois State Bar Association notice attached as an exhibit to Chevron's motion for summary judgment and response to Fleetwood's motion for summary judgment, LeRoy Weis died, at age 95, on October 18, 1999.

7. The petition in the receivership states an effort had been made to locate LeRoy Weis. At hearing on the motions herein, counsel for Chevron pointed out that notice of the receivership was due the interest owner, which was Bokma, not individual shareholders such as LeRoy Weis.

8. Chevron also asserts Fleetwood acquired no interest in the tract and has no right to challenge Chevron's interest, claiming Fleetwood fraudulently obtained reinstatement of Bokma's corporate status and any purported conveyance from that fraudulently reinstated corporation to Fleetwood was legally insufficient, invalid, and passed no interest to him. Proof of this allegation would require consideration of evidence extrinsic to the judgment roll for the Delaware reinstatement proceedings. Having determined Fleetwood's challenge is untimely, we need not address this issue, but do note Delaware precedent holds that "once a charter has been renewed and revived only the State can institute proceedings to void it on the ground that the parties applying for such renewal and revival were not authorized to do so." *Engstrum v. Paul Engstrum Associates, Inc.*, 124 A.2d 722, 724, 36 Del.Ch. 19, 23 (1956).

STATE OF OKLAHOMA ex rel.
DEPARTMENT OF TRANSPORTATION,
Plaintiff/Appellee, vs. JAMES R. TEAL, JR.,
and PAMELA TEAL, Defendants/Appellants,
and DELAWARE COUNTY TREASURER,
Defendant.

Case No. 106,244. February 1, 2010

APPEAL FROM THE DISTRICT COURT OF
DELAWARE COUNTY, OKLAHOMA

HONORABLE BARRY DENNEY,
TRIAL JUDGE

DISMISSED

Barry K. Roberts, Norman, Oklahoma for Plaintiff/Appellee

K. Ellis Ritchie, Ryan M. Roberts, David F. Duvall, K. ELLIS RITCHIE, P.C., Pryor, Oklahoma, for Defendants/Appellants

JANE P. WISEMAN, CHIEF JUDGE:

¶1 This appeal arises from the trial court's order denying Defendants' Exception to Report of Commissioners. The issue before us is whether the trial court erred in instructing the Commissioners not to consider damages arising from the loss of access and parking in front of Defendants' property caused by a highway project's curb and gutter construction. Having reviewed the record on appeal and applicable law, we dismiss for lack of appellate jurisdiction.

FACTS AND PROCEDURAL HISTORY

¶2 The Oklahoma Department of Transportation (ODOT) filed a petition to acquire an interest in certain real property in Delaware County for the purpose of "establishing, constructing and maintaining" a highway in front of property owned by James R. Teal, Jr.¹ and Pamela Teal (Defendants). After their appointment and instruction by the trial court, the Commissioners filed their first report on May 8, 2006, assessing just compensation in the amount of \$24,600. Neither party filed an exception to this Commissioners' Report nor challenged the validity of the report or of the taking. In May 2006, ODOT filed a demand for jury trial.

¶3 On September 25, 2007, ODOT filed a motion in limine requesting the trial court to "exclude at trial any and all testimony of the Defendant[s'] expert appraisal witness, Chris Rolland, regarding remainder/cost of cure

damages" to Defendants' building as a result of their "loss of use of pre-existing highway right-of-way for access and parking." ODOT argued Mr. Rolland's expert opinion is unreliable on this point because it is based on faulty evidence. ODOT contended that at the time of his deposition, Mr. Rolland had not seen the easement ODOT acquired back in 1941 which gave it permission to use the property for highway purposes.

¶4 Even though Defendants have used the highway right-of-way as access for their property and for parking, ODOT argues, this use was "entirely dependent and contingent upon [ODOT's] use of said area for highway purposes." Once ODOT decided to use the property for reconstruction of the highway per the 1941 easement, Defendants' use of the same property for access and parking was terminated. ODOT contends that, as a result, Defendants' loss of use of the property is not compensable. ODOT claimed that, because the loss complained of is not compensable, Defendants' expert should be prohibited from testifying that Defendants' building sustained a reduction in value from the "alleged loss of access and parking."

¶5 In response, Defendants argued the motion in limine should be denied because "the [e]ffects of the taking and project on access and parking are proper and admissible under *State of Oklahoma ex rel. Department of Highways v. Burden*, 1959 OK 60, 338 P.2d 154." Defendants argued their expert properly considered loss of access and parking in determining the impact the loss had on the value of their property.

¶6 After hearing both parties' arguments on ODOT's motion in limine, the trial court found a Daubert² hearing was necessary before ruling on the issue. At the conclusion of the *Daubert* hearing, the trial court held in part as follows:

Again, in reviewing the-the Burden case, it is not apparent to the Court that the curbing in that particular case was built on the original right-of-way before this taking of the-the point there. And based on that, my conclusion is that the Highway Department certainly had every right, with the taking that they had from 1941, to do anything on that particular easement related to the highway. In other words, it's the opinion of this Court that if they had chosen to, they could have curbed the existing highway without even taking anything further.

The trial court also held that under *Daubert*, Mr. Rolland's opinion was unreliable:

particularly since [he] is unable to tell the Court how much of his value relates to the building of that curbing and therefore the ... loss of the access, the Court will prohibit him from testifying as to the value that he's arrived at where he cannot say how much of that was due to what was unreliable information or ... an unreliable assumption that he's made in coming up with his appraisal.

¶7 On January 23, 2008, Defendants filed a motion requesting the trial court to certify its *Daubert* order for interlocutory appeal or alternatively reappoint the Commissioners to issue an amended report to conform with the trial court's motion in limine ruling.

¶8 ODOT objected to certifying the ruling for appeal arguing that motion in limine rulings are advisory, non-final orders, and therefore not appealable and further arguing that the ruling is not an interlocutory order certifiable under 12 O.S.2001 § 952. ODOT also denied that good cause existed for the Commissioners to reassess the property and file an amended report.

¶9 Although the trial court declined to certify the case for interlocutory appeal, it ordered the re-appointment of Commissioners with amended instructions. The Commissioners filed their Amended Report on March 18, 2008, assessing just compensation in the same amount as its first report, \$24,600.

¶10 On April 14, 2008, Defendants filed an exception to the Amended Report of the Commissioners claiming the instructions given to the Commissioners relating to the curbing issues resulted in Defendants being denied their constitutional right of just compensation "for the [e]ffects of the curbing upon access and parking and resulting damages occasioned thereby."

¶11 On April 11, 2008, ODOT filed a demand for jury trial followed a week later by Defendants' demand for jury trial.

¶12 On August 4, 2008, the trial court entered an order denying Defendants' exception to the Amended Report of Commissioners. The trial court held in part:

That based on all the evidence presented both in the hearing on Plaintiff's First

Motion in Limine on September 27, 2007, and the evidence and arguments presented by counsel in the hearing . . . regarding Defendants' exception to the commissioners' award, the Court finds that Plaintiff's use of its pre-existing highway easement rights obtained in the easement dated April 21, 1941, was proper and will not result in any compensable damages to the Defendants resulting from loss of access and/or parking due to installation of curbing; that the commissioners were properly re-appointed and instructed to re-evaluate their estimate of just compensation based on the Court's September 21, 2007, ruling; and that the resulting Amended Report of Commissioners is proper; consequently, Defendants' Exception to Report of Commissioners should be denied.

Defendants appeal the trial court's ruling denying their exception to the Amended Report of Commissioners.

STANDARD OF REVIEW

¶13 The question presented is one of law which we review *de novo*. *K&H Well Serv., Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223. In a review *de novo*, the appellate court engages in a plenary, independent, and non-deferential examination of the trial court's legal rulings. *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, ¶ 5, 895 P.2d 731, 733 (approved for publication by the Oklahoma Supreme Court).

