THE OKLAHOMA BAR
Journal
Volume 89 — No. 15 — 5/26/2018

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Journal

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF CAROL ROSE GOFORTH, SCBD #6633 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 Carol Rose Goforth 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, June 19, 2018**. 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.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

2018 OK 41

IN THE MATTER OF THE REINSTATEMENT OF WILLIAM MARTIN MCLAUGHLIN, TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS

SCBD-# 6517. May 15, 2018

PROCEEDING FOR REINSTATEMENT TO THE OKLAHOMA BAR ASSOCIATION

¶0 Petitioner, William Martin McLaughlin, filed a petition seeking reinstatement as a member of the Oklahoma Bar Association. McLaughlin was suspended under Rule 10.2, Rules Governing Disciplinary Proceedings, and subsequently stricken from the rolls for non-compliance with Mandatory Continuing Legal Education and failure to pay bar dues. After a hearing, the Professional Responsibility Tribunal unanimously recommended reinstatement. Upon *de novo* review, we concur with the PRT's findings and approve Petitioner's reinstatement; however, this ruling is subject to McLaughlin's payment of costs in the amount of $25.60 and any unpaid bar dues within thirty (30) days from the date this opinion becomes final.

PETITION FOR REINSTATEMENT GRANTED; COSTS IMPOSED

Tom M. Cummings, Oklahoma City, Oklahoma, for Petitioner.

Stephen L. Sullins, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Respondent.

GURICH, VCJ.:

Facts and Procedural History

¶1 William Martin McLaughlin graduated from Oklahoma City University School of Law in May of 1988. Following successful completion of the bar examination, he was admitted to the Oklahoma Bar Association (hereinafter "OBA") on October 5, 1988. For the first seven years in practice, McLaughlin resided in Stillwater and worked as an assistant district attorney for Logan and Payne Counties. McLaughlin left the district attorney's office in 1995, to begin a private practice.

¶2 In September 1997, McLaughlin was involved in an automobile accident which severely injured his left arm. Prior to the accident, McLaughlin had been a "scratch" golfer, but the extensive injury ended his ability to play competitive golf. Consumed with physical pain and depression, McLaughlin began self-medicating with alcohol. As his use of alcohol escalated, McLaughlin accumulated multiple criminal charges. During the hearing before the Professional Responsibility Tribunal (hereinafter "PRT"), McLaughlin testified that he had been charged in sixteen separate criminal cases, all of which were connected to his abuse of alcohol. The vast majority of these criminal charges were for driving under the influence or public intoxication.[1]

¶3 On January 30, 2007, the OBA filed a Complaint against McLaughlin asserting he should be immediately suspended pursuant to Rule 10 under the Rules Governing Disciplinary Proceedings[2] (hereinafter "RGDP"), and subject to discipline under RGDP Rule 7. The OBA's Complaint alleged McLaughlin: 1) should be immediately suspended pursuant to RGDP Rule 10, due unfitness to practice law caused by alcoholism; and 2) was subject to discipline under Rule 7 based on his guilty pleas in several criminal cases. During 2007, McLaughlin was the subject of six different OBA investigations; five of the matters were predicated on grievances levied by former clients and one was brought independently by OBA General Counsel.

¶4 On April 23, 2007, this Court issued an order suspending McLaughlin's OBA license as a result of his being "personally incapable of practicing law within the meaning of Rule 10."[3] Subsequently, orders were entered, striking McLaughlin's name from the OBA rolls for non-payment of dues and non-compliance with continuing legal education requirements.[4] Following an application by the OBA, we issued another order on February 14, 2011, finding the April 2007 suspension was a final

adjudication of McLaughlin's status. Additionally, the order dismissed any Rule 7 charges and informed McLaughlin that any future attempt to qualify for reinstatement would require him to "meet the burdens of both Rule 10.11 and 11.4 of the RGDP."[5] Because this Court dismissed the Rule 7 charges, McLaughlin was never subjected to disciplinary action for his criminal misconduct.

¶5 On May 31, 2017, McLaughlin filed a petition seeking reinstatement with the OBA. A hearing before the Professional Responsibility Tribunal was held on August 17, 2017. OBA investigator, Rhonda Langley, testified before the panel that she had conducted numerous background checks on McLaughlin in preparation for the reinstatement hearing. Her findings included the following: (1) a claim of $500.00 had been made against the Client Security Fund by one of McLaughlin's former clients and this sum had been repaid; (2) McLaughlin was not on probation for any of his criminal cases; (3) all fees due and owing to the OBA had been paid in full; and (4) McLaughlin had been the subject of six grievances and he had fully responded to each matter.[6] Multiple witnesses testified regarding McLaughlin's sobriety, his remorse and humiliation for his abhorrent behavior while drinking, and the marked changes in McLaughlin as a result of his rehabilitation and recovery through Alcoholics Anonymous.

¶6 In accordance with RGDP Rules 11.4 and 11.5, the PRT issued the following findings in its report: (1) McLaughlin demonstrated, by clear and convincing evidence, that he possesses the requisite good moral character for re-admission to the OBA; (2) McLaughlin established by clear and convincing evidence that he has not engaged in the unauthorized practice of law in the State of Oklahoma; and (3) McLaughlin demonstrated by clear and convincing evidence that he possesses the competency and learning in the law required for admission to practice law; and (4) despite his suspension of more than ten years, McLaughlin should not be required to take and successfully pass the Oklahoma bar examination. The panel unanimously recommended McLaughlin be reinstated.

Analysis

¶7 We are vested with a non-delegable, constitutional duty to regulate the practice of law. In Re Reinstatement of Mumina, 2009 OK 76, ¶ 7, 225 P.3d 804, 808. Our primary objectives when weighing an attorney's request for reinstatement are protecting the public welfare and ensuring reinstatement would not adversely affect the Bar. In Re Reinstatement of Page, 2004 OK 49, ¶ 3, 94 P.3d 80, 82 (citing In Re Reinstatement of Cantrell, 1989 OK 165, ¶ 2, 785 P.2d 312, 313). Furthermore, factual findings and legal conclusions set forth in the PRT's report are merely advisory and the panel's conclusions are not binding on the Court. In Re Reinstatement of Kerr, 2015 OK 9, ¶ 6, 345 P.3d 1118, 1121. This Court conducts a review of PRT findings by "exercis[ing] independently its original jurisdiction and appl[ying] a *de novo* standard of review." In Re Reinstatement of Hird, 2008 OK 25, ¶ 3, 184 P.3d 535, 537. The focus of the Court is not on a person's past, but rather on the person's current condition and future consequences of reinstatement. State ex rel. Oklahoma Bar Ass'n v. Albert, 2007 OK 31, ¶ 12, 163 P.3d 527, 533.

¶8 An attorney seeking reinstatement after suspension due to personal incapacity must utilize the procedures outlined in RGDP Rule 11. Id. ¶ 13, 163 P.3d at 533. Thus, RGDP Rule 11.5 requires McLaughlin to demonstrate by clear and convincing evidence that: 1) he possesses good moral character entitling him to be admitted to the OBA; 2) he has not engaged in the unauthorized practice of law during the period of suspension; and 3) he possesses the competency and learning required for admission to the practice of law. Failure to establish any of these essential conditions necessitates denial of reinstatement. Moreover, because McLaughlin's suspension was predicated on his incapacity due to alcoholism, he must present clear and convincing evidence that his "condition is no longer a threat rendering the applicant personally incapable of practicing law." Id.; *see also* RGDP Rule 10.11 ("petitioner will be required to supply such supporting proof of personal capacity as may be necessary.")

¶9 In evaluating a bid for readmission to the OBA, this Court weighs certain factors, including but not limited to: 1) the applicant's present moral fitness; 2) the applicant's understanding of the wrongfulness and disrepute their unprofessional conduct brought upon the legal profession; 3) the extent of applicant's rehabilitation; 4) the original misconduct's seriousness; 5) the applicant's conduct after resignation; 6) time elapsed since the resignation; 7) the applicant's character, maturity, and experience when suspended; and 8)

the applicant's present legal competence. Albert, ¶ 14, 163 P.3d at 534.

¶10 Our primary focus in cases involving incapacity stemming from drug or alcohol abuse is the extent of rehabilitation from the incapacity, the conduct subsequent to the suspension and treatment received for the condition, and the time which has elapsed since the suspension. Id. It is essential that the record demonstrate the applicant has, for a significant amount of time, maintained sobriety and refrained from abusing drugs or alcohol; passed random drug and alcohol tests; immersed himself/herself in a 12-step program; sought necessary counseling; and participated in Lawyers Helping Lawyers. Id. ¶ 15, 163 P.3d at 534. Only after an applicant has diligently pursued and maintained his or her sobriety, and has met the other requirements associated with reinstatement, may a petition seeking reinstatement be granted. Id.

¶11 Following his Rule 10 suspension, McLaughlin began efforts to achieve sobriety. While he abstained from alcohol for roughly two years, McLaughlin did not initially attend Alcoholics Anonymous, nor did he implement any other 12-step program. As a result of this omission, McLaughlin continuously relapsed. It wasn't until July 18, 2011, that McLaughlin was finally able to stop drinking alcohol. Following his last drink, McLaughlin began working the 12-steps of AA, and has been able to maintain his sobriety for more than six years.

¶12 McLaughlin accumulated multiple criminal charges between 2004 and 2011. Each of the criminal matters formed sufficient basis for disciplinary action by this Court; however, our prior order dismissing the Rule 7 case precludes imposition of discipline. Nevertheless, we have considered these criminal acts for purposes of determining whether reinstatement is justified. There can be no doubt that McLaughlin's actions were reprehensible and reflected negatively on the legal profession. Each time McLaughlin sat behind the wheel of his car while under the influence, he put lives of innocent Oklahoma citizens in jeopardy. Additionally, McLaughlin, while intoxicated, sought sexual favors from a prospective client. The totality of these criminal acts would have certainly warranted disbarment. All of these transgressions, however, were directly attributable to McLaughlin's alcoholism.

¶13 Based on the evidence presented at the PRT hearing, the record conclusively establishes dramatic positive changes in McLaughlin's life that were brought about through sobriety. Collectively the record before us demonstrates McLaughlin's present moral character to practice law. While testifying before the PRT, McLaughlin acknowledged the disrepute his behavior brought on the legal profession, and he expressed remorse for his unprofessional conduct. McLaughlin's rehabilitation has been extensive, allowing him to maintain sobriety over a period of more than six years. He has been active in both AA and OBA's Lawyers Helping Lawyers program. Numerous witnesses testified that over the past six years McLaughlin has mentally and physically rehabilitated himself.[7]

¶14 For example, McLaughlin's Alcoholics Anonymous sponsor testified that he would hire McLaughlin as his lawyer if he was ever in trouble and McLaughlin had his license back. McLaughlin's senior case manager at the Pershing Center testified, "[McLaughlin] is a man of character," and she would absolutely recommend McLaughlin for reinstatement. Furthermore, McLaughlin's ex-wife testified the she believes he will not relapse again because he treats his sobriety "like oxygen and food, [and] that [it] is the most important thing, because [McLaughlin] has told [her] many times if he doesn't maintain his sobriety, then he will lose everything."[8]

¶15 The evidence also demonstrates McLaughlin refrained from engaging in the unauthorized practice of law during his suspension. In 2011, McLaughlin began working as a legal assistant for attorney Clyde Anderson. Aware of his suspension, Anderson conditioned the employment arrangement on an agreement which imposed specific restrictions, including: (1) McLaughlin was prohibited from directly or indirectly dealing with clients; (2) McLaughlin was not allowed to participate in any legal proceeding (including appearing in court, depositions or mediation, etc.) or from transacting any client matter with a third party; (3) McLaughlin could not give clients legal advice in any manner; and (4) McLaughlin was prohibited from handling client funds.[9] Additionally, McLaughlin's work space was situated so as to minimize his contact with incoming clients.