ANALYSIS

¶14 Defendants filed this appeal after the trial court denied their exception to the Commissioners' Amended Report, citing 66 O.S.2001 § 56 and Supreme Court Rule 1.20(a)(13), 12 O.S.2001, ch. 15, app. 1,³ as authority for us to consider this appeal. "Title 66 O.S.2001 § 56 provides for an appeal from the district court regarding decisions on objections to the report of the commissioners." *Jones v. Ransom*, 2008 OK CIV APP 44, ¶ 10, 184 P.3d 561, 563; *see also* 69 O.S.2001 § 1203(f) ("Either party aggrieved may appeal to the Supreme Court from the decision of the district court on exceptions to the report of commissioners")

¶15 "Pursuant to 12 O.S.2001 § 952(b)(1), an order adjudicating an exception challenging the right to condemn, *i.e.*, an issue regarding the taking of a property owner's interest, is appealable as a final order." *State of Oklahoma*,

ex rel. Dep't. of Transpor. v. Mehta, 2008 OK CIV APP 25, ¶ 21, 180 P.3d 1214, 1219; *see also Jerry Scott Drilling Co., v. Scott*, 1989 OK 131, ¶ 9, 781 P.2d 826, 828. However, even though a trial court's order ruling on exceptions may be considered a final order in some instances, such as when no demand for a jury trial is made, when a timely demand has been made, the Commissioners' Report and a trial court's order confirming it do not end the lawsuit. *Scott*, 1989 OK 131 at ¶ 8, 781 P.2d at 828.

¶16 As explained in *Mehta*, "the trial court's denial of ODOT's exception challenging the Commissioners' Report which apportioned the compensation award in contravention to the 'unit rule' [was] not immediately appealable as a final order" when both parties demanded a jury trial "thereby bringing to issue just compensation and damages." *Mehta*, 2008 OK CIV APP 25at ¶ 23, 180 P.3d at 1220.

¶17 Before addressing the merits of the case, we must first determine whether this appeal is properly before us. We have appellate jurisdiction to review only final orders, certified interlocutory orders, and interlocutory orders appealable by right. *Smith v. Moore*, 2002 OK 49, ¶ 2, 50 P.3d 215, 216; 12 O.S.2001 § 952. In this case, none of the parties requested trial court certification of the order in question for interlocutory appeal. Furthermore, the trial court's order is not an interlocutory order appealable by right. 12 O.S.2001 § 993; Supreme Court Rule 1.60, 12 O.S.2001, ch. 15, app. 1.

¶18 After reviewing the appellate record, we find the trial court's order denying Defendants' exception challenging the Commissioners' Amended Report is not immediately appealable as a final order. Defendants' challenge to the report is that the Commissioners did not consider damages arising from a loss of access and parking in front of Defendants' commercial building resulting from a highway project. As argued in their "Exception to Report of Commissioners":

3. The aforesaid instructions to the Commissioners as [it] relates to the curbing issues results in the Defendants being denied any compensation for the [e]ffects of the curbing upon access and parking and resulting damages occasioned thereby.

4. Defendants allege that this is erroneous and not in accordance with existing law on "Just Compensation" and that they are

entitled to be compensated for damages occasioned by the installation of curbing along the frontage of their property

Defendants' issue on appeal centers on the appropriate measure of damages, and "these issues may be the proper subject of appeal after the jury has returned a verdict." *Scott*, 1989 OK 131 at ¶ 10, 781 P.2d at 828-29.

¶19 Both parties in this case filed a timely demand for jury trial after the Commissioners filed their Amended Report. We held in *Mehta*:

When a timely demand for jury trial has been filed, the Commissioners' Report does not end the proceedings. . . . "The appropriate amount of damages must still be fixed by a jury as allowed in the statutory scheme. Thus, in the normal situation where a jury assessment has been demanded, only where the jury has finally determined the amount of compensation will the case be in a posture for appeal to this Court."

Mehta, 2008 OK CIV APP 25at ¶ 23, 180 P.3d at 1220 (quoting *Scott*, 1989 OK 131 at ¶ 8, 781 P.2d at 828). Defendants' exception challenging the Amended Report also becomes "immaterial and moot upon the parties' demands for jury trial" because the Commissioners' award is no longer "relevant when superseded by the jury's verdict." *Id.* at ¶ 24, 180 P.3d at 1220; *see also Owens v. Oklahoma Tpk. Auth.*, 1954 OK 345, ¶ 10, 283 P.2d 827, 831. It should be noted that the Commissioners' report is not admissible as evidence at trial. *Richardson v. State ex rel. Oklahoma Dep't. of Transp.*, 1991 OK CIV APP 100, ¶ 6, 818 P.2d 1257, 1258.

¶20 For these reasons, the trial court's order denying Defendants' exception to the Commissioners' Amended Report is not a final order subject to immediate appellate review. Regardless of the correctness of the trial court's instructions to the Commissioners in determining just compensation, the Commissioners' Amended Report became immaterial on the issue of just compensation upon the parties' demands for jury trial because the Commissioners' award will be superseded by the jury's verdict. The order under review is not final but interlocutory in nature and is not properly before us, requiring us to dismiss this appeal for lack of jurisdiction.

CONCLUSION

¶21 Both parties filed a demand for jury trial, and the issue of just compensation has been reserved for the jury's determination. This Court lacks jurisdiction to decide this appeal which we therefore dismiss.

¶22 DISMISSED.

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

1. The petition filed by ODOT lists James Teal's middle initial as "A." In pleadings filed by defendants, James' middle initial is listed as "R."
2. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
3. This rule states in part as follows:
 - (a) Judgment. A judgment is the final determination of the rights of the parties in an action. . . . The term "judgment" is synonymous with a final order for the purpose of these rules. A judgment includes any decision appealable under the provisions of: . . . (13) 66 O.S.1991 § 56 (condemnation appeals)

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JASON ANTONIO MARTINEZ, SCBD #5626 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Jason Antonio Martinez should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, October 20, 2010**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Deadline for Delegate Submission

SEPTEMBER 1, 2010

Dear County Bar Presidents:

Thank you to the County Bar Presidents of:

Adair, Alfalfa, Beckham, Blaine, Bryan, Canadian, Carter, Cherokee, Choctaw, Cleveland**, Coal, Comanche, Cotton, Creek, Custer, Ellis, Garfield, Garvin, Grant, Greer, Harper, Jackson, Jefferson, Johnston, Kingfisher, Kiowa, Love, Mayes, McClain, McCurtain, McIntosh, Muskogee, Oklahoma, Ottawa**, Pittsburg, Pontotoc, Pushmataha, Roger Mills, Seminole, Texas, Tulsa, Washington, Washita and Woodward counties for submitting your Delegate and Alternate selections for the upcoming OBA Annual Meeting.

(Reported, awaiting election)**

Listed below are the counties that have not sent their Delegate and Alternate selections to the offices of the Oklahoma Bar Association. Please help us by sending the names of your Delegates and Alternates now. In order to have your Delegates/Alternates certified, mail or fax Delegate certifications to OBA Executive Director John Morris Williams, P.O. Box 53036, Oklahoma City, OK 73152-3036, or Fax: (405) 416-7001.

Atoka	Haskell	Marshall	Payne
Beaver	Hughes	Murray	Pottawatomie
Caddo	Kay	Noble	Rogers
Cimarron	Latimer	Nowata	Sequoyah
Craig	LeFlore	Okfuskee	Stephens
Delaware	Lincoln	Okmulgee	Tillman
Dewey	Logan	Osage	Wagoner
Grady	Major	Pawnee	Woods
Harmon			

In accordance with the Bylaws of the Oklahoma Bar Association (5 OS, Ch. 1, App. 2), "The House of Delegates shall be composed of one delegate or alternate from each County of the State, who shall be an active or senior member of the Bar of such County, as certified by the Executive Director at the opening of the annual meeting; providing that each County where the active or senior resident members of the Bar exceed fifty shall be entitled to one additional delegate or alternate for each additional fifty active or senior members or major fraction thereof. In the absence of the elected delegate(s), the alternate(s) shall be certified to vote in the stead of the delegate. In no event shall any County elect more than thirty (30) members to the House of Delegates."

"A member shall be deemed to be a resident, ... of the County in which is located his or her mailing address for the Journal of the Association."