¶16 Finally, the evidence supports a finding that McLaughlin "possesses the competency and learning in the law" required by RGDP

Rule 11.5(c). McLaughlin worked as a legal assistant for six years preceding his reinstatement effort. He studied the Oklahoma Bar Journal, discussed legal matters with Anderson, and amassed over 135 continuing legal education ("CLE") hours. McLaughlin adequately demonstrated he possesses the competency and learning required for re-admission to practice law. We believe the evidence displays sufficient competency to overcome Rule 11.5 (c)'s presumption that McLaughlin be required to take the bar examination.[10]

¶17 McLaughlin's case is analogous to other cases decided by this Court when considering the reinstatement of an attorney who has incurred multiple drug and/or alcohol related offenses. Most similar to McLaughlin's situation are the Albert case and In Re Reinstatement of Whitworth, 2011 OK 79, 261 P.3d 1173. In Albert, the attorney was suspended pursuant to Rule 10 due to drug and alcohol addiction. Albert, ¶ 4, 163 P.3d at 531. Like McLaughlin, Albert had endured a traumatic event that sparked his addiction. He lost his father and began suffering marital problems, which caused Albert's drug and alcohol abuse to begin. Id. ¶ 2, 163 P.3d at 531. It was not until Albert implemented the 12-step program of Alcoholics Anonymous that he began his path to reinstatement. Id. ¶ 17, 163 P.3d at 534. At his reinstatement hearing, Albert established that he had fully recovered from his alcoholism by implementing the proper rehabilitation methods, and that his conduct would conform to the high standards of the legal profession. Albert, ¶ 18, 163 P.3d at 534.

¶18 In the Whitworth case, an attorney had been suspended pursuant to Rule 10 for his alcohol addiction. Whitworth, ¶ 1, 261 P.3d at 1174. At his reinstatement hearing before the PRT, Whitworth presented a litany of evidence supporting his reinstatement. Id. Like McLaughlin, he was an active participant in AA. Whitworth also showed that he could sustain a lengthy period of sobriety before applying for reinstatement, waiting two years from his last drink before petitioning for reinstatement. Id. ¶ 25, 261 P.3d at 1180. Both the Albert and Whitworth cases reflected dramatic recovery, similar to the evidence presented by McLaughlin in this case. *See also* In re Reinstatement of Tully, 2004 OK 44, ¶ 2, 92 P.3d 693, 693 (attorney had been charged with "one count of Felonious Possession of a Controlled Substance and one misdemeanor count of Carrying a Concealed Weapon" and was reinstated on a showing of rehab attendance and other treatment programs.); In re Reinstatement of Johnson, 2007 OK 46, 162 P.3d 922 (Johnson was convicted of one count of attempting to pass a steroid, three felony counts of use of a telephone to facilitate the distribution of marijuana, and one felony count of conspiracy to distribute marijuana. The Court, after hearing evidence of his change in character, ordered his reinstatement.); In re Reinstatement of Sanger, 2012 OK 91, ¶ 8, 288 P.3d 935, 938 (Sanger resigned due to grievances filed as a "result of his chronic alcoholism and the failure to properly attend to client affairs." The Court found Sanger was duly committed to being sober and ordered his reinstatement.).

¶19 Perhaps the most analogous case to McLaughlin's bar matter was decided in State ex rel. Okla. Bar Ass'n v. McBride, 2007 OK 91, 175 P.3d 379. Although not a reinstatement case, McBride involved an attorney suffering from alcoholism who had been charged with multiple drug and alcohol offenses. Id. ¶ 2, 175 P.3d at 380-82. The OBA brought disciplinary proceedings pursuant to RGDP Rules 6 and 7; additionally, the OBA sought to suspend McBride's license for personal incapacity under RGDP Rule 10. Id. ¶ 3, 175 P.3d at 382. Despite accumulating a significant number of drug and alcohol convictions, we determined (1) McBride was not incapacitated; (2) he had successfully addressed his alcohol problem, and had taken significant steps toward achieving and maintaining his sobriety; and (3) McBride's criminal acts did not result in neglect of client matters or client financial loss.[11] Ultimately, this Court publicly censured McBride and further issued a deferred suspension of two years and one day.

¶20 In the present case, each of McLaughlin's criminal acts was attributable to his alcoholism. We believe the uncontroverted evidence indicates all of McLaughlin's ethical misconduct was directly linked to his alcohol abuse. The record clearly reflects that so long as McLaughlin maintains his sobriety, he is an excellent lawyer and law abiding citizen. Prior to his descent into an alcoholic abyss, McLaughlin maintained a spotless record as an Oklahoma attorney. He is to be commended on achieving six, and now nearly seven, years of sobriety. Although one of McLaughlin's criminal cases involved a prospective client, we believe this isolated incident will not be repeated so long as

McLaughlin continues without misstep in his recovery. As we noted in McBride:

> Discipline imposed in cases involving alcohol-related crimes has ranged from the severe, when coupled with harm to clients, to censure, when no clients were involved. Probationary periods have often been imposed in cases of alcohol-related offenses. While alcoholism alone is not enough to mitigate discipline, the fact that an attorney recognized his or her problem, sought and cooperated in treatment and was willing to undergo supervision has convinced the Court that severe discipline need not be imposed.

Id. ¶ 23, 175 P.3d at 387.

Conclusion

¶21 The evidence in this case supports a finding that McLaughlin is no longer suffering from an incapacity which would preclude him from practicing law. Furthermore, Petitioner William McLaughlin has established: by clear and convincing evidence: 1) he possesses good moral character, (2) he has not engaged in the unauthorized practice of law during his suspension, and (3) he possesses the competency and learning required for admission to practice law. We believe his conduct since achieving sobriety has and will continue to conform to the high standards required of Oklahoma Bar Association members. Respondent is hereby reinstated to the rolls of the OBA. He is ordered to pay the costs of this proceeding in the amount of $25.60 within thirty (30) days after the effective date of this opinion.

PETITION FOR REINSTATEMENT GRANTED; COSTS IMPOSED

¶22 Gurich, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif, Darby, JJ., concur.

¶23 Combs, C,J., Wyrick, J., dissent.

1. In one criminal case, Payne County District Court Case No. CM-2007-749, McLaughlin was charged and convicted of soliciting a lewd act. According to testimony and exhibits in the record, McLaughlin was inebriated and solicited sexual activity from a prospective client. McLaughlin pleaded no contest to the charge and was sentenced to six months in the county jail.

2. 5 O.S.2011, ch. 1, app. 1-A.

3. McLaughlin filed a document entitled Consent to Entry of Order of Interim Suspension and Answer to Complaint, wherein he waived any objection to immediate suspension under RGDP Rules 7 and 10. On April 13, 2007, McLaughlin filed an amended consent, acknowledging his entry into a treatment facility and his present inability to practice law.

4. *See* In the Matter of the Striking of Names of Members of the Oklahoma Bar Association, 2010 OK 64; and In the Matter of the Striking of Names of Members of the Oklahoma Bar Association, 2010 OK 63.

5. Order, Feb. 14, 2011, SCBD No. 6517.

6. Langley also testified that she attempted to contact each of the former clients, but each former client she contacted either did not wish to cooperate or could not be reached.

7. Among those who testified at the PRT hearing were: McLaughlin's ex-wife, a licensed professional counselor, a member of Lawyers Helping Lawyers, a senior case manager from the Pershing Center, McLaughlin's Alcoholics Anonymous sponsor, an Administrative Law Judge, two practicing attorneys, and an investigator for the Oklahoma Bar Association's General Counsel.

8. Tr. Reinstatement Hr'g, Page 66, Lines 19-21, Aug. 17, 2017.

9. Anderson showed considerable prudence and exercised tremendous care by placing his own limitations on McLaughlin's job duties. The restrictions served to protect both individuals and the public from potential ethical transgressions. *See* In re Reinstatement of Blake, 2016 OK 33, 371 P.3d 465 (Gurich, J. concurring).

10. RGDP Rule 11.5(c) provides "any applicant whose membership in the Association has been suspended or terminated for a period of five (5) years or longer, or who has been disbarred, shall be required to take and successfully pass the regular examination." However, an applicant can overcome this requirement by presenting "clear and convincing evidence that, notwithstanding his long absence from the practice of law, he has continued to study and thus has kept himself informed as to current developments in the law sufficient to maintain his competency." Id.

11. It should be noted, however, that McBride was forced to arrange representation for two clients in matters he was unable to attend while in jail due to a DUI charge. Id. ¶ 22, 175 P.3d at 387.

2018 OK 42

GREEN MEADOW REALTY CO., d/b/a and/or a/k/a KELLER WILLIAMS REALTY, and/or KELLER WILLIAMS GREEN MEADOW, an Oklahoma Corporation, Plaintiff/Appellee, v. ROGER P. GILLOCK, an individual, and MARY GILLOCK, an individual, Defendants/Appellants.

No. 115,159. May 15, 2018

CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS, DIVISION I, ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

HONORABLE ALETIA HAYNES TIMMONS, TRIAL JUDGE

¶0 Realtor sued to recover a commission on a sale to certain buyers that Owners believed were excluded from the listing agreement. Realtor relied on an addendum to the listing agreement that limited the period of time in which an excluded sale could occur as well as the fact that the sale closed outside the time period. Owners claimed they insisted on a complete exclusion and did not knowingly agree to a time limit for the excluded sale, despite having signed the addendum. Owners asserted that they signed the addendum without reading it based on Realtor's representation that it set forth "your exclusion." The trial court concluded Owners were bound by the addendum, having had the opportunity to read it and not doing so. The trial court granted summary judgment to Realtor. The Court of Civil Appeals affirmed the summary judgment

awarding Realtor the commission, but reversed for further proceedings on a counter claim by Owners. Owners sought certiorari review. Realtor did not.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; TRIAL COURT'S SUMMARY JUDGMENT REVERSED IN TOTO.

Shawn D. Fulkerson, Jennifer A. Bruner, and Carolie E. Rozell, FULKERSON & FULKERSON, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee,

Terry M. McKeever and Eric J. Cavett, FOSHEE & YAFFE LAW FIRM, Oklahoma City, Oklahoma, for Defendant/Appellant.

REIF, J.:

¶1 This case concerns a dispute between Green Meadow Realty Co. (Realtor) and Roger and Mary Gillock (Owners) over Realtor's right to a commission. The trial court and Court of Civil Appeals resolved this dispute in favor of Realtor on the basis of the summary judgment record presented by the parties. Both courts found Owners were bound by an addendum to the listing agreement, even though it contained different terms than Realtor allegedly agreed to. The dispositive issue on certiorari review is whether summary judgment was proper under the record presented. We hold summary judgment was not proper.

¶2 Summary judgment is improper if under the evidence, reasonable minds could reach different conclusions from the facts. *Boren v. Kirk*, 1994 OK 94, ¶5, 878 P.2d 1059, 1061 (citation omitted). On review, all inferences in the evidence must be taken in a light most favorable to the party opposing the motion. *Id.*

¶3 The controversy over the commission stemmed from a sale of the listed property to certain buyers that Owners believed were excluded from the listing agreement. It is undisputed that an addendum to the listing agreement provided that a sale to the buyers in question would be "reserved until June 5, 2014 (6/5/14) with a 3% listing commission." It is also undisputed that the sale to the "reserved" buyers occurred outside this time period. Furthermore, Owners admitted they signed the addendum.

¶4 Owners nonetheless maintain that they did not knowingly agree to the "reservation." Owners assert they asked for a complete exclusion and that they signed the addendum without reading it based on statements by Realtor's agent. According to Owners, Realtor's agent said "she would do it (i.e., the requested exclusion)" and told them the addendum set forth "your exclusion."

¶5 In determining whether reasonable minds could differ over the actions and intent of the parties, two further facts are of consequence. First, the subject and terms of excluding a sale to the buyers in question were proposed by Owners, not by Realtor or its agent. According to Owners, Realtor's agent agreed to **their** requested exclusion and did not indicate that the agent "can't give you the exclusion for the whole time." Second, Realtor's agent prepared the addendum and when she presented it to Owners affirmatively represented that it reflected "**your** exclusion."