2011 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 17, 2010

OFFICERS

President-Elect

Current: Deborah Reheard, Eufaula
Ms. Reheard automatically becomes OBA president Jan. 1, 2011
(One-year term: 2011)

Nominee: Cathy Christensen, Oklahoma City

Vice President

Current: Mack K. Martin, Oklahoma City
(One-year term: 2011)

Nominee: Reta M. Strubhar, Piedmont

BOARD OF GOVERNORS

Supreme Court Judicial District Two

Current: Jerry L. McCombs, Idabel
Atoka, Bryan, Choctaw, Haskell, Johnston,
Latimer, LeFlore, McCurtain, McIntosh, Marshall,
Pittsburg, Pushmataha and Sequoyah Counties
(Three-year term: 2011-2013)

Nominee: Gerald C. Dennis, Antlers

Supreme Court Judicial District Eight

Current: Jim T. Stuart, Shawnee
Coal, Hughes, Lincoln, Logan, Noble,
Okfuskee, Payne, Pontotoc, Pottawatomie
and Seminole Counties
(Three-year term: 2011-2013)

Nominee: Scott Pappas, Stillwater

Nominee: Gregg W. Luther, Shawnee

Supreme Court Judicial District Nine

Current: W. Mark Hixson, Yukon
Caddo, Canadian, Comanche, Cotton, Greer,
Harmon, Jackson, Kiowa and Tillman Counties
(Three-year term: 2011-2013)

Nominee: Vacant

Member-At-Large

Current: Jack L. Brown, Tulsa
(Three-year term: 2011-2013)

Nominee: Renée DeMoss, Tulsa

Nominee: Kimberly K. Hays, Tulsa

Summary of Nominations Rules

Not less than 60 days prior to the Annual Meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the Executive Director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such Judicial District, or one or more County Bar Associations within the Judicial District may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the Annual Meeting, 50 or more voting members of the OBA from any or all Judicial Districts shall file with the Executive Director, a signed petition nominating a candidate to the office of Member-At-Large on the Board of Governors, or three or more County Bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the Annual Meeting, 50 or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect or Vice President or three or more County Bar Associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Vacant positions will be filled at the OBA Annual Meeting Nov. 17-19. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2010. Nomination and resolution forms can be found at www.okbar.org.

OBA Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

BOARD OF GOVERNORS

SUPREME COURT JUDICIAL DISTRICT NO. 8

SCOTT PAPPAS, STILLWATER

Nominating Petitions have been filed nominating Scott Pappas for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011.

A total of 57 signatures appear on the petitions

GREGG W. LUTHER, SHAWNEE

Nominating Petitions have been filed nominating Gregg W. Luther for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011. Twenty-five of the names thereon are set forth below:

Randy Parsons, Cregg Webb, William S. Haselwood, Michael D. Clover, Robert S. Duran Jr., George Wright, Charles M. Laster, Jon Flowers, H. Edward Terry, Paul Choate, Paul Sutton, Jim Cole Pettis, Walter W. Roberson, Michelle A. Freeman, John Canavan Jr., Joe Vorndran, Steven L. Parker, Gregory B. Jackson, Greg Wilson, Kelli McCullar, John Hargrave, Terry W. West, Richard Smothermon, Bradley C. West and Shawn Spencer

A total of 25 signatures appear on the petitions.

MEMBER-AT-LARGE

KIMBERLY K. HAYS, TULSA

Nominating Petitions have been filed nominating Kimberly K. Hays for election of Member-at-Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011. Fifty of the names thereon are set forth below:

Jack L. Brown, Melissa G. DeLacerda, Linda S. Thomas, Peggy Stockwell, Steven Dobbbs, Robert S. Farris, W. Mark Hixson, R. Victor Kennemer III, Thomas R. Brett, William G. LaSorsa, C. Michael Zacharias, Joseph M. Vorndran, Michael Loeffler, A. Gabriel Bass, Frederick K. Slicker, Chrissi Nimmo, P. Scott Buhlinger, Bruce Peabody, Betty O. Williams, Roy D. Tucker, Kimberly A. Cooper, James Allen Williamson, Stefanie N. Hampton, Alan Souter, Doris L. Gruntmeir, Javier Ramirez, Noel Tucker, Phil Tucker, Donelle Ratheal, Patrick W. Fitzgerald, Rees Evans, Brad Grundy, Jennifer L. DeAngelis, Mark McCullough, Charles O. Hanson, Sharisse L. O'Carroll, Robert R. Faulk, Joseph R. Farris, Michael A. Shiflet, Larry Gene Vickers Jr., Clark Brewster, James Weger, Keri Williams Foster, Paul Bryan Middleton, Dean Rinehart, Ronald H. Lawson, Wesley G. Smith, Jeffrey Trevillion, Thomas Neil Lynn III and Vere Frazier

A total of 253 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties:

Creek and Washington

NOTICE: JUDICIAL ELECTION COMPLAINTS

Please take notice that the Professional Responsibility Panel on Judicial Elections is available to receive complaints concerning candidates running for judicial office in the upcoming elections. In the event that you believe that a candidate has violated the Judicial Canons or other rules applying to Judicial Elections, please forward your written, verified complaint with any supporting documentation to the following address:

*Professional Responsibility Panel on Judicial Elections
c/o William J. Baker
P.O. Box 668
Stillwater, OK 74076*

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF AMBER LEE WAID (WADE), SCBD #5659 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Amber Lee Waid (Wade) should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Tuesday, October 19, 2010**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS

Wednesday, August 11, 2010

F-2008-1077 — Appellant, Scotty Nash Clark, represented by counsel, entered a guilty plea in Stephens County District Court Case No. CF-2005-111 to Driving Under the Influence of Alcohol. Pursuant to a plea agreement, execution of Clark's sentence was delayed conditioned upon his successful completion of the Stephens County Drug Court Program. On April 30, 2007, the State filed an application to terminate Clark from Drug Court participation. A hearing was held on the State's application on June 28, 2007, before the Honorable Joe H. Enos, District Judge. At the conclusion of the hearing, Clark was terminated from the program and his sentence was imposed. From this order of termination, Clark has perfected his appeal. The District Court's order terminating Clark from the Stephens County Drug Court Program and imposing sentence in CF-2005-111 is AFFIRMED. Opinion by: Lewis, J.; C. Johnson, P.J.: Concur; A. Johnson, V.P.J.: Concur; Lumpkin, J.: Concur.

M-2009-288 — John William Reeves, Appellant, was found guilty by jury of Domestic Abuse Assault and Battery in Mayes County District Court Case No. CM-2008-491. The Honorable Gary J. Dean, Special Judge, sentenced Appellant to two weeks in the county jail. From this Judgment and Sentence Appellant has perfected this appeal. The Judgment of the District Court is AFFIRMED. However, the matter is REMANDED to the District Court WITH INSTRUCTIONS to modify Appellant's sentence by removing the condition of Domestic Abuse Counseling. Opinion by: Lewis, J.; C. Johnson, P.J.: Concur; A. Johnson, V.P.J.: Concur in Results; Lumpkin, J.: Concur in Results.

Thursday, August 12, 2010

F-2008-1205 — Mike P. Emerson, Appellant, was tried by jury for the crime of Robbery in the First Degree in Case No. CF-2008-949 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twenty-two years imprisonment. The trial court sentenced accordingly.

From this judgment and sentence Mike P. Emerson has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: A. Johnson, V.P.J.; C. Johnson, P.J., concurs; Lumpkin, J., concurs; Lewis, J., concurs in results.

F-2009-262 — Jonathan Luther Trask, Appellant, was tried by jury for the crime of First Degree Child Abuse Murder by Committing Child Abuse and, in the alternative, by Permitting Child Abuse, in Case No. CF-2007-184 in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Jonathan Luther Trask has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, P.J.; A. Johnson, V.P.J., Concur; Lumpkin, J., Concur; Lewis, J., Concur.

Friday, August 13, 2010

F-2009-287 — Appellant Ashley Lorene Parnell was tried by jury and convicted of First Degree Murder, Case No. CF-2008-1607, in the District Court of Tulsa County. The jury recommended as punishment life imprisonment with the possibility of parole and a five thousand dollar (\$5,000.) fine. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; C. Johnson, P.J., concur in result; A. Johnson, V.P.J., concur in result; Lewis, J., concur.

C-2009-1085 — Petitioner Harold James Johnson was charged in the District Court of Oklahoma County, Case No. CF-2007-5283 with Possession of a Firearm After Former Juvenile Adjudication, After Former Conviction of a Felony; Case No. CF-2007-7248 with First Degree Murder (Count I), First Degree Burglary, After Former Conviction of a Felony (Count II), Kidnapping, After Former Conviction of a Felony (Count III), Felonious Possession of a Firearm (Counts IV and V); and in Case No. CF-2008-329 with Assault and Battery with a Deadly Weapon (Count I), Felonious Possession of a Firearm (Count II), Possession of a Controlled Dangerous Substance with Intent to Distribute (Count III), Possession of

an Offensive Weapon while Committing a Felony, and Possession of a Controlled Dangerous Substance (Count V). Petitioner's claims of error, when reviewed both singly and cumulatively, do not warrant relief. AFFIRMED. Opinion by: Lumpkin, J.; C. Johnson, P.J., concur; A. Johnson, V.P.J., concur; Lewis, J., concur in results.

C-2010-39 — Petitioner Randy Don Beck was charged in the District Court of Beckham County, Case No. CF-2008-440, with Conspiracy to Obtain Controlled Substance by Fraud (Count I); Possession of Controlled Substance with Intent to Distribute within 2,000 Feet of a Park or School (Count II); Possession of Controlled Substance (Count III); Maintaining a Place of Keeping Controlled Substance (Count IV); Unlawful Possession of Drug Paraphernalia (Count V), and Obtaining Controlled Substance by Forgery or Fraud Counts 10 – 14 and Counts 16 – 22. On September 23, 2009, Petitioner entered guilty pleas before the Honorable Charles L. Goodwin, District Judge. Petitioner's pleas were accepted and he was sentenced to five (5) years imprisonment for each count except Count V, where he was sentenced to one year imprisonment. The court ordered the sentences to run consecutively. On November 3, 2009, Petitioner filed an Application to Withdraw Guilty Pleas. At a hearing held on January 6, 2010, the trial court denied the application to withdraw pleas. It is that denial which is the subject of this appeal. AFFIRMED. Opinion by: Lumpkin, J.; C. Johnson, P.J., concur; A. Johnson, V.P.J., concur; Lewis, J., concur.

F-2009-637 — Benita Kaye Jones, Appellant, appeals from the acceleration of her deferred judgment and sentencing in Case No. CF-2007-560 in the District Court of Pottawatomie County, entered by the Honorable Douglas L. Combs, District Judge. On April 30, 2008, Appellant entered a plea of guilty to Possession of Controlled Substance, and judgment and sentencing was deferred for a period of five years, until April 30, 2011, under rules and conditions of probation. The State filed applications to accelerate Appellant's deferred judgment and sentencing alleging she had violated probation by failing to obtain permission before changing residency, failing to complete community service, and failing to abstain from consuming or possessing a controlled dangerous substance, by testing positive for marijuana in a random drug test. On February 18, 2009, the acceleration hearing was conducted and

Appellant stipulated to the alleged violations. On July 1, 2009, Judge Combs convicted and sentenced Appellant to a five year suspended sentence, plus fines and costs. The acceleration of Appellant's deferred judgment and sentencing in Case No. CF-2007-560 in the District Court of Pottawatomie County is AFFIRMED. Opinion by: A. Johnson, V.P.J.; C. Johnson, P.J., concurs; Lumpkin, J., concurs in results; Lewis, J., concurs.

F-2009-843 — Christopher Brian Shirey, Appellant, was tried by jury for the crimes of Assault and Battery with a Deadly Weapon (Count I) and Unauthorized Use of a Vehicle (Count II), both After Former Conviction of Two or More Felonies, in Case No. CF-2009-48 in the District Court of Pottawatomie County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment on Count I, and three years imprisonment on Count II. The trial court sentenced accordingly ordering the sentences be served consecutively. From this judgment and sentence Christopher Brian Shirey has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, P.J.; A. Johnson, V.P.J., Concur; Lumpkin, J., Concur; Lewis, J., Concur.

ACCELERATED DOCKET
Thursday, August 12, 2010

J-2010-0257 — Appellant, K.S., born April 21, 1993, was charged in Oklahoma County District Court Case No. CF-2009-3746 on June 19, 2009, as a Youthful Offender for Assault and Battery With a Deadly Weapon. On July 14, 2009, the State filed a motion to impose an adult sentence should Appellant be convicted. Following a hearing October 27, 2009, the Honorable Stephen P. Alcorn, Special Judge, sustained the State's motion for imposition of an adult sentence. Appellant appeals from the order of the District Court. The District Court's order sustaining the State's motion to sentence Appellant as an adult should he be convicted is AFFIRMED. Opinion by: Lewis, J.; Johnson, C., P.J.: Concur; A. Johnson, V.P.J.: Not Participating; Lumpkin, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, August 13, 2010

105,144 — Bucky Lee Hopwood, Appellant, vs. Stephanie Payne, Appellee. Appeal from the District Court of Rogers County, Oklahoma. Honorable Robert E. Price, Trial Judge.

Appeal of a trial court order setting child support and awarding attorney fees in a paternity case. HELD: The judgment of the trial court in setting child support is supported by the evidence and in accord with statutory guidelines. The award of attorney fees and costs is not against the clear weight of the evidence nor has the trial court abused its discretion. The trial court's judgment is AFFIRMED. Opinion by Hetherington, J.; Buettner, P.J., concurs, and Hansen, J., dissents with opinion.

105,991 — Midland Funding, LLC, Plaintiff/Appellee, vs. Janette Lytle, Defendant/Appellant. Appeal from the District Court of Carter County, Oklahoma. Honorable Thomas S. Walker, Judge. Defendant/Appellant Janette Lytle (Debtor) appeals from the trial court's judgment in favor of Plaintiff/Appellee Midland Funding, LLC (Creditor) in an action to collect a debt. This appeal proceeds on Appellant's brief only. We reverse. REVERSED. Opinion by Buettner, P.J.; Hansen, J., concurs in result, and Hetherington, J., concurs.

106,212 — Baer, Timberlake, Coulson & Cates, P.C., Plaintiff/Appellees, vs. Rahmana Warren, Defendant/Appellant, Herbert E. Warren, John Doe, Jane Doe, Gregory Jackson, Rodney Steward, Spouse, if any, of Rodney Steward, Marisha A. Steward, Spouse, if any, of Marisha A. Steward, Naeemah B. Steward, and Spouse, if any, of Naeemah B. Steward, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Trial Judge. Appeal of a judgment in favor of Appellee in which Appellant argues Appellee was not a holder of her note and should not be allowed to recover when a mistake in a payoff quote was caused by its own calculation error. The trial court found Appellant owed a balance on her note. HELD: The addition mistake here is readily apparent by examining the column of numbers itself and there is testimony the total was the result of an error. This presented a question for the trier of fact, here the trial court. Appellee had possession of the bearer note and, as its holder, was entitled to enforce it. 12A O.S.2001 § 3-301. The judgment of the trial court finding Appellee made a simple, unintentional error when totaling figures in a payoff quote is supported by competent evidence and is not affected by an abuse of discretion or error of law. The judgment is AFFIRMED. Opinion by Hetherington, J.; Buettner, P.J., and Hansen, J., concur.

106,373 — Martin A. Brown, Petitioner/Appellant, vs. Dionne R. Brown, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kyle B. Haskins, Judge. Petitioner/Appellant Martin A. Brown (Husband) appeals from the trial court's order denying Husband's motion to reconsider the award of attorney fees made in the dissolution of marriage proceedings between Husband and Respondent Dionne R. Brown (Wife). We find no abuse of discretion and affirm. AFFIRMED. Opinion by Buettner, P.J.; Hansen, J., and Hetherington, J., concur.