¶6 Viewing this evidentiary material in a light most favorable to Owners reveals that reasonable minds could conclude that Realtor's agent (1) orally agreed to Owners' request and terms for the exclusion, (2) undertook to draft an addendum to reflect the oral agreement, (3) intentionally deviated from the oral agreement by substituting terms that were never discussed, (4) did not disclose this deviation and (5) affirmatively misrepresented that the addendum reflected the exclusion proposed by Owners. Where one party falsely represents to another party that the writing includes the oral agreement, and the other party is thereby induced to sign the writing without reading it, that is a sufficient trick, artifice and fraud to support a claim of fraud in the inducement. *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 25, 760 P.2d 174, 178, citing *Miller v. Troy Laundry Machinery Co.*, 1936 OK 513, ¶11, 62 P.2d 975, 978. The misrepresentation that the written contract contains the parties' prior oral agreement must be "expressly made" and be "contemporaneous with the signing of the instruments." *Id*. If proven, such fraud will provide a defense to Realtor's claim for a commission as well as support a counterclaim for damages.

¶7 The trial court and Court of Civil Appeals regarded Owners' failure to read the addendum when presented with it to be dispositive. While this is certainly important, it is just one of many facts to be considered and weighed by the trier of the fact. Ultimately, the communications and conduct of the parties with respect to

the addendum must be judged in the totality of the circumstances surrounding its creation.

¶8 In *Boren v. Kirk*, 1994 OK 94, 878 P.2d 1059, a client contended that she instructed the lawyer she hired to be the sole lawyer to work on her case, while the lawyer maintained he received no such instruction. This Court held this controversy precluded summary judgment on client's breach of contract claim. The conflicting positions and evidentiary materials of the parties in the case at hand pose a comparable controversy that would preclude summary judgment on Realtor's claim for a commission.

¶9 In addition to resolving Realtor's claim for a commission, the trial court also granted Realtor summary judgment on Owners' counterclaims. Owners alleged Realtor (1) breached the parties' contract, (2) committed fraud, and (3) tortiously interfered with the "excluded" sale by filing a false mechanics lien against the property. The Court of Civil Appeals affirmed the summary judgment on Owners' first two counterclaims but reversed as to the tortious interference claim.

¶10 On certiorari review, we reverse the summary judgment in toto. The same facts and inferences that support Owners' fraud in the inducement defense are relevant to resolving all of the counterclaims as well.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; TRIAL COURT'S GRANT OF SUMMARY JUDGMENT REVERSED IN TOTO.

COMBS, C.J., GURICH, V.C.J., WINCHESTER, EDMONDSON, COLBERT,

REIF, WYRICK, and, DARBY, JJ., concur.

KAUGER, J., not participating.

Applicants for July 2018 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given July 24-25, 2018.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

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Jacob William Allison
Logan Ashton Blackburn
Brian Gary Bond
Sheila Ann Cunningham
Gerard Michael D'Emilio
Debra Lynn Davis
Garrett Allen Eller
Robert Everett Ferrell
Levi Grant Gibson
Charles Ellis Hart
Eric William Holey
Jordan Danielle Hutchison
Brandon Alan Jones
Carrie L Kincade
Daniel Craig McCain
Jacob Alan McDonald
Brady Wear Robison
Valerie Marie Salem
David Phillip Spielman
Michael Phillip Whaley

NORMAN

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Justin Paul Ashlock
Kelly Lucile Bergin
Mariah Kathleen Borek
Eleanor Claire Burg
Colby James Byrd
Christopher John Campbell
Shawn Ward Ceyler
Kathryn Christine Chevis
Robert Eugene Craig III
Matthew Ryan Dever
Joshua Richard Fanelli
Lauren Ashley Fournier
Erin Nicole Fuller
Kathryn Elizabeth Gardner
Molly Beth Gardner
Grant Thomas Gille
Bryan Kirkland Hall
Miles Jackson Heald
Abby Marie Meaders Henderson
Abby Rae Herren
Jonathan Herrera
Tara Lindsay Jordan
Robin Michelle Kirk
Connor Brian Kohlscheen
Jessica Susanne Ladd
Jacob Hale Laughlin
Kellie Renee Reidlinger Laughlin
Garrett Lee McKibben
Walter Henry Mengden IV
Margaret Spence Moon
William Orlando Moon III
Jaron Tyler Moore
Andersen Brady Newville
Ashton Nichole Paschal-Wilson
Ryan Patrick Raupe
Raymond Dale Rieger
John Phillip Sartin III
Christine Suzanne Schem
Alina Ruth Carlile Sorrell
Alexander Michael Sullivan
Brian Christopher Trent
Caitlin Ann Vance
Bailey Malone Warren
Rebekah Ruth Wilson
Kimberly Ann Wurtz

OKLAHOMA CITY

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Tessa Christine Sheffield Baker
Brooke Lindsay Ballard
Isabel Victoria Bautista
Kathryn Lauren Bautista
Branton James Leland Bentley
Justin Edward Boerner
Jason Craig Bollinger
Cathleen Hope Brantley
Farrah Yong Burgess
Cesar Israel Cano Pascual
Kane Bennett Cassil
Matthew David Craig
Jeffrey Taylor Cummings
Nana Abram Dankwa
Justin Kyle Davis
Joseph Lee DeGiusti

Danielle Kristine Dezort
Matthew Allen Dunn
Fallon Angeline Elliott
Sheridan Ann Fulkerson
Evan Blake Gatewood Jr.
Ryan Edmond Geary
Olivia Suzanna Glazner
August Robert Hadwiger
Chad Tyler Hantak
Rilee Dean Harrison
Jennifer Briana Hartsell
David Ray Herber
James Matthew Hill
Austin Tyler Hilterbran
Clarence Joe Hutchison
William Floyd Johnston
Leslie Lanay Jones
Will Thomas Jordan
Gunner Brock Joyce
Jared A. King
Kelly Suzanne Kinser
Rachel Olivia Klubeck
Joseph Morgan LeMay
Landon Scott Lester
Lisa Leigh Lopez
Martin James Lopez III
William Henry Frederick Lutz
Bryan Ross Lynch
Aimee Lynn Majoue
Kyle Scott McAllister
Brittany Faithe McMillin
James Ryan Moody
Thomas Lake Moore, V
Wendi Kathleen Morse
Bryan Ashton Don Muse
Hunter Christian Musser
Tracy Ella Neel
Amber Dawn Nelson
Carly MacKenzie Ortel
Alex Anthony Pedraza
Lindsey Anne Pever
Allyson Colleen Pogue
Alexander Gabriel Price
Brett Taylor Reavis
Grant Thomas Reynolds
Mari Claire Riera
Kace Selee Rodwell
Ty Edward Schoenhals
Peter Alexander Shadid
Brandt Steven Sterling
Preston Michael Sullivan
Russell Benjamin Taylor, Jr.
Alexander Kerr Thomas
Alexandra Courtney Towler
Jonathan Kyle Tully
Ernest Raymond Walcher III
John Harrison Warden
John William Warren
Abigail Leigh Wilburn
Cody Alan Wood
Zachary Nicholas Wright
Jacqueline Renee Zamarripa

TULSA

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Andrew Tyler Boone
Theodore Nicholas Cooper
James Linden Curtis
Keri Laine Denman
Mitchel Dalton Downing
John Scott Farley III
Mary Hope Forsyth
Daniel Antonio Gibson
Drew Wortham Gilbert
Kymberli Jan-Miyoko Heckenkemper
Robert Wallace Hill
Christopher James Hollingsworth
Casey Raquelle Johnson
William Caleb Jones
Taylor Nathan Kincanon
Henry Herman Klaus
Michelle Kruse
Danya Mahjoub
Benjamin David Moser
Courtney Nicole Nelbach
Lynn Hollis Nix
Alison Eva Nutt
Manuel Madrid Pallarez III
Stephen James Pontius
Matthew Jason Primm
Wyatt Mathew Rosette
Emalie Lynne Rott
Alexandra Lauren Simmons
Quin Mary Swiney
Grant Bailey Thetford
Bryce Alan Van Buren
Paige Elizabeth Vitale
John David Weidman II
Jazmin Guadalupe Zaragoza

OTHER OKLAHOMA CITIES AND TOWNS

Misbauddin Ahmed, Moore
Stephanie Elaine Anderson, Yukon
Wriley Kenneth Anderson, Moore
John Wesley Austin, Yukon
Hallie Elizabeth Bovos, Poteau
Isaiah Nathaniel Brydie, Owasso
Courtney Lynn Cagle, Claremore
Jacklyn Frances Capite, Jenks
Hans Michael Carlson, Broken Arrow
Lauren Kay Clifton, Pawhuska
Madeline Patricia Coffey, Nichols Hills
Mackenzie Leigh Coplen, Morris
Thomas Allan Cunningham, Moore
Skylar Augustus Forster, Mill Creek
William Richard Frank, Moore
Jonathan Alan Fried, Purcell
Jill Ann Fritts, Duncan
Stacy Nichole Fuller, Owasso
Paige Nicole Green, Yukon
Travis Evan Harrison, The Village
Brittany Samantha Hayes, Sand Springs
Valerie Ann Hays, Okemah
Ashley Rene Helberg, Moore
Stacy Wyatt Hill, Fort Cobb
Stephanie Renae Jackson, Broken Arrow
Nekanapeshe Peta James, Wagoner

Brayden Micah Jennings, Moore
Priscilla Jean Jones, Ralston
Zachariah Ahmad Kanaa, Moore
William Ray Keene, Pawhuska
Aaron Christopher Kroier, Midwest City
Vanessa Laurine Lock, Bixby
Amanda Michelle Lowe, Broken Arrow
Stacy Lenice Lubbers, Ardmore
Cole Braden McLanahan, The Village
Cannon Patrick McMahan, Nichols Hills
Cody Ray Melton, Claremore
Alex Edward Mustain, Medford
Garrett Reed Oates, Woodward
Ashley Rose Ogle, Broken Arrow
Amy Christine Patrick, Lawton
Nocona Louise Pewewardy, Lawton
Raymond Conrad Purdom III, Claremore
Austin Bradley Rabon, Lawton
Emily Anne Ramseyer, Broken Arrow
Amity Eileen Ritze, Broken Arrow
Johanna Faye Roberts, Owasso
Mary Cynthia Rogers, McAlester
Erik Girard Roscom, El Reno
Dalton Bryant Rudd, Davis
Jeff David Scott, Shawnee
Michael David Shouse, Owasso
Phillip John Shyers Jr., Miami
Caleb Jeffrey Smith, Jenks
Alexander Sokolosky, Owasso
Jordan Marie Soto, Blanchard
Emily Jo Steinert, Goltry
Jackson Thomas Stone, Duncan
Jessica Ann Swapp, Wayne
Kelly Rae Sweeney, Oologah
Brian Michael Taylor, Ponca City
Benjamin Joshua Tech, Guthrie
Kanton Brock Vaverka, Midwest City
Miroslava Ivanova Vezirska-Gabrovski, Bethany
Cody Aaron Wainscott, Yukon
Patrick Augustus Weigant, Pawhuska
Lucas Michael West, Mustang
Nicholas Charles Williams, Pryor
Katie Ann Wilmes, Altus
Phillip Bryan Wilson, Owasso
Randall Don Young, Broken Arrow

OUT OF STATE

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Keah Beeftu, Highland Village, TX
Shannon Sara Bell, Allen, TX
Margaret Maryanna Birkel, Washington, DC
James Edward Blaise, Tomball, TX
Rachel Hope Bokmeyer, Austin, TX
Gregory Thomas Buzzard, New Haven, CT
Candace Lee Carter, Shady Shores, TX
Andrew Bryce Cartmell, Portland, OR
Brett Thomas Cook, Waco, TX
Austin Taylor Dail, New Orleans, LA
Kathryne Kamillah Miller Grow, Addison, VT
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Katherine Blair Hand, Abilene, TX
Robert Lee Harmon, Colleyville, TX
William Joseph Holland III, Plano, TX
Colin Wade Holthaus, Topeka, KS
John Marshall Homra, Jackson, TN
Dallas Myrl Howell, Parks, AZ
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Morgan Rae Lyness, Rio Vista, TX
Patrick Colin Madden, Reisterstown, MD
Eric William Meissner, Mountain Lake, MN
Garrad Duane Mitchell, Marietta, GA
Tammy Ray Page, Fort Myers, FL
Michael Scott Proctor II, Upper Arlington, OH
Melissa Diane Revell, Hurst, TX
Travis John Roeder, Tuscaloosa, AL
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Court of Criminal Appeals Opinions

2018 OK CR 11

ROBERT A. STEVENS, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.