108,011 — Myriad Systems, Inc., an Oklahoma Corporation, Plaintiff/Appellee, vs. Sterling Bancshares, Inc., a Texas Corporation, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barbara G. Swinton, Trial Judge. Appellee (Myriad) filed a petition for breach of a commercial check processing contract against Appellant (Sterling) seeking \$185,084.50, interest, fees, and costs. Pursuant to 12 O.S. 2001 §1101.1, Sterling made an offer of judgment in the amount of \$7,400.00. Myriad did not respond to the offer. Both parties filed motions for summary judgment. The trial court entered judgment in favor of Myriad in the amount of \$4,627.94. Pursuant to §1101.1(B)(3), Sterling filed a motion for costs and attorney fees. Myriad also filed a motion for costs and attorney fees based on the commercial check processing contract between it and Sterling. The court awarded Myriad attorney fees in the amount of \$32,333.98 and costs in the amount of \$1,001.89, and awarded Sterling attorney fees in the amount of \$49,533.00, and costs in the amount of \$4,608.02. Pursuant to Okla. Sup. Ct. R.1.36, Sterling appeals, and Myriad counter-appeals. Section 1101.1(B)(3) plainly states a defendant is entitled to its costs and attorney fees when the amount of an award to the plaintiff is less than the defendant's offer of judgment. However, the statutory language does not address the issue of recovery of costs and attorney fees for a plaintiff when the amount awarded is less than the defendant's offer of judgment. In awarding Myriad its attorney fees, the trial court considered Myriad's filing of its motion for attorney fees one day late the result of excusable neglect. We cannot say this was an abuse of the trial court's discretion. The trial court's orders are AFFIRMED. Opinion by Hansen, J.; Buettner, P.J., concurs in part, dissents in part with opinion, and Hetherington, J., concurs.

108,113 — Chaparral Energy, L.L.C., an Oklahoma Limited Liability Company, Plaintiff/Appellee/Counter-Appellant, vs. Pioneer Exploration, Ltd., a Foreign Limited Partnership, Defendant/Appellant/County-Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Trial Judge. This appeal arises from the action of Plaintiff/Appellee/Counter-Appellant (Chaparral) against Defendant/Appellant/Counter-Appellee (Pioneer), to recover for a gas imbalance. Both parties seek review of the trial court's order granting summary judgment in favor of Chaparral for conversion and setting damages based on the imbalance's value as of the date the trial court found the conversion claim accrued. We reverse, holding the parties' accounting dispute did not as a matter of law give rise to a conversion claim. REVERSED AND REMANDED. Opinion by Hansen, J.; Buettner, P.J., and Hetherington, J., concur.

(Division No. 2)

Wednesday, August 11, 2010

106,953 (cons. with 107,221) — State of Oklahoma *ex rel.* Department of Transportation, Plaintiff/Appellee, v. Sharon L. Cox f/k/a Sharon L. McDonald, Defendant/Appellant, and Thomas Cox, RCB Bank, and the Rogers County Treasurer, Defendants. Appeal from orders of the District Court of Rogers County, Hon. J. Dwayne Steidley, Trial Judge, granting ODOT's combined motion to quash subpoenas and first motion in limine and granting in part and denying in part ODOT's motion for costs. Cox claims the trial court erred when it granted ODOT's motion to quash subpoenas for two of Cox's potential witnesses. We find Cox failed to show that the testimony she sought to introduce was relevant to the jury's determination of just compensation and damages. Even if the testimony were relevant, the exclusion of the testimony did not prejudice Cox. We affirm the exclusion of this testimony. We also affirm the trial court's finding that costs are to be assessed pursuant to 69 O.S.2001 § 1203(e)(1) when both parties demand a jury trial. ODOT asserts the trial court erred in finding 12 O.S.2001 § 942 does not apply to condemnation cases. We agree with ODOT. Costs in a condemnation proceeding to be awarded pursuant to 69 O.S.2001 § 1203(e)(1) include those recoverable pursuant to 12 O.S.2001 § 942. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the

Court of Civil Appeals, Division II, by Wiseman, C.J.; Fischer, P.J., and Barnes, J., concur.

107,706 — June Dill, individually and on behalf of those similarly situated; Jennifer Anderson; Kregg Anderson; Mary Helen Atkins; Debra Auten; John Bailey; Mark Baker; Wanda Baker; Kenneth Baugh; Gary Black; Mary Black; Norita Bridges; Jottalyn Campbell; David Case; Debra Case; Lloyd Cole; Paula Cole; Lori Comeau; Ron Comeau; Barbara J. Cottrell; Heidi Eldred; Dorothy Garner; Dr. Sharon Gieselmann; Frank Gieselmann; Hope Harlan; John Hartley; Brian Jones; Myra Kirkland; Audrey Kowalczyk; Sharon Kowalczyk; Richard "Lou" Lathan; Claudia McPherson; Sharon Novak; Chris Russell; Katherine Russell; Donna Sadoski; Anita Sedillo; Mary Shattuck; Carla Short; Sandra Slayton; Bennie Spaulding; DeAnn Spaulding; Shelley Tancil; Susan Thomas; Terry Walker; Joan Evans, Plaintiffs/Appellants, v. American Home Products Corporation; Wyeth Corporation; Wyeth Corporation, d/b/a Fort Dodge Animal Health, Defendants/Appellees. Appeal from orders of the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge, granting Defendant's motion to dismiss, denying Plaintiffs' motion to compel, granting Defendant's motion to stay and granting Defendant's combined *Daubert* and summary judgment motions and denying Plaintiffs' alternative request for additional time to obtain a new expert witness. Defendant manufactures and distributes ProHeart®6 which dogs receive by injection to provide them with heartworm protection for six months. Plaintiffs bring this lawsuit against Defendant for product liability and gross negligence after their dogs experienced serious adverse reactions from the drug. Defendant filed a combined *Daubert* motion and motion for summary judgment. Defendant proffered epidemiological evidence to show that ProHeart®6 is safe and effective. Plaintiffs' expert failed to mention or discuss the epidemiological evidence, and provided no scientific evidence of his own contradicting Defendant's evidence. We agree with the trial court's finding that because Plaintiffs failed to counter this epidemiology with medically reliable and scientifically valid methodology, Plaintiffs' expert testimony must be excluded. His opinion based only on his clinical experience is scientifically unreliable because he assumes "what science has largely shown does not exist" — a causal connection between the drug and the diseases alleged. Accordingly, we affirm the trial court's grant-

ing of Defendant's combined *Daubert* and summary judgment motions and affirm the trial court's denial of Plaintiffs' request for additional time to conduct discovery. Because we have determined that evidence of causation is lacking, we need not address whether the trial court erred in granting Defendant's motion to dismiss on the issue of non-economic damages. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, C.J.; Fischer, P.J., and Barnes, J., concur.

Monday, August 16, 2010

107,968 — Shawver & Sons, Inc. and Commerce & Industry Insurance, Petitioners, v. Jenifer Wise, Corey Wise (deceased), Travelers Insurance Co., 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. This case involves a claim by Jenifer Wise on behalf of her deceased husband, Corey Wise (Deceased), for death benefits. The primary issue presented on appeal is whether Employer's insurer at the time of Deceased's on-the-job injury, or Employer's insurer at the time of Deceased's death should be liable for any death benefits that may be due. We find that the latter should not be held liable for the potential results of an incident, Deceased's on-the-job injury, that occurred during the policy period of the predecessor insurer. Such a result would undermine the basis for death benefits compensation, and it would contravene the legislative intent expressed in 85 O.S. Supp. 2006 §§ 11(B) and 64. We also find that a workers' compensation court order dismissing an insurer is an appealable order. Therefore, we reverse the order of the three-judge panel insofar as it held that the order is not appealable, and we sustain the order of the three-judge panel in all other respects and remand this case to the trial court for further proceedings. We express no view upon the merits of Wife's claim for death benefits. SUSTAINED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Barnes, J.; Wiseman, C.J., and Fischer, P.J., concur.

107,835 — Nancy Shore, individually and as guardian of Jim Shore, Plaintiff, v. Empire Indemnity Insurance Company, Defendant/Appellant, and Blake Trucking Co. a/k/a Blake Trucking, L.L.C. and Michael Lee Mason, an individual, Defendants, and Michael Lee Mason and Blake Trucking Co. a/k/a Blake

Trucking, L.L.C., Third Party Plaintiffs/Appellants, v. Eulis Madewell, Third Party Defendant/Appellee, and Johnny Cox, Jack Hamilton and Ella Mae Hamilton, husband and wife, Faye Cloud, and various John or Jane Does, Third Party Defendants. Appeal from a judgment of the District Court of LeFlore County, Hon. Brian Henderson, Trial Judge. A car driven by Madewell collided with a cow, causing serious injuries and fatalities. The driver settled with two of his passengers' estates, as well as with another injured passenger and his wife/guardian. Two others involved in the accident filed a third party petition against Madewell, in addition to other named parties, for contributory negligence, indemnification and/or contribution. Madewell answered, asserting he had settled his claims with the plaintiffs and filed a motion for summary judgment on the third party petition. Responding to the motion for summary judgment, the third party plaintiffs alleged that under the totality of the circumstances, Madewell's settlements were not made in good faith. Based on a lack of disputed material facts supported by acceptable evidentiary material, the trial court granted Madewell's motion for summary judgment, from which the third party plaintiffs appeal. We find there are no material issues of fact precluding summary judgment. *See Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, 22 P.3d 695; *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187. We affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, J.; Wiseman, C.J., and Fischer, P.J., concur.