No. PC-2017-219. May 10, 2018

OPINION REMANDING POST-CONVICTION PROCEEDING TO THE DISTRICT COURT OF CANADIAN COUNTY WITH INSTRUCTIONS

LUMPKIN, PRESIDING JUDGE:

¶1 Petitioner, Robert A. Stevens, was charged on March 15, 1994 by Amended Information in the District Court of Canadian County with Murder in the First Degree (21 O.S.1991, § 701.7) in Case No. CF-1994-90; Shooting With Intent to Kill (21 O.S.Supp.1992, § 652) in Case No. CF-1994-91; and Forcible Sodomy (21 O.S. Supp.1992, § 888) in Case No. CF-1994-230.[1] On February 22, 1995, the State filed a Bill of Particulars in Case No. CF-1994-90 giving Petitioner notice that it intended to seek the death penalty as punishment for his commission of First Degree Murder.

¶2 On April 19, 1996, Petitioner, while represented by counsel, entered a negotiated plea. Petitioner entered a plea of guilty to the murder offense and a plea of no contest to the other two offenses. The Honorable Edward C. Cunningham, District Judge, accepted Petitioner's pleas. As to CF-1994-90, the District Court sentenced Petitioner to imprisonment for life without the possibility of parole and ordered that this sentence run consecutively to his sentence in District Court of Oklahoma County Case No. CF-1994-5960.[2] As to CF-1994-91 and CF-1994-230, the District Court sentenced Petitioner to imprisonment for ten (10) years and ordered the sentences to run concurrent with Petitioner's sentence in CF-1994-90.

¶3 Petitioner did not seek to withdraw his plea and his conviction and sentence became final on April 30, 1996. On April 27, 1997, Petitioner filed his first Application for Post-Conviction relief. On July 10, 1997, the District Court denied Petitioner's application. On October 2, 1997, this Court denied his appeal of the District Court's ruling in *Robert A. Stevens v. State*, Case No. PC-1997-1131, unpub. dispo. (Okl. Cr. Oct. 2, 1997).

¶4 On January 17, 2017, Petitioner filed his Second Application for Post-Conviction Relief. Relying on 22 O.S.2011, § 1080, Petitioner claimed that his sentence of life without the possibility of parole was in violation of the Constitution in light of the United States Supreme Court's pronouncements in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L. Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). On January 23, 2017, the State filed its Response requesting that the District Court deny Petitioner's application. On February 6, 2017, the District Court entered its Order Denying Post-Conviction Relief summarily denying Petitioner's application without the aid of a hearing pursuant to 22 O.S.2011, § 1084. Petitioner timely appeals the denial of his Second Application for Post-Conviction Relief.[3]

¶5 On September 20, 2017, we directed the State to file a response to Petitioner's appeal. The State filed its answer brief on November 20, 2017.

BACKGROUND

¶6 On or about the 8th day of March, 1994, Petitioner, while acting conjointly with Marcus Dewayne Stevens and Michael Ray Goode, kidnapped Johnny Lawrence and Lamount Dority and held them against their will. Petitioner, Goode, and Stevens shot Lawrence with handguns with the premeditated design to effect his death. Petitioner also fired a pistol at Dority, intending his death. On that same day, Petitioner forced a female victim to orally sodomize him. Lawrence died from his wounds. These offenses occurred in Canadian County, Oklahoma.

¶7 Petitioner had not attained 18 years of age. He was 17 years and 259 days old at the time of the offenses.

¶8 In his plea form, Petitioner admitted to shooting and killing Lawrence. In addition to that statement, the District Court had several different sources of information about Petitioner available to it at the plea hearing. The court heard evidence concerning the other offenses which Petitioner had committed, including the offense of First Degree Murder which Petitioner had committed in Oklahoma

County. Petitioner shot and killed Jessie T. Bradley with a rifle on January 25, 1994. This occurred prior to the present offense.

¶9 The District Court file in Canadian County contained the records concerning Petitioner's mental capacity. On June 24, 1994, an Application for Determination of Competency was filed on Petitioner's behalf. The District Court held a hearing on the application on June 28, 1994, and ordered that Petitioner be evaluated at the State mental health facility in Vinita. On December 15, 1994, the District Court held a post-examination competency hearing and determined that Petitioner was competent to stand trial.

¶10 The District Court file also contained records concerning Petitioner's youthfulness. Based upon the fact that he was seventeen (17) years of age at the time of the charged offenses, Petitioner filed an Application for Certification as a Juvenile. On May 26, 1995, the District Court held a hearing on Petitioner's request, considered Petitioner's evidence and the statutory factors, and denied the application. Petitioner timely appealed the denial of his application and on December 12, 1995, this Court affirmed the District Court's denial.

DISCUSSION

¶11 Petitioner asserts, again on appeal, that his sentence of life without the possibility of parole is in violation of the United States Constitution because he committed the offense before the age of 18. He argues that the District Court wrongly determined that the Supreme Court's recent decisions in *Miller* and *Montgomery* did not apply to him when it summarily denied his claim.

¶12 This Court reviews the District Court's determination of an application for post-conviction relief for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶13 Although *Miller* and *Montgomery* do not invalidate Petitioner's guilty plea, they are clearly applicable to his sentence of life without the possibility of parole. As the District Court failed to properly consider the applicable law pertaining to Petitioner's claim, we find that the District Court abused its discretion when it summarily denied Petitioner's claim.

¶14 "The Post-Conviction Procedure Act governs post-conviction proceedings in this State." *Wackerly v. State*, 2010 OK CR 16, ¶ 2, 237 P.3d 795, 796. The Act provides petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. Post-Conviction review is not intended to provide a second appeal. *Carter v. State,* 1997 OK CR 22, ¶ 2, 936 P.2d 342, 343. "Issues that were previously raised and ruled upon by this Court are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973; *Battenfield v. State*, 1998 OK CR 8, ¶ 4, 953 P.2d 1123, 1125; 22 O.S.2011, § 1086.

¶15 There are even fewer grounds available to a petitioner to assert in a subsequent application for post-conviction relief. *Rojem v. State,* 1995 OK CR 1, ¶ 7 n. 6, 888 P.2d 528, 530 n. 6 ("Subsequent applications for post-conviction relief can only be filed under certain, limited circumstances.") (citing 22 O.S.2011, § 1086). Section 1086 limits the grounds for relief asserted within subsequent petitions to only those grounds which for sufficient reason were not asserted or were inadequately raised. *Johnson v. State*, 1991 OK CR 124, ¶ 4, 823 P.2d 370, 372. This Court has recognized that an intervening change in the law which did not exist at the time of Petitioner's direct appeal or in previous post-conviction proceedings constitutes a sufficient reason for not previously asserting an allegation of error. *VanWoundenberg v. State,* 1991 OK CR 104, ¶ 2, 818 P.2d 913, 915.

¶16 The State providently concedes that Petitioner's claim is properly raised. In *Miller,* the United States Supreme Court determined that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for offenders who were under the age of 18 at the time of their crimes. *Miller,* 567 U.S. at 465, 132 S.Ct. at 2460. "[*Miller*] rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery,* 136 S.Ct. at 734

(quotations and citation omitted). Unlike its announcement in *Graham v. Florida*, 560 U.S. 48, 79, 130 S.Ct. 2011, 2032-33, 176 L.Ed.2d 825 (2010), the Supreme Court in *Miller* did not place a categorical prohibition against the imposition of life without parole sentences on juvenile homicide offenders. *Luna v. State,* 2016 OK CR 27, ¶ 9, 387 P.3d 956, 960. Instead, *Miller* held that an individualized sentencing hearing is required before an offender who committed his or her offense under the age of eighteen (18) years of age may be sentenced to life without the possibility of parole. *Montgomery,* 136 S.Ct. at 735; *Miller,* 567 U.S. at 483, 132 S.Ct. at 2460. "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S.Ct. at 735 (quoting *Miller,* 567 U.S. at 465, 132 S.Ct. at 2460).

¶17 In *Montgomery,* the United States Supreme Court determined that *Miller* announced a substantive rule of constitutional law which is given retroactive effect. *Montgomery*, 136 S.Ct. at 734. The Supreme Court also recognized for the first time that: "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.*, 136 S.Ct. at 731-32. Based upon the Supreme Court's holding in *Montgomery*, this Court in *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, determined that *Miller's* holding applied retroactively to juvenile offenders whose convictions and sentences were final before *Miller* was decided. *Luna*, 2016 OK CR 27, ¶ 11, 387 P.3d at 960.

¶18 Turning to the present case, Petitioner's conviction and sentence were final before the Supreme Court announced *Miller.* His original application for post-conviction relief was also decided before *Miller.* Thus, Petitioner's Second Application for Post-Conviction Relief was his first opportunity to raise a claim under *Miller.* Section 1080(f) of the Post-Conviction Procedure Act explicitly permits a petitioner to raise a challenge that his "conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy." As *Miller* is clearly an intervening change in the law which did not exist at the time of Petitioner's direct appeal or in previous post-conviction proceedings, we find that this constitutes a sufficient reason for his failure to previously raise his present claim of error and conclude that his claim could be grounds for relief in a successive application for post-conviction relief.

¶19 The District Court determined that Petitioner's case was distinguishable from *Miller* and *Montgomery* because he entered a negotiated plea. The record reveals that Petitioner was convicted for first degree murder and sentenced to life without the possibility of parole for a homicide which he had committed at 17 years of age. The District Court imposed Petitioner's sentence in 1996, approximately 14 years prior to the Supreme Court's pronouncement in *Miller*. Although *Miller* and *Montgomery* clearly call into question the constitutionality of Petitioner's sentence, the District Court properly concluded that these subsequent judicial decisions did not invalidate Petitioner's plea and convictions.

¶20 The United States Supreme Court has determined that subsequent judicial decisions do not impugn the truth or reliability of a criminal defendant's guilty plea. *Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 1473-74, 25 L.Ed.2d 747 (1970).

> [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. . . .
>
> We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. We further note that the United States Supreme Court recognized that States are not required to relitigate convictions in order to give *Miller* retroactive effect. *Montgomery,* 136 S.Ct. at 736. Accordingly, we conclude that Petitioner's plea and conviction remain constitutionally valid.

¶21 However, the District Court's determination that *Miller* and *Montgomery* are not applicable to Petitioner's sentence based upon the continued validity of his plea is a clearly erroneous conclusion of law. Petitioner's negotiated plea of guilty cannot render his sentence constitutional. Section 1080(A) of the Post-Conviction Procedure Act explicitly permits a petitioner to raise a claim that his "conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." (emphasis added). Petitioner's negotiated plea to the offense cannot justify his sentence if the sentence is found to be unconstitutional. *See Montgomery,* 136 S.Ct. at 731 ("[A]s a general principle, [ ] a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced."). We note, as a parallel, that this Court reviews properly preserved excessive sentence claims on *certiorari* review even though the claim does not impugn the validity of the plea. *Whitaker v. State*, 2015 OK CR 1, ¶¶ 7-9, 341 P.3d 87, 89-90.

¶22 Citing *Weeks v. State*, 2015 OK CR 16, 362 P.3d 650, the State asserts that Petitioner's guilty plea waived his claim because there is no indication that the District Court did not have the power to hear Petitioner's case. We are not persuaded by this argument. "[A] guilty plea has a preclusive effect on a petitioner's collateral attacks on his conviction" but "does not preclude review of a claim that implicates the State's power to prosecute the case, or concomitantly, on the trial court's power to hear the case." *Weeks*, 2015 OK CR 16, ¶¶ 8, 13, 362 P.3d at 653-54. The Supreme Court has concluded that a sentence of life without the possibility of parole imposed in contravention of *Miller* is both illegal and void. *Montgomery,* 136 S.Ct. at 731. Therefore, after *Miller,* a court is without the power to sentence a juvenile offender to life without the possibility of parole without the benefit of an individualized sentencing hearing.

¶23 The State further argues that Petitioner waived his right to an individualized sentencing hearing by pleading guilty. We refuse to find that Petitioner waived his rights under *Miller* when he entered his guilty plea. *See King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35 (holding defendant must be advised of all constitutional rights he relinquishes with his plea). Petitioner could not have been aware that he had the right to an individualized sentencing hearing because this right was not recognized until the Supreme Court announced it in *Miller.*

¶24 Given that Petitioner was seventeen years old when he committed first degree murder, his sentence of life without parole clearly falls within the confines of *Miller* and *Montgomery*. As the District Court failed to apply this controlling precedent to Petitioner's case, we find that the District Court abused its discretion. Accordingly, we find that the District Court's Order Denying Post-Conviction Relief should be reversed.

¶25 Our determination that *Miller* and *Montgomery* apply to Petitioner's sentence, standing alone, does not require us to modify Petitioner's sentence to imprisonment for life. *Miller* did not bar imposition of life without parole on all juvenile homicide offenders. *Montgomery,* 136 S.Ct. at 734. Instead, *Miller* drew a line between juveniles whose crimes reflect "transient immaturity" and the rare juvenile whose crime reflects "irreparable corruption." *Id.* Thus, the punishment may still be imposed on the rare juvenile offender whose crime reflects "irreparable corruption." *Miller,* 567 U.S. at 479–80, 132 S.Ct. at 2469; *Montgomery*, 136 S.Ct. at 726, 736.

¶26 This Court has not had the opportunity to determine how the district courts are to retroactively apply *Miller* and *Montgomery* on post-conviction review. A petitioner raising a claim that his life without parole sentence is unconstitutional under *Miller* and *Montgomery* carries the burden of establishing that he or she is entitled to relief. "There is a presumption of regularity in the trial court proceedings." *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25. The petitioner in post-conviction proceedings has the burden of presenting sufficient evidence to rebut this presumption. *Id.* To establish a claim under *Miller* and *Montgomery* on post-conviction review, the petitioner must establish that he is serving a sentence of life without parole for a homicide committed while he or she was under 18 years of age and was deprived of an individualized sentencing hearing where youth and its attendant characteristics were considered along with the nature of the crime. *See Montgomery,* 136 S.Ct. at 734, 735; *Miller,* 567 U.S. at 465, 483, 132 S.Ct. at 2460, 2471; *Luna,* 2016 OK CR 27, ¶¶ 16, 20, 387 P.3d at 961-62. If the sentencer held such a hearing, then the challenged sentence does not run

afoul of *Miller. Cf. Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962.

¶27 Turning to the present case, we find that Petitioner has shown that he is entitled to relief. Although there was information in the record concerning Petitioner's youth and the attendant characteristics relating to youth, the sentencing judge did not have an opportunity to consider this evidence in the proper context. We note that the District Court file had several different sources of information about Petitioner in it at the time of sentencing. In the plea form, Petitioner admitted to shooting and killing Lawrence. The court also heard evidence concerning the other crimes which Petitioner had committed, including the offense of First Degree Murder which Petitioner had committed in Oklahoma County. Petitioner shot and killed Jessie T. Bradley with a rifle on January 25, 1994. This occurred prior to the present offense.

¶28 The District Court file in Canadian County contained records concerning Petitioner's mental capacity. On June 24, 1994, an Application for Determination of Competency was filed on Petitioner's behalf. The District Court held a hearing on the application on June 28, 1994, and ordered that Petitioner be evaluated at the State mental health facility in Vinita. On December 15, 1994, the District Court held a post-examination competency hearing and determined that Petitioner was competent to stand trial.

¶29 The District Court file also contained records concerning Petitioner's youthfulness. Based upon the fact that he was seventeen (17) years of age at the time of the charged offenses, Petitioner filed an Application for Certification as a Juvenile. On May 26, 1995, the District Court held a hearing on Petitioner's request, considered Petitioner's evidence and the statutory factors, and denied the application. Petitioner timely appealed the denial of his application and on December 12, 1995, this Court affirmed the District Court's denial.

¶30 The sentencing judge could have considered this evidence at Petitioner's sentencing hearing. *See Berget v. State*, 1991 OK CR 121, ¶¶ 16-17, 824 P.2d 364, 370 (recognizing trial court's ability to look at entire record when sentencing on a plea).[4] However, the United State Supreme Court determined in *Miller* that the discretion available to a judge at certification proceedings cannot substitute for the discretion at sentencing in adult court necessary to satisfy the Eighth Amendment. *Miller,* 567 U.S. at 489, 132 S.Ct. at 2475.[5] As the District Court sentenced Petitioner prior to the Supreme Court's pronouncement in *Miller,* Petitioner could not have known what evidence to put on to fall within the protection of *Miller* and *Montgomery*. Further, the sentencing judge could not have determined that Petitioner was irreparably corrupt and permanently incorrigible since he did not know that he was required to make such a finding. Therefore, we find that Petitioner is entitled to relief and his sentence must be vacated.

¶31 On remand, the District Court should proceed to resentence Petitioner unless the State is agreeable to the modification of his sentence to life imprisonment. The Supreme Court has explicitly determined that the State may remedy a violation of *Miller* by agreeing to the modification of a petitioner's sentence. *Montgomery*, 136 S.Ct. at 736. Otherwise, the District Court should conduct a new sentencing hearing.

¶32 In *Luna v. State*, 2016 OK CR 27, ¶ 21, 387 P.3d 956, 962-63, this Court set forth the requirement that the trial court had to hold an individualized sentencing hearing in all future cases where the State seeks to impose a sentence of life without the possibility of parole upon a defendant who was under eighteen (18) years of age at the time of the offense.[6] However, we take this opportunity to clear up several issues which remain unanswered in *Luna* and further establish the interim rules of procedure for these types of cases. We note that this Court was presented with a similar challenge when the United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that mentally retarded individuals were no longer eligible for the death penalty. In *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, we were required to set out certain interim rules of procedure for the courts of this State until the Oklahoma Legislature acted to fill the gap in our procedure based upon the Supreme Court's holding in *Atkins.* While the Legislature ultimately adopted the procedure in *Murphy,* our decision was never intended to supplant the Legislative process but to give trial courts guidance until the Legislature acted. *Murphy,* 2002 OK CR 32, ¶ 30, 54 P.3d at 567; 21 O.S.Supp.2006, § 701.10b. Until such time as the Legislature addresses this matter, trial court practitioners should follow the procedure outlined herein.

¶33 In all future trials where the State intends to seek a sentence of life without the possibility of parole for an offender who committed his or her offense under the age of eighteen (18) years of age the State shall give notice of this fact by stating at the bottom of the Information in bold type: **"The State is seeking the punishment of life without the possibility of parole for the offense of Murder in the First Degree, as Defendant (state last name here) is irreparably corrupt and permanently incorrigible."** *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986 (adopting notice pleading). Both parties shall be afforded full discovery on this issue in accordance with established discovery law. 22 O.S.2011, § 2001 *et seq*. The assigned trial judge has the authority under our Discovery Code to issue any orders necessary to accomplish this task.

¶34 The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000). The defendant's trial shall be bifurcated and the issue of the defendant's guilt shall be separately determined from the enhancement of his or her sentence. *Cf. Mitchell v. State*, 2011 OK CR 26, ¶ 119, 270 P.3d 160, 186 (contrasting sentencing procedure where State seeks to enhance sentence); 22 O.S.2011, § 860.1 (statutory procedure for sentencing). The prohibition against the introduction of evidence in either aggravation or mitigation set forth in *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, shall not be applicable to the sentencing proceeding in this type of case. Therefore, each party shall be afforded the opportunity to present evidence in support of its position as to punishment in the second stage of the trial. The trial court shall submit a special issue to the jury as to whether the defendant is irreparably corrupt and permanently incorrigible. *Cf.* 21 O.S.2011, § 701.10b(F). Pending Legislative action the District Courts of the State are directed, in addition to the instruction set out in *Luna,* to use the instruction and verdict form attached as "Appendix A" at the conclusion of this Opinion.

¶35 It is the State's burden to prove, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible. *Luna*, 2016 OK CR 27, ¶ 21 n. 11, 387 P.3d at 963 n. 11; *see also Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding facts increasing punishment beyond the maximum authorized by a guilty verdict must be proven beyond a reasonable doubt). The State shall have the opportunity to present any evidence tending to establish this fact subject to the limitations of 12 O.S.2011, § 2403. Generally, this will include, but not be limited to, evidence concerning the defendant's: (1) sophistication and maturity; (2) capability of distinguishing right from wrong; (3) family and home environments; (4) emotional attitude; (5) pattern of living; (6) record and past history, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and (7) the likelihood of the defendant's rehabilitation during adulthood. *See Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962; *Cf.* 10A O.S.2011, § 2-5-205(E).

¶36 Similarly, the defendant must be permitted to introduce relevant evidence concerning the defendant's youth and its attendant characteristics. *Miller,* 567 U.S. at 489, 132 S.Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for a juvenile."). Generally, this will include, but not be limited to, evidence concerning the defendant's: "(1) chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and (3) whether the circumstances suggest possibility of rehabilitation." *Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962 (quotations and citation omitted).

¶37 If the sentencer unanimously finds that the defendant is irreparably corrupt and permanently incorrigible it is then authorized to consider imposing a sentence of life without the possibility of parole. If the sentencer does not make this finding it is prohibited from considering a sentence of life without the possibility of parole and may only impose a sentence of life imprisonment.

¶38 The procedure for resentencing in the present case is slightly different. Since Petitioner's plea of guilty and conviction remain valid, the trial court need only conduct a new sentencing hearing in the present case. 22 O.S.2011, § 929(A). If the State does not agree to the modification of Petitioner's sentence then it

shall file a notice pleading with the language set out in this opinion. The trial court shall schedule the matter for resentencing in accordance with both § 812.1 and § 929 of Title 22, and enter any orders which are necessary for the timely completion of discovery.

¶39 The trial court shall conduct resentencing pursuant to 22 O.S.2011, § 929 and follow the procedure outlined above for future cases as nearly as possible. Each party shall be afforded the opportunity to present evidence concerning, but not limited to, the factors set out above. The sentencer can consider the prior evidence documenting Petitioner's youthfulness, mental capacity, maturity, and likelihood of rehabilitation contained in the District Court file together with any additional evidence presented pursuant to *Miller* and *Montgomery. See* 22 O.S.2011, § 929 (providing that "all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in [a] new sentencing proceeding.").

¶40 If the sentencer unanimously finds that Petitioner is irreparably corrupt and permanently incorrigible it is then authorized to consider imposing a sentence of life without the possibility of parole. If the sentencer does not make this finding it is prohibited from considering a sentence of life without the possibility of parole and may only impose a sentence of life imprisonment. Petitioner may solely appeal from the sentencer's determination of his sentence and may not challenge his conviction. 22 O.S.2011, § 1051, § 1066; Rule 1.2(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

DECISION

¶41 The District Court erroneously concluded that Petitioner's negotiated guilty plea prevented *Miller* and *Montgomery* from applying to his sentence of life without the possibility of parole. Accordingly, the District Court's Order Denying Post-Conviction Relief is **REVERSED**. The Sentence of life without the possibility of parole is **VACATED** and the matter is **REMANDED** to the District Court for resentencing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY FOR PETITIONER
Debra K. Hampton, Attorney at Law, 3126 S. Blvd., #304, Edmond, OK 73013

ATTORNEY FOR RESPONDENT
Mike Hunter, Attorney General of Oklahoma, Jennifer B. Welch, Assistant Attorney General, 313 NE 21st St., Oklahoma City, OK 73105

OPINION BY LUMPKIN, P.J.
LEWIS, P.J.: Concur
HUDSON, J.: Specially Concurs
KUEHN, J.: Concur
ROWLAND, J.: Concur

APPENDIX A

LIFE WITHOUT PAROLE PROCEEDINGS – JUVENILE OFFENDER

Should you unanimously find that the State has proven the Defendant is irreparably corrupt and permanently incorrigible beyond a reasonable doubt, you are authorized to consider, but not required to impose, a sentence of life without the possibility of parole. If you do not unanimously find beyond a reasonable doubt that the State has proven the Defendant is irreparably corrupt and permanently incorrigible, you are prohibited from considering a sentence of life without the possibility of parole. In that event, the sentence must be imprisonment for life with the possibility of parole.