107,238 — Michelle Griffith, Petitioner, vs. Correctional Healthcare Company, Inc., Commerce & Industry Insurance Company and The Workers' Compensation Court, Respondents. Proceeding to review an order of a Three-Judge Panel of the Workers' Compensation Court, Hon. Michael J. Harkey, Trial Judge, affirming in part and modifying in part the trial court's decision. The panel modified the trial court's award of permanent partial disability for reflex sympathetic dystrophy from a disability to the body as a whole to disability for the right foot only. In a workers' compensation case the burden of producing evidence and of persuasion rests entirely on the claimant. *Barnhill v. Smithway Motor Express*, 1999 OK 82, ¶ 2, 991 P.2d 527, 529. Where there is a conflict in the evidence and the weight of medical experts' opinions and lay witness testimony is at issue, we cannot, as Claimant urges us to do, treat such matters as questions of law. It is only when there is a com-

plete lack of competent evidence to support a compensation court's determination of disability that the issue becomes one of law. *Parks*, 1984 OK 53 at ¶ 12, 684 P.2d at 552. Such is not the case here. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Fischer, P.J.; Wiseman, C.J., and Barnes, J., concur.

Tuesday, August 17, 2010

106,555 — In re the estate of Charles Franklin Childress, Deceased, Deborah VanDine, Jacqueline E. Childress and Roy Cecil Childress, Plaintiffs/Appellants, vs. Bennie Childress, Defendant/Appellee. Appeal from the District Court of Stephens County, Oklahoma, Honorable G. Brent Russell, trial judge. Deborah VanDine appeals the decision of the district court that Charles Franklin Childress (Charles) was competent when he made a will leaving his property to Bennie Childress. The medical records indicate that Charles suffered various physical maladies and some periods of confusion both before and after signing the will, but also experienced sustained periods of lucidity. The parties presented conflicting evidence on the issue of testamentary capacity at the time the will was made. The district court found that Charles had sufficient capacity to execute a valid and effective will. That finding is not clearly against the weight of the evidence. It must therefore be affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Wiseman, C.J., and Barnes, J., concur.

106,552 — In re the marriage of Michele Rae Littleton, Petitioner/Appellee, vs. Rickey Allen Littleton, Respondent/Appellant. Appeal from the District Court of Atoka County, Oklahoma, Honorable Neal Merriott, trial judge. Rickey Allen Littleton (Husband) appeals an award to Michele Rae Littleton (Wife) in a divorce decree of \$20,000 in lieu of property distribution. The decree's net awards were of debt, because the couple's debts substantially exceeded their assets. The net award to Wife was \$47,000 in debt, while the net award to Husband was \$7,800 in debt. However, Husband argues that this distribution is inequitable to him because Wife agreed during an exchange at trial that a \$70,000 student loan included in these figures should be her separate debt. No written agreement is part of the record. Even if Wife's statement at trial constituted a unilateral oral agreement, the district court was not required to abide by it, and it has the authority to approve, modify, or totally reject such an agreement. *See*

Acker v. Acker, 1979 OK 67 ¶ 7, 594 P.2d 1216, 1219. Further, the record shows the student loan, which was incurred during marriage for family purposes, qualifies as marital debt. Husband fails to show the overall distribution by the district court is inequitable. Consequently, we must affirm the judgment of the district court. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Wiseman, C.J., and Barnes, J., concur.

106,363 — In re J.J.H., an alleged deprived child; Dacia Griffin and Kyle Henderson, Appellants, vs. the State of Oklahoma, Appellee. Appeal from the District Court of Garvin County, Oklahoma, Honorable Candace L. Blalock, trial judge. Dacia Griffin and Kyle Henderson (collectively Parents) appeal the decision of the district court that their minor child, JJH, should be adjudicated as deprived. Parents argue that (1) the court improperly considered the testimony of a child forensic interviewer and an accompanying videotaped interview with Mother's two other minor children that it had previously ruled inadmissible; (2) the court considered inadmissible hearsay statements of the other minor children offered to law enforcement personnel; (3) the court failed to inquire into the competence of the minor children to make those statements; (4) the court could not consider the statements because there was no "corroborating evidence" as required by 12 O.S. Supp 2004 § 2803.1(A)(2)(b); and (5) the court was prejudiced by reviewing various material for admissibility, and should have assigned another judge to perform such review. We find no evidence that the court relied on any testimony or media not admitted at trial, and find those hearsay statements of the minor children that the court considered were admitted without objection, or admissible as impeachment testimony. We further find that the court properly considered the competence of the children's testimony, and that no corroborative evidence was necessary because the children were not "unavailable" to testify at trial pursuant to 12 O.S. Supp. 2002 § 2804. We find no authority requiring a court in such cases to assign in-camera review of potential evidence to another judge. The findings of the district court are supported by competent evidence. Parents have failed to show any error in this proceeding or that the district court abused its discretion in finding JJH is deprived child in need of protection by the State. The decision of the district court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division

II, by FISCHER, P.J.; WISEMAN, C.J., and BARNES, J., concur.

106,749 — In re the Estate of Ruth Mildred Kachulak; Tom Mitcham, Plaintiff/Appellant, vs. Gary Sarna, as personal representative of the estate of Ruth Mildred Kachulak, Defendant/Appellee. Appeal from the District Court of Pittsburg County, Oklahoma, the Honorable William H. Layden, Jr., trial judge. Tom Mitcham (Tom) appeals the district court's finding that the Estate is the owner of various mineral rights located in Coal, Hughes and Pittsburg Counties. Prior to 1943, the minerals in question were owned by Tom's father, Earl Mitcham (Earl). Tom claims that the minerals were transferred to he, his sister Lynn, and his mother, Mildred, in a 1943 separation agreement between Mildred and Earl. The separation agreement contained the following descent provision: "[i]n the event of the death of [Earl], all his property shall descend to [Mildred] and [Tom and Lynn] share and share alike" Mildred and Earl's divorce was finalized later in 1943, and the district court adopted the "agreed property distribution" of the separation agreement as part of the divorce decree. Earl subsequently married Ruth Kachulak (Ruth). He died accidentally in 1959. The Estate claims descent through Earl's 1957 will that leaves all his property to Ruth. We find the separation agreement contains numerous clauses inconsistent with an intended permanent distribution, and the parties' post-decree actions are also inconsistent with Tom's argument. We conclude that the descent provision was intended as a temporary measure to provide for the disposition of Earl's property in the event of his death during the separation period or during his children's minority. After the divorce became final and his children reached majority, Earl retained sole ownership of the minerals. Therefore, the district court correctly determined that the minerals were not distributed to Mildred or the children pursuant to the 1943 decree. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Wiseman, C.J., and Barnes, J., concur.

(Division No. 3)

Monday, August 16, 2010

107,881 — Hewlett Packard Company and Old Republic Insurance Co., Petitioners, vs. Michael Brian Grimes and The Workers' Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court. Petitioners

(Employer) seek review of an order of the Three-Judge Panel of the Workers' Compensation Court (Panel) finding Respondent (Claimant) has a compensable cumulative trauma injury to his hands and authorizing medical treatment. In his medical report, Dr. Kenneth Trinidad opined the major cause of Claimant's injuries and his need for treatment was cumulative work-related trauma that occurred during Claimant's four years of employment with Employer. This medical evidence supports the Panel's determination of a work-related bilateral injury to Claimant's hands. Employer contends Claimant is not entitled to temporary total disability (TTD) benefits. Claimant concedes he is not entitled to TTD benefits. We sustain the Panel's finding of a compensable cumulative trauma injury, but reverse and vacate the Panel's finding and award of TTD benefits. **SUSTAINED IN PART; VACATED IN PART.** Opinion by Bell, V.C.J.; Joplin, P.J., and Mitchell, J., concur.