VERDICT FORM

LIFE WITHOUT PAROLE PROCEEDINGS – JUVENILE OFFENDER

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs	)	Case No. ___
JOHN DOE,	)	
Defendant.)	)	

VERDICT (SECOND STAGE)

COUNT 1 – **[CRIME CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

[Check and complete only one.]

_____ the Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____ _____.

_____ Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

_____
FOREPERSON

HUDSON, J., SPECIALLY CONCURS

¶1 I concur in today's decision but write separately because neither the jury instruction formulated in today's case, nor the instruction previously articulated in *Luna v. State*, 2016 OK CR 27, ¶ 21 n.11, 387 P.3d 956, 963 n.11, provide any relatable explanation to jurors of the phrase "irreparable corruption and permanent incorrigibility." The Supreme Court in *Montgomery v. Louisiana*, 577 U.S.__, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) paraphrased this language with the statement that "a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity **that rehabilitation is impossible** and life without parole is justified." *Id.*, 136 S. Ct. at 733 (emphasis added). The Supreme Court also observed in this context that "[t]hose prisoners who have shown **an inability to reform** will continue to serve life sentences." *Id.*, 136 S. Ct. at 736 (emphasis added).

¶2 This language from *Montgomery* provides an explanatory gloss for "irreparable corruption and permanent incorrigibility" to mean the defendant has shown an inability to reform and rehabilitation is impossible. Although my colleagues have declined to formulate further explanation of this type in the instructions, that does not mean trial judges should not use this or similar language when responding to what I believe will be inevitable questions from jurors concerning its meaning.[1] I have grave concerns that jurors will not know what they are being asked to do if additional explanation of this type is not provided in the instructions. We can only hope at this point that any Legislative action in this area will provide additional explanation beyond that set forth in the current instructions.

LUMPKIN, PRESIDING JUDGE:

1. The State charged Petitioner, Marcus Dewayne Stevens, and Michael Ray Goode conjointly in the murder. On August 31, 1994, Marcus Dewayne Stevens entered a negotiated guilty plea to the offense and the District Court sentenced him to imprisonment for life. On June 13, 1996, Michael Ray Goode entered a negotiated guilty plea to the offense and the District Court sentenced him to imprisonment for life.

2. Both Petitioner and the State waived venue and the District Court also accepted Petitioner's plea of no contest to First Degree Murder in District Court of Oklahoma County Case No. CF-1994-5960. Pursuant to the plea agreement: the State dismissed the Bill of Particulars, dismissed District Court of Pottawatomie County Case Nos. CF-1994-118 and CF-1994-231, and recommended consecutive terms of imprisonment for life without the possibility of parole in each of the murder cases.

3. Petitioner solely filed his second application in District Court of Canadian County Case No. CF-1994-90. He did not file the application in District Court of Oklahoma County Case No. CF-1994-5960 and seek relief concerning that conviction and sentence. Thus, Petitioner has not invoked the jurisdiction of this Court as to his conviction and sentence in the Oklahoma County case.

4. The transcript of the plea hearing at which the District Court sentenced Petitioner is not within the record on appeal.

5. Although the juvenile certification proceedings cannot take the place of the requisite individualized sentencing hearing, a sentencer's consideration of this type of evidence at an adult sentencing hearing is what is at the core of *Miller*.

6. I maintain that the Supreme Court did not impose a formal fact-finding requirement in *Miller* but that this matter should be addressed by the Oklahoma Legislature. *Luna v. State*, 2016 OK CR 27, ¶ 2, 387 P.3d 956, 963–64 (Lumpkin, V.P.J., concurring in part/dissenting in part).

HUDSON, J.

1. Oklahoma law contemplates supplemental instructions in response to juror questions during deliberations. *See* 22 O.S.2011, § 894 (allowing for additional instruction during deliberations if there be a disagreement between the jurors as to any part of the testimony "or if they desire to be informed on a point of law arising in the cause[.]"); *Harris v. State*, 2007 OK CR 28, ¶ 11, 164 P.3d 1103, 1110 (trial court did not abuse its discretion in defining the words "probability" and "possibility" in response to juror's request during deliberations); *Cohee v. State*, 1997 OK CR 30, ¶ 2, 942 P.2d 211, 215 (trial court should attempt to answer the jury's questions as fully as the law permits while using clear and plain language); *Milam v. State*, 1923 OK CR 230, 24 Okl.Cr. 247, 259, 218 P. 168, 172 ("If it becomes necessary to give additional instructions to the jury after the original written instructions have been given, they should also be reduced to writing and properly numbered and filed, in the same manner as those originally given."). Whether the trial court answers a jury question is, of course, left to the trial court's broad discretion. *Smallwood v. State*, 1995 OK CR 60, ¶¶ 83-84, 907 P.2d 217, 238; *Boling v. State*, 1979 OK CR 11, ¶ 4, 589 P.2d 1089, 1091.

2018 OK CR 13

DESMOND DEANTHONY ANDERSON, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.

Case No. C-2017-669. May 17, 2018

SUMMARY OPINION GRANTING *CERTIORARI* AND REMANDING FOR EVIDENTIARY HEARING

LUMPKIN, PRESIDING JUDGE:

¶1 Petitioner Desmond Deanthony Anderson entered blind pleas of guilty in the District Court of Pottawatomie County, Case No. CF-2016-521, to Trafficking in Illegal Drugs, (Count I) (63 O.S.Supp.2015, § 2-415) and Possession of a Controlled Dangerous Substance with Intent to Distribute (Count II) (63 O.S. Supp.2012, § 2-401(A)(1)), both counts After Former Conviction of Two or More Felonies. The Honorable John G. Canavan, Jr., District Judge, accepted Petitioner's pleas and sentenced him to twenty (20) years imprisonment in each count plus a $25,000.00 fine in Count I. Judge Canavan ordered credit for time served, suspended the fine in Count I, imposed various fees and costs for both counts, and ordered

the sentences to be served concurrently. Petitioner, represented by counsel, timely filed a Motion to Withdraw Plea which was summarily denied. Petitioner appeals the denial of his motion, and raises the following propositions of error:

I. The trial court erred in failing to hold a hearing on the motion to withdraw the pleas;

II. Petitioner failed to receive the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article II, Section 20 of the Oklahoma Constitution.

¶2 After thorough consideration of these propositions and the entire record before us on appeal, we have determined that *certiorari* should be granted and the case should be remanded to the district court for an evidentiary hearing with respect to the motion to withdraw guilty plea.

¶3 The requirements for *certiorari* appeals are set forth in Rule 4.2(A) and (B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). Rule 4.2(B) states that the "trial court shall hold an evidentiary hearing and rule on the application [to withdraw plea] within thirty (30) days from the date it was filed." Pursuant to the rules of statutory construction, the use of the term "shall" in a statute usually indicates a mandatory duty. *See Kingdomware Technologies, Inc. v. United States*, 579 U.S. ——, ——, 136 S.Ct. 1969, 1977, 195 L.Ed.2d 334 (2016) ("[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement"); *United States v. Gabaldon*, 522 F.3d 1121, 1125 (10th Cir. 2008) ("[t]he word 'shall' indicates a mandatory duty"); *Jordan v. State*, 1988 OK CR 227, ¶ 4, 763 P.2d 130, 131 ("it is a rule of statutory construction that the term 'shall' is mandatory"). We interpret our court rules under the same principles. By the use of the term "shall", this Court has made the evidentiary hearing on the motion to withdraw plea mandatory upon the filing of an application to withdraw plea, and not discretionary or conditional upon a request of the defendant. The application to withdraw guilty plea and the evidentiary hearing are both necessary and critical steps in securing the appeal rights as provided by Rule 4.1. *Randall v. State*, 1993 OK CR 47, ¶ 5, 861 P.2d 314, 316. The use of "shall" in Rule 4.2(B) is unambiguously a mandatory directive.

¶4 This Court reviews a trial court's decision to deny the withdrawal of a guilty plea for an abuse of discretion. *Weeks v. State*, 2015 OK CR 16, ¶ 16, 362 P.3d 650, 654; *Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142; *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. Inherent in this type of appeal is a review of the trial court's actions taken as a result of the defendant's motion to withdraw his plea. *Whitaker v. State*, 2015 OK CR 1, ¶ 10, 341 P.3d 87, 90. If a matter is not presented to the trial court, there is nothing for this Court to review. *Id.* If the trial court does not hold the requisite hearing, there is nothing upon which this Court can base a ruling regarding whether the trial court did or did not abuse its discretion in denying the application to withdraw. Without evidence presented in a hearing, any review by this Court would be *de novo*, which we do not do.

¶5 Further, a waiver of the right to the mandatory evidentiary hearing by trial counsel is *ipso facto* an act of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as counsel has deprived the defendant of the record required for this Court to review the voluntariness of the guilty plea.

¶6 In the present case, in the absence of an evidentiary hearing on the motion to withdraw plea, this Court is unable to review the trial court's denial of Petitioner's motion. Therefore, the petition for *Writ of Certiorari* is granted, and the case is remanded to the District Court of Pottawatomie County for a hearing on Petitioner's motion to withdraw his pleas in accordance with the provisions of Rule 4.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018).

¶7 This resolution renders moot Petitioner's claims in Proposition II and the Application for Evidentiary Hearing on Sixth Amendment Grounds filed contemporaneously with the petition for *Writ of Certiorari.*

DECISION

¶8 The **Petition for a Writ of *Certiorari* is GRANTED. The case is REMANDED TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON THE APPLICATION TO WITHDRAW PLEA. THE APPLICATION FOR EVIDENTIARY HEARING ON SIXTH AMENDMENT GROUNDS is DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018),

the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY

THE HONORABLE JOHN G. CANAVAN, JR., DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

Karen E. Byars, 32 N. Broadway, Shawnee, OK 74801, Counsel for the Defense

Richard L. Smothermon, District Attorney, Abby Nation, Assistant District Attorney, Pottawatomie County Courthouse, 331 N. Broadway, Shawnee, OK 74801, Counsel for the State

APPEARANCES ON APPEAL

Robert W. Jackson, P.O. Box 926, Norman, OK 73070, Counsel for Petitioner

NO RESPONSE NECESSARY

OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur
HUDSON, J.: Dissenting
KUEHN, J.: Concur
ROWLAND, J.: Concur

HUDSON, J., DISSENTING

¶1 Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) requires that an evidentiary hearing be held on an application to withdraw a guilty plea. **However,** Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) conditions that requirement on an actual request being made for an evidentiary hearing in the application to withdraw guilty plea. In the present case, Petitioner did not request an evidentiary hearing in his motion to withdraw guilty plea. Since Petitioner did not request an evidentiary hearing, his motion to withdraw was defective; the trial court was not required to hold a hearing; and he has not preserved appellate review of his guilty plea on the present record. *See Whitaker v. State*, 2015 OK CR 1, ¶ 10, 341 P.3d 87, 90 (holding that the petitioner must make a sufficient record in district court proceedings to allow for meaningful appellate review of his claim on certiorari); *Tate v. State*, 2013 OK CR 18, ¶ 14, 313 P.3d 274, 280 (holding that petitioner preserved appellate review of her plea of no contest by following Section IV of our Rules; she filed her motion to withdraw plea of no contest in the trial court clerk's office within 10 days from the date of pronouncement of judgment and sentence setting forth in detail the grounds for the withdrawal of the plea and requested an evidentiary hearing in the trial court). The trial court therefore did not abuse its discretion in summarily denying Petitioner's motion to withdraw.