106,395 — Little Bear Resources, LLC, Plaintiff/Appellee, vs. Nemaha Services, Inc., Defendant/Appellant. Appeal from the District Court of Kay County, Oklahoma. Honorable D.W. Boyd, Judge. Appellant (Nemaha) appeals the trial court's order confirming the sheriff's sale of certain real property upon a writ of general execution in favor of Appellee (Little Bear) to collect on a judgment. The sole issue is whether the trial court abused its discretion in applying the \$107,000 obtained at the sheriff's sale against Little Bear's judgment instead of the full appraised value of \$160,000. Title 12 O.S. 2001 §686 reflects a legislative intent to ensure that debtors receive full credit for the value actually received by the creditor — the fair market value of the property. Where there has been a sheriff's sale of property and the creditor purchased the property at the sale, the value accruing to creditor is not merely the amount of its bid. Little Bear received property of a certain value which is well in excess of its successful bid. The value received by Little Bear exceeds the amount credited to its judgment against Nemaha, yielding an inequitable result. In order to adequately protect both Little Bear and Nemaha, the full appraised value of the property (\$160,000) should have been credited against Little Bear's judgment. The trial court abused its discretion in its application of Little Bear's purchase price at sheriff's sale of \$107,000 as credit against the judgment in favor of Little Bear instead of crediting the full appraised value of the property of \$160,000.

Section 686 and justice require Nemaha receive full credit for the appraised "real value" of the property, such that \$160,000 should be applied against the judgment in favor of Little Bear. REVERSED AND REMANDED. Opinion by Mitchell, J.; Joplin, P.J., and Bell, V.C.J. concur.

107,901 — Thomas J. Lewis and Verna M. Lewis, Plaintiffs/Appellants, vs. State of Oklahoma ex rel., Oklahoma Department of Transportation, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson D. Sellers, Judge. In this premises liability action, Appellants seek review of the trial court's order granting the motion for summary judgment of Appellee (ODOT). The court held Appellants' action against ODOT is barred under the Oklahoma Governmental Tort Claims Act, 51 O.S. 2001 §151 *et seq.* (GTCA). Appellants claims for ODOT's failure to inspect and maintain the RPMs and its failure to warn motorists of malfunctioning RPMs are also barred. The trial court properly granted ODOT's judgment as a matter of law. AFFIRMED. Opinion by Bell, V.C.J.; Joplin, P.J., and Mitchell, J., concur.

(Division No. 4)

Thursday, July 22, 2010

107,681 — Choctaw Memorial Hospital and Oklahoma Health Care Association (Group #75175), Petitioners, vs. Melissa M. Spear 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, awarding benefits to Claimant for a work-related injury to Claimant's respiratory system and hands while working for Employer as a housekeeper. The panel's decision is supported by competent evidence. Employer failed to show that the claim is covered by 85 O.S. Supp. 2009 § 22(3)(d) covering soft tissue injuries. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

Friday, July 23, 2010

106,937 — HSMEP The Plaza, Tulsa, L.P., A Texas Limited Partnership, Plaintiff/Appellee/Cross-Appellant, vs NRD, Inc., Ward Harrison, Brett Rehorn, and Collin McKinney, Defendants/Appellants/Cross-Appellees, and Kevin Crysler and Blake Edward Dement, Defendants. Appeal from Order of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge, granting judgment in favor of Plain-

tiff in its action to enforce a guaranty agreement. The trial court erred when it entered judgment in favor of Plaintiff after finding that Defendants' defense of lack of contract was not encompassed within the court's pre-trial conference order listing claims and defenses of the parties. Plaintiff's contention that Defendants' appeal was untimely is rejected as a collateral attack on the Supreme Court's previous order finding that Defendants' appeal is timely. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

Wednesday, July 28, 2010

108,193 — Camran Durham, Plaintiff/Appellant, vs. McDonald's Restaurants of Oklahoma, Inc., an Oklahoma Corp., Defendant/Appellee. Appeal from the District Court of Tulsa County, Hon. Deborah C. Shallcross, Trial Judge, granting summary judgment in favor of Defendant, in Plaintiff's suit for intentional infliction of emotional distress. A previous determination that Defendant's conduct was not "severe" precludes a finding that its conduct was "extreme and outrageous," which is a necessary element of the tort. Issue preclusion applies. AFFIRMED. Opinion from Court of Civil Appeals, Division 4, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

Thursday, July 29, 2010

107,142 — In re the Marriage of: Jimmy Dean Hartzell, Petitioner/Appellee, vs. Gwenlynn K. Hartzell, Respondent/Appellant. Proceeding to Review an Order of the District Court of Garfield County, Hon. Dennis W. Hladik, Trial Judge. Wife appeals the trial court's property division, and specifically its division of the funds in a 401(k) plan which Wife established through her work prior to marriage, and maintained through the marriage. The trial court erred in its division of the fund to the extent it subtracted a marital loan from the funds that were indisputably Wife's separate property prior to marriage. We therefore modify the order to correct the amount awarded to Wife attributable to that fund. The order is otherwise affirmed. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs; and Rapp, J., not participating.

Friday, July 30, 2010

106,978 — The Lola Ladene Webb Trust, Dated June 6, 2003, and The Robin Jeanne Webb Trust, Plaintiffs/Appellees, vs. Charles L. Watkins, Defendant/Appellant. Appeal from the District Court of Noble County, Hon. Dan Allen, Trial Judge, awarding attorney fees to Plaintiffs, the prevailing parties in their action to quiet title. Though this was an action to quiet title, the trial court awarded attorney fees pursuant to 42 O.S.2001 § 176, the statute authorizing attorney fees to prevailing parties in actions to enforce liens. Because neither party filed an action or counterclaim to enforce a lien, attorney fees were not authorized under the statute. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., and Rapp, J., concur.

108,078 — In Re the Marriage of Blakewell, James A. Blakewell, Petitioner/Appellee, v. Laurie G. Blakewell, Respondent/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. Barry L. Hafar, Trial Judge, granting summary judgment to Petitioner. Respondent's Guardian filed a petition to vacate the Blakewells' divorce degree on the grounds of fraud. Our review of the evidentiary materials presented reveal that Guardian has failed to show that Wife mentally incompetent at the time of the divorce, or that Husband perpetrated a fraud upon Wife, or that the division of assets in the decree was inequitable. Thus, we affirm the trial court's order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Gabbard, P.J., concurs; Rapp, J., not participating.

108,243 — Karry D. French, Plaintiff/Appellant, vs. Midwest Towers, Inc., Defendant/Appellee. Appeal from the District Court of Grady County, Hon. Richard G. Van Dyck, Trial Judge. The trial court plaintiff, Karry D. French (French) appeals an Order granting summary judgment to the defendant, Midwest Towers, Inc. (MTI). In this action under 85 O.S. Supp. 2009, § 5, French, as an ex-employee must show: (1) employment; (2) on the job injury; (3) receipt of treatment under circumstances which put the employer on notice that treatment had been rendered for a work-related injury, or that the employee in good faith instituted, or caused to be instituted, proceedings under the Act; and (4) consequent termination of employment. For purposes of summary judgment, MTI conceded the first three elements and presented summary judgment

materials to show that French has no evidence to establish the fourth element. French had the burden to demonstrate that a factual controversy exists with regard to her fourth element of the cause of action. The only showing made by French was that the discharge occurred a short time after the injury. The worker's compensation claim was filed after the termination. Proximity in time is not sufficient alone to establish the fourth element of the cause of action. French had no other relevant facts and conceded that MTI had not threatened her or interfered with her regarding pursuing a worker's compensation claim. French's response concentrated upon refuting any claim by MTI that it had a legitimate reason for discharge and was not pertinent to establishing that evidence existed to prove the fourth element of the cause of action. Therefore, the trial court's summary judgment is affirmed. AFFIRMED. Opinion from Court of Appeals, Division IV, by Rapp, J.; Gabbard, P.J., concurs, and Goodman, J., concurs in result.