¶2 The majority interprets Rule 4.2's language to mandate an evidentiary hearing "upon the filing of an application to withdraw plea, and not discretionary or conditional upon a request of the defendant." Majority at 3. The majority reasons that without a hearing, "there is nothing upon which this Court can base a ruling regarding whether the trial court did or did not abuse its discretion in denying the application to withdraw. Without evidence presented in a hearing, any review by this Court would be *de novo*, which we do not do." Majority at 2.

¶3 This reading of Rule 4.2 ignores that an evidentiary hearing need not be held where the petitioner is not challenging the voluntariness of his plea or not otherwise making a factual claim regarding the validity of his plea. This typically arises when a defendant challenges the constitutionality of a statute. *Maxwell v. State,* 2006 OK CR 33, ¶¶ 2-3, 5-6, 141 P.3d 564, 566-67; *Allen v. City of Oklahoma City*, 1998 OK CR 42, ¶ 7, 965 P.2d 387, 390. Hence, there is a very sound reason not to read the language in Rule 4.2(A) and 4.2(B) as mandating an evidentiary hearing for every motion to withdraw filed. Simply, not every application to withdraw plea requires a hearing.

¶4 The majority's reliance upon *Randall v. State,* 1993 OK CR 47, 861 P.2d 314, for the proposition that an evidentiary hearing is both a "necessary" and "critical" step in securing a defendant's right to certiorari appeal, Majority at 3, goes only so far. *Randall* stands for the proposition that a defendant has the right to have counsel present at all critical stages of a criminal prosecution, including when an evidentiary hearing is held on an application to withdraw plea. This holding is a reflection of *Randall's* facts. The defendant in that case went unrepresented at a hearing on a motion to withdraw plea despite his request for counsel. *Id.*, 1993 OK CR 47, ¶¶ 9-10, 861 P.2d at 316. *Randall* does not, however, dictate that an evidentiary hearing must be held on each and every application to withdraw plea filed in district court. *Id.*, 1993 OK CR 47, ¶¶ 2-7, 861 P.2d at 315-16.

¶5 Moreover, *Randall* actually undercuts the majority's rationale and ultimate conclusion by holding that harmless error analysis is applicable to the denial of counsel "where: (1) the defendant neither alleges that he is innocent nor that his plea was involuntary; and (2) it is clear that the defendant is not entitled to withdraw his plea." *Id.*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316. *Randall* reflects this Court's understanding that not all deficiencies arising during "critical" and "necessary" proceedings on a defendant's motion to withdraw plea – even major deficiencies like the absence of counsel – are of sufficient magnitude to warrant automatic relief. From the outset, the majority's conclusion that the denial of an evidentiary hearing amounts to structural error warranting automatic relief, regardless of the circumstances, is a radical departure from our established precedent.

¶6 The majority's decision also represents a radical approach to statutory construction. The interpretation of Rule 4.2 given by the majority renders superfluous the express language contained within Rule 4.2(A) concerning the prerequisites for the application to withdraw plea:

> **A. Application to Withdraw Plea.** In all cases, to appeal from any conviction on a plea of guilty or nolo contendere, the defendant **must** have filed in the trial court clerk's office an application to withdraw the plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence, setting forth in detail the grounds for the withdrawal of the plea **and requesting an evidentiary hearing in the trial court.** *See* Sections 1051 and 1054 of Title 22.

(emphasis added). In other words, if the district court is required to hold an evidentiary hearing for *every* application to withdraw plea, and is not conditional upon the request of the defendant, then the plain language contained within Rule 4.2(A) requiring the application to contain a request for a hearing is of no consequence and rendered superfluous. In other words, why do we require in Rule 4.2(A) a formal request for evidentiary hearing if Rule 4.2(B) makes an evidentiary hearing mandatory regardless? This is contrary to the canons of statutory interpretation. Our interpretation of statutes is driven by the plain language and plain meaning of the statute as a whole and avoids any construction which would render any part of the statute superfluous. *Whirlpool Corp. v. Henry,* 2005 OK CR 7, ¶ 4, 110 P.3d 83, 85. There is no reason that interpretation of our own rules – which, of course, have the force of statute – should be any different. My interpretation of Rule 4.2 stays true to our established mode of statutory analysis. The majority's does not.

¶7 The majority has cited no published decisions from this Court, let alone any decision from the United States Supreme Court, mandating an evidentiary hearing even where the defendant does not request such a hearing for the claims contained within his application to withdraw plea. Notably, the Tenth Circuit has held that a defendant is not entitled to an evidentiary hearing as a matter of right when he seeks to withdraw his plea. Rather, "the defendant must present some significant questions concerning the voluntariness or general validity of the plea to justify an evidentiary hearing. No hearing need be granted when the allegations on a motion to withdraw a guilty plea before sentencing merely contradict the record, are inherently incredible, or are simply conclusory." *United States v. Carter,* 109 Fed. Appx. 296, 299 (10th Cir. 2004) (unpub'l) (quoting *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992)). *See, e.g., United States v. Alvarado,* 615 F.3d 916, 920 (8th Cir. 2010) (the trial court can deny a motion to withdraw plea without an evidentiary hearing "if the allegations in the motion are inherently unreliable, are not supported by specific facts or are not grounds for withdrawal even if true."); *Zapata v. Comm.*, 516 S.W.3d 799, 802 (Ky. 2017) (the defendant must present "a colorable argument" before the trial court is required to hold an evidentiary hearing on the motion to withdraw plea). Due process of law does not mandate a hearing before denying each and every motion to withdraw plea.

¶8 The present case is instructive. Petitioner's motion to withdraw plea, filed through plea counsel, alleged without detail that "[h]e did not understand the nature and consequences of his plea[.]" Petitioner's written application did not request an evidentiary hearing and none was held. Despite the absence of any record where Petitioner could have presented such supporting evidence, this Court has been presented with an otherwise thorough record, the review of which shows the entry of a knowing and voluntary guilty plea. The record includes transcripts of Petitioner's preliminary hearing as well as his plea and sentencing hearings. The record also contains the fully-completed Plea of Guilty Summary of Facts form signed by Petitioner and acknowledged by him at the

plea hearing as containing his true and correct answers to the questions presented.

¶9 The transcript of the preliminary hearing shows Petitioner was passed out in a car while blocking drive-thru traffic at a Taco Bell around 1:00 a.m. on June 18, 2016. When Shawnee Police arrived, they found Petitioner slumped back and unconscious in the driver's seat of the car which was in drive. Police also observed in the passenger seat three bags of what appeared to be marijuana. Petitioner's eyes were bloodshot and he smelled of alcohol. After being removed from the vehicle, placed in handcuffs and secured in the backseat of a patrol car, Petitioner started screaming and asking about money in his car. He also started kicking the back windows of the patrol unit. In addition to the bags of marijuana, police found four bags of what appeared to be crack cocaine in a side pocket of the driver's side door. Open containers of beer and Vodka were also found in the vehicle. Subsequent laboratory analysis showed that the crack cocaine weighed roughly 11.95 grams. The arresting officer testified that, based on his training and experience, the narcotics recovered from Petitioner's vehicle was consistent with trafficking or distribution (P.H. Tr. 5-20).

¶10 Petitioner's case was set for jury trial the morning on which he entered his blind plea of guilty to both counts as charged. The transcript of the plea hearing shows Petitioner acknowledged having gone over with plea counsel the fully completed Plea of Guilty Summary of Facts form contained in the record. Petitioner stated that plea counsel helped him fill out the form and that he, Petitioner, understood each and every question contained on this document (Plea Tr. 3; O.R. 40-47, 50). Petitioner stated that he did not need to speak with Judge Canavan about any of his responses on the plea form (Plea Tr. 4). Petitioner acknowledged both his signature on page 6 of the plea form and that his signature meant the answers given on the plea form were his true and correct answers to each question. Petitioner acknowledged having the advice of plea counsel when deciding to plead guilty. He further acknowledged that he was pleading guilty because he was in fact guilty and that no one had threatened or coerced him in any way to get him to plead (Plea Tr. 4-5).

¶11 Petitioner stated that he understood this was a blind plea meaning there was no agreement by either side as to what would be recommended for punishment. Petitioner also acknowledged that the trial court would be able to sentence him anywhere within the range of punishment for both counts. The nature of the plea offer which had previously been withdrawn by the State was discussed. The parties acknowledged that the State withdrew its plea offer of 15 years imprisonment because Petitioner did not accept it in a timely manner. The trial court specifically reviewed with Petitioner the range of punishment for both counts in light of Petitioner's numerous prior felony convictions (Plea Tr. 5-6). Knowing these things, Petitioner stated that he wished for the court to accept his guilty plea (Plea Tr. 6).

¶12 At the sentencing hearing, plea counsel urged leniency for Count 1 on grounds that the range of punishment set by the Oklahoma Legislature for trafficking in cocaine base was discriminatory against poor black men. Plea counsel also noted the State's previous recommendation of 15 years imprisonment and requested that the court order drug treatment so Petitioner could deal with his drug problem. The State urged that Petitioner be sentenced to 30 years imprisonment because of his long list of priors which included felony convictions for possession of contraband in a penal institution (two separate convictions), felonious possession of a firearm, possession of controlled dangerous substances with intent to distribute (two separate convictions) and shooting with intent to kill (S. 3-10; O.R. 3).

¶13 From the record before this Court, we have no basis to find that Petitioner's guilty plea was anything other than knowingly, voluntarily and intelligently entered. We examine the entire record before us on appeal to determine the knowing and voluntary nature of the plea. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970); *Hopkins v. State,* 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. On this record, Petitioner fails to show that his plea was invalid. He also fails to present anything in his accompanying Rule 3.11(B) application calling into question the validity of his guilty plea.[1] Petitioner therefore fails to show that, even had he been granted a hearing through counsel's efforts (or simply as a discretionary act by Judge Canavan) that the result of the proceeding would have been any different, i.e.,

that the district court would have granted his application to withdraw guilty plea.

¶14 The above discussion further demonstrates that an evidentiary hearing is not necessarily required whenever a defendant seeks to withdraw his or her plea. That is particularly so where, as here, we are faced with the conclusory assertion that Petitioner "did not understand the nature and consequences of his plea." Petitioner does not identify any factual issue that requires resolution at a hearing. Petitioner simply has not presented us a colorable basis to question the validity of his plea, especially considering the record evidence which torpedoes his claim. His sole allegation is too conclusory and is contradicted by the record which shows why his plea is valid. For these reasons, the district court was not required to hold an evidentiary hearing on Petitioner's application to withdraw prior to denying relief.

¶15 Nor was counsel ineffective for failing to request a hearing on Petitioner's behalf. Petitioner has the burden of proving that counsel was ineffective which requires a showing of both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part test). When a claim can be disposed of on grounds of lack of prejudice, that course should be followed. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. Based on the record before this Court, we have no basis to find that Petitioner's guilty plea was anything other than knowingly, voluntarily and intelligently entered. Petitioner fails to present any evidence supporting the bare claim raised in his motion to withdraw that he did not understand the nature and consequences of his plea. Again, he fails to show that, even if a hearing had been held, that the result of the proceeding would have been different.

¶16 Today's decision takes a one-size-fits-all approach to applications to withdraw pleas. A better option would be to amend Rule 4.2 to require the district court hold an evidentiary hearing absent the filing of a written waiver of the hearing. This would be true to the reality that not every application to withdraw plea needs a hearing without engaging in strained interpretations of our own rule. It is worth noting again that Petitioner had the opportunity to present us with anything – including statements in his Rule 3.11(B) affidavit – supporting his claim that his plea is invalid. He has not done so. Considering that we have a full record which flatly contradicts his cursory assertion that his plea is invalid, Petitioner should not be given what amounts to a redo on his motion to withdraw and his certiorari appeal. Petitioner never asked for a hearing. And he has done nothing to show us that his plea was invalid.

¶17 Should the need arise, Petitioner may pursue post-conviction proceedings in district court. Instead, we mandate the extravagant protection of an evidentiary hearing for even the most frivolous cases and champion form over substance. This is a bad approach to these cases, especially when the plain language of the Rule makes clear what is supposed to happen and the petitioner ignores the multiple safeguards at his disposal to force our hand on a single procedural issue. I would deny the petition for writ of certiorari and affirm Petitioner's judgment and sentence.

1. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) allows a petitioner to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the proceedings below. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. This Court reviews the application along with supporting affidavits to see if it contains sufficient evidence to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Notably, this standard is less demanding than the test imposed by *Strickland*. *Id.*

2018 OK CR 15

JOHN PATRICK WILLIAMSON, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2016-865. May 17, 2018

OPINION

LEWIS, VICE PRESIDING JUDGE:

¶1 Appellant, John Patrick Williamson, was tried by jury and convicted of first degree (malice) murder, in violation of 21 O.S.Supp.2012, § 701.7(A), in the District Court of McCurtain County, case number CF-2015-147, before the Honorable Gary L. Brock, Special Judge. The jury set punishment at life imprisonment without parole and Judge Brock pronounced judgment and sentence according to the verdict. Mr. Williamson now appeals to this Court.

FACTS

¶2 Appellant shot and killed his step-brother, Michael Sean Daniel, in the middle of the road near Idabel, Oklahoma, in McCurtain County. Two witnesses, Kathy Minor and Gwen Devasier, saw Daniel on his knees in the road while

Appellant shot him once in the chest. Daniel fell and Appellant shot him again in the face. Daniel had also been shot in the arm. Appellant walked to his pickup and drove away, leaving Daniel in the road. Daniel's motorcycle was parked just a few yards from where he was lying and the killing took place near Daniel's home.

¶3 Earlier, another witness saw the victim's motorcycle and Appellant's pickup traveling east on the road at a high rate of speed with the pickup just about fifty yards behind the motorcycle. Investigators found spots that appeared to be blood on the left side of the motorcycle.

¶4 The medical examiner found three wounds to the victim; a wound to his left arm went through his arm and into the left side of his chest. There was one to the right side of his chest, and one to the right side of the victim's face. The victim had a blood alcohol content of .14 percent. He also had levels of the antidepressants Sertraline and Trazodone in his system.

¶5 This shooting was the culmination of a feud between Appellant and his step-mother's family, including his step-brother Michael Daniel, which began soon after his father died. His step mother, Anita Williamson, testified that when her estranged husband, John Henry Williamson, died, Appellant moved into his house. Mrs. Williamson was, however, a joint owner and she started proceedings to have him removed from the house.

¶6 One day, about seven months prior to this shooting, Mrs. Williamson went with the victim, who was her son, to visit a couple of friends and talk about getting Appellant out of the house. They sat around drinking beer and decided they should get Appellant out of the house before he had a chance to cause damage. They went to the house and Daniel and one friend went to the door. Appellant met them at the door carrying a cane. Appellant struck both men with the cane and they went to the ground. Mrs. Williamson went to the door carrying a baseball bat. She told her step-son that the house was hers and she wanted him out. Appellant gathered his children and drove away. Mrs. Williamson stayed there that night and apparently moved in.

¶7 Another time, about five weeks prior to the shooting, Mrs. Williamson and Daniel drove by Appellant and he started hollering, yelling and cursing them out. They just drove on by. Later that day, however, Daniel received threatening text messages from Appellant in an attempt to get Daniel to fight him.

¶8 The night before the shooting Appellant stayed at the home of Jeffrey and Gayla Alford. On the morning of May 6, Appellant drove to Wal-mart in Idabel, where he was caught on video, and drove back to the Alford home. Around 2:30 p.m. Appellant received a call and went outside to answer the call. He came back in and told Gayla Alford that he would be spending the night in Broken Bow. Witnesses remembered seeing the shooting occur at about 3:40 p.m.

¶9 After Appellant drove away from the scene of the shooting he drove to Cheryl Tutt's house arriving there about 4:00 p.m. Tutt is Gayla Alford's sister. Tutt testified that she invited Appellant in and he looked scared. He was shaking and sweating. His color was pale. He told her, "I done it and somebody saw my truck." Appellant was wearing the same Carhartt shirt that Wal-mart video showed he was wearing before the shooting. Appellant asked Tutt to drive him to Texarkana, but she could not because she did not have her car. Appellant asked for back-road directions to Gayla's house. He asked Tutt to not say anything to anybody. After Appellant left, Tutt called Gayla and told her Appellant was on his way and something was not right.

¶10 Appellant arrived at the Alford home, but he was no longer wearing the blue Carhartt shirt. Appellant asked Gayla to take him to Texarkana, but she could not. He asked her for money, told her he loved her, and asked her to take his dog. He wanted her to not think he was a bad person, but he had to go.

¶11 Investigators found the blue Carhartt shirt near where Appellant had parked at the Tutt house. They also found a box of .22 caliber shells nearby. Appellant's pickup was located in Hope, Arkansas the next morning and Appellant was eventually arrested nearby at around 8:00 a.m.

ANALYSIS

¶12 Appellant claims in proposition one that his trial was fundamentally unfair because the admission of prejudicial and otherwise improper law enforcement testimony invaded the province of the jury. Appellant concedes that most of the testimony came without objection,

so this Court reviews those instances for plain error only.

¶13 To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *see Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶14 Appellant complains about OSBI Agent Whit Kent's testimony. His testimony, Appellant contends, was a rehash of other witnesses' testimony using a timeline to summarize the State's theory of the case. Appellant also complains that Agent Kent was allowed to testify regarding the contents of recordings of Appellant's jail conversations before the recordings were introduced to the jury.

¶15 Agent Kent testified about a timeline prepared by him and introduced as an exhibit with no objection by Appellant. His testimony about the timeline was a summary of the investigation and what information he gathered to form the basis for the timeline. His testimony did not give an opinion regarding the veracity of the witnesses' testimony. As such, his testimony did not amount to improper bolstering or vouching. *See Warner v. State,* 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860-61, *overruled on other grounds Taylor v. State*, 2018 OK CR 6, ___ P3d___ (where there is no expression of personal belief in witnesses' credibility or that evidence not presented supports witnesses' testimony there is no improper vouching). Contrary to Appellant's argument, Kent's testimony did not force the jury to ignore its responsibility to make its own conclusions based on the facts and circumstances appearing in evidence. This testimony, therefore, was not improper as it did not tell the jury what conclusions to reach. *Romano v. State*, 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109.

¶16 Kent's testimony may have reiterated some of the witnesses' testimony; however, the reiteration was not so cumulative that its probative value was substantially outweighed in violation of 12 O.S.2011, § 2402. The testimony was probative to show the steps in the investigation, why the focus was on Appellant, and how law enforcement conducted their investigation leading to Appellant's apprehension.

¶17 Kent's testimony about the recordings of Appellant's jail conversations also garnered no objection by defense counsel, thus we review for plain error only. Appellant complains that, in setting a foundation for the introduction of the recordings, Kent testified about incriminating phrases on the recordings just before the trial court admitted the tapes. Appellant's only complaint is that the testimony bolstered the recordings, was cumulative of the recordings, and usurped the jury's ability to decide what was on the recordings.

¶18 Here, the jury was not asked to abandon its own perception of the recordings and substitute its interpretation for that of Kent. Kent only testified about the phrases he thought were important in the investigation and which statements were incriminating based on his training and experience. The jurors were free to determine the weight of these recordings on their own. There was no error in Kent's testimony.

¶19 Finding no error in the admission of Kent's testimony, this Court cannot find plain error. Proposition one is denied.

¶20 In proposition two, Appellant argues that the admission of State's Exhibits 9, 21, and 42-55 was error because the exhibits were more prejudicial than probative and were unnecessarily cumulative. Appellant failed to object at trial, therefore, we review only for plain error. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 692-93. To obtain relief, Appellant must prove a plain or obvious error affected the outcome of the proceeding. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶21 Appellant first claims that it was error to admit the timeline prepared by Agent Kent (Exhibit 9), because it was only a demonstrative aid. Again, Appellant made no objection at trial, thus we review for plain error only. *See* 12 O.S.2011, § 2104. Appellant cites *Mitchell v. State,* 2006 OK CR 20, ¶ 59, 136 P.3d 671, 698, where this Court held that plain error occurred when a demonstrative timeline was admitted as evidence.

¶22 The timeline in *Mitchell* was a "best guess" timeline prepared by a crime scene reconstruction expert in order to aid the jury in understanding his expert testimony. Further-

more in *Mitchell* the State admittedly characterized the timeline as a demonstrative aid during trial. The timeline in this case, however, was based on the factual testimony of several witnesses who testified about times and places relevant to the crime.

¶23 In *Mitchell,* the introduction of the timeline did not serve as the sole purpose for the reversal and remand for a new sentencing, thus this Court is free to determine whether the introduction of the timeline in this case affected Appellant's substantial rights. Here, the timeline accurately reflected the witnesses' testimony and was not based on any speculation. Thus, no clear error is shown. Moreover, the introduction of the summation of witnesses' testimony as represented by the timeline did not adversely affect Appellant's rights.

¶24 Appellant next complains about the introduction of the victim's blood soaked shirt (Exhibit 21). He claims the shirt was not relevant to any issue in the case and served only "to inflame the jury and prejudice the defendant." Citing *Brewer v. State,* 1966 OK CR 58, ¶ 21, 414 P.2d 559, 564; *see* 12 O.S.2011, §§ 2402-2403.

¶25 In *Brewer*, the appellant objected to the introduction of the bloody clothing. Here there was no objection. Not only did Appellant fail to object, he stipulated to the admission of the shirt. As stated, we will review for plain error only. This shirt is the only piece of evidence showing the amount of blood at the scene of the crime. This shirt represents the best evidence of the color of the shirt, which corroborates the witnesses' description of the shirt worn by the victim. Furthermore, Appellant has not shown that the introduction of this bloody shirt prejudiced him in any way.

¶26 Appellant next complains about the introduction of fourteen different photographs of bullets and bullet fragments which were removed from the victim's body. (Exhibits 42-55) No objection to the introduction of these photographs was made at trial. Appellant's argument is that the numerous photographs "likely confused the jury and made them believe many more than three bullets had been fired . . . ." Again, Appellant cannot show that he suffered any prejudice from the introduction of these photographs.

¶27 All of the evidence complained of in this proposition was probative and relevant for the jury to understand the criminal elements, the overall context of the crime, Appellant's method of committing the crime, his actions after the crime was committed, and the identity of the victim. Appellant cannot show that the introduction of this evidence was substantially outweighed by any of the dangers outlined in 21 O.S.2011, § 2403. This Court, finding no error in the introduction of this evidence, therefore, cannot conclude that the introduction of this evidence rises to the level of plain error. Proposition two is denied.

¶28 Appellant complains, in proposition three, about the giving of the instructions by the trial court. He first complains that the trial court's reading of the instructions to the jury was confusing and misleading.

¶29 He points out, first, that the trial court took out an instruction during the reading of the instructions. The trial court had just read the elements of first degree murder for the second time and began to read the elements of manslaughter. The trial court commented that instruction 26 was a repeat of the elements of heat of passion manslaughter so he was removing it. There was no objection from Appellant.

¶30 Appellant next points out that the trial court's comment during the reading of the instructions that he is "reading ahead of myself" was confusing. There is nothing at all confusing in the record here. Appellant next notes that the trial court took out instruction 35 because it was a repeat of the eighty-five percent instruction. Again there was no objection.

¶31 A reading of the transcript does not reveal confusing or misleading instructions. There is no error evident on the record. The initial hurdles for plain error cannot be met here.

¶32 Appellant argues error occurred because the trial court failed to define malice aforethought during the initial instructions to the jury, but gave the instructions after the State had presented the first closing argument. The trial court obviously corrected its own error and there was no objection by Appellant. He cannot show that he was harmed in any manner. There is no plain error here.

¶33 Appellant argues that it was error for the trial court to fail to define re-establishment, in the context of self-defense, in the instructions. *See* OUJI CR 2d, 8-51. Appellant