Tuesday, August 3, 2010

107,088 — State of Oklahoma *ex rel.* Department of Transportation, Plaintiff/Appellant, vs Marbet, L.L.C., an Oklahoma limited liability company, Defendant/Appellee. Appeal from the District Court of Payne County, Hon. Donald L. Worthington, Trial Judge. The trial court denied the Oklahoma Department of Transportation's requests for temporary and permanent injunctions prohibiting Defendant from drilling an oil well on a "perpetual flood easement" obtained by ODOT in an inverse condemnation proceeding, and granted Defendant its costs and attorney fees incurred as a result of a temporary restraining order that ought not to have been granted. Denial of the injunctions is supported by the evidence, which failed to show that extraordinary circumstances exist which would warrant injunctive relief. An attorney fee award is allowed by 12 O.S.2001 §1384.2, which does not require, as ODOT argues, that a party prove malice by the party seeking a TRO before attorneys fees are allowed the party against whom the TRO was improperly issued. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., and Rapp, J., concur.

Thursday, August 12, 2010

108,026 — Haupt Law, P.C., by assignment from Haupt Brooks Vandruff Cloar, PLLC, Plaintiff/Appellee, vs. Tracey Smith, Defendant/

Appellant. Appeal from the District Court of Oklahoma County, Hon. Noma Gurich, Trial Judge, entering summary judgment in favor of Plaintiff on a contract claim for legal services. The record reveals a fact issue as to whether the parties reached an accord and satisfaction of Defendant's debt to Plaintiff, thereby precluding summary judgment. REVERSED AND REMANDED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

107,378 — In re the Marriage of: Craig E. Buntmeyer, Petitioner/Appellee, vs. Robin J. Buntmeyer, f/k/a Robin McEver, Respondent/Appellant. Appeal from the District Court of Tulsa County, Hon. Carl Funderburk, Trial Judge, from the enforcement of a prenuptial agreement and property division in accordance therewith. The prenuptial agreement made generally accurate disclosures of Husband's premarital assets, and is valid and enforceable. The trial court's other findings are also supported by evidence and the law. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

Friday, August 13, 2010

107,687 — Triad Bank, N.A., Plaintiff/Appellant, vs. Advanceme, Inc., Defendant/Appellee. Appeal from the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge, entering summary judgment in favor of Defendant on a claim for conversion based on a non-party debtor's sale, to Defendant, of the debtor's future credit card receivables from accounts on which Plaintiff held a perfected security interest. While the written terms of the parties' various contracts with the debtor are not disputed, there is a material and substantial factual dispute as to whether Plaintiff implicitly consented, in its security agreement with the debtor, to the disposition of the debtor's accounts collected by credit card in the manner set forth in the debtor's agreement with Defendant. REVERSED AND REMANDED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

Monday, August 16, 2010

106,876 — In re the Marriage of Lynda Lee Thomsen, Petitioner/Appellee, v. Eric Ronsholt Thomsen, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Hon. Geary L. Walke, Trial Judge. Eric Thom-

sen appeals from a judgment entered against him after Lynda Lee Thomsen filed for contempt alleging that he failed to pay the mortgage on the marital home and other consumer debt as ordered by their divorce decree, resulting in foreclosure action and financial distress. The trial court did not find Appellant in contempt, but awarded damages for injury to Appellee's credit history. This was error. We reverse and remand for further proceedings consistent with this opinion. REVERSED AND REMANDED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Gabbard, P.J., concurs; Rapp, J., not participating.

Tuesday, August 17, 2010

104,925 — Richard Lynn Dopp, Plaintiff/Appellant, v. John Harkins, Defendant/Appellee, and Western Surety Company, and Board of County Commissioners of the County of Ottawa, Oklahoma, Defendants. Appeal from an Order of the District Court of Ottawa County, Hon. David Gambill, Trial Judge. The trial court plaintiff, Richard Lynn Dopp (Dopp), appeals an order denying his motion for new trial after a judgment denying his claim for damages against the defendant, John Harkins, Administrator of Jack Harkins Estate. The order and judgment are affirmed. A decree of divorce between Dopp and his former wife awarded Dopp "[a]ll other Cattle, Horses, property and equipment, not specifically awarded to the Defendant (Wife)." Apparently, Dopp did not obtain possession of the cattle and horses, so he applied for, and was given, a Writ of Assistance in May 1999, directing the sheriff, Jack Harkins (Sheriff), to inquire of the former wife the whereabouts of the animals and to deliver possession of them to a named individual. In November 2002, Dopp filed a petition against the Sheriff's estate, subsequently amended, seeking damages. Dopp alleged that Sheriff had failed to execute the Writ of Assistance, which resulted in damages for loss of the cattle and horses. The trial court ruled that Dopp failed to demonstrate that any of the cattle or horses were in the county of Sheriff's jurisdiction, that Sheriff had any knowledge of their whereabouts, or that the Sheriff's actions, or inactions, had caused him any damages. Dopp has failed, in part, to preserve his appellate arguments because they were not included in his motion for new trial. He has failed to demonstrate error on the basis of his remaining contentions. The judgment is affirmed. AFFIRMED. Opinion from Court of

Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Goodman, J., concur.

107,923 — John Filby, Petitioner, v. Steel & Pipe Supply Co., Inc., Wausau Underwriters Insurance Co., 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. The petitioner, John Filby (Claimant), appeals an Order of the Three-Judge Panel of the Workers' Compensation Court affirming an order in favor of Steel & Pipe Supply Co. (Employer) and its insurer that denied his claim for worker's compensation benefits. Claimant alleged that he sustained an injury when he jumped from a table. Employer denied that Claimant suffered a work-related injury. After trial, the court found that Claimant failed to sustain his burden of proof. After finding that Claimant did not suffer a work-related injury, the claim was denied. The Three-Judge Panel affirmed and Claimant now appeals. The Order of the Three-Judge Panel of the Workers' Compensation Court is supported by competent evidence. The Order is sustained. *SUSTAINED*. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING

(Division No. 1)

Friday, August 6, 2010

107,357 — In the Matter of the Estate of Wendell R. Wisdom, Deceased. Wendy Allen, Appellant, vs. Michelle Deanise Wisdom Riley, Personal Representative of the Estate of Wendell R. Wisdom, Deceased, Appellee. Appellant's Motion for Rehearing filed June 30, 2010 is *DENIED*.

(Division No. 2)

Wednesday, August 4, 2010

106,657 — Capital Equity Funding Corporation, Plaintiff, W.M. Specialty Mortgage, LLC, Plaintiff, vs. David Littleton and Brenda Littleton, Defendants, Fremont Investment & Loan, Defendant, NLCO, Intervenor, Brenda Littleton, Third-Party Plaintiff/Appellant, Countrywide Home Loans, Inc., Third-Party Defendant/Appellee, and Countrywide Insurance Group, Third-Party Defendant. The petition for rehearing filed by the third-party plaintiffs and appellants Brenda and David Littleton is *DENIED*.

(Division No. 3)

Monday, August 2, 2010

106,704 — In Re the Marriage of Duechting: Jay Duechting, Petitioner/Appellant, vs. Debbie Duechting, Respondent/Appellee. Appellant's Petition for Rehearing, filed June 17, 2010, is *DENIED*.

(Division No. 4)

Wednesday, July 28, 2010

108,003 — First National Bank, Lindsay, Oklahoma, Plaintiff/Appellee, vs. James E. Rolen, an individual, Defendant/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

Friday, August 13, 2010

107,904 — Christopher Jay Smith, Plaintiff/Appellant, v. City of Lawton and Greg Province, Defendants/Appellees. Appellant's recent "Notice of Intent to Appeal" is recast as a Petition for Rehearing and is hereby *DENIED*.



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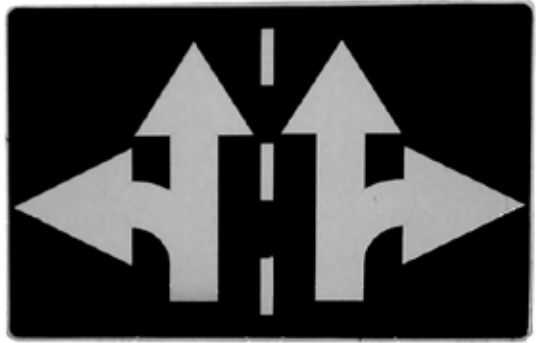
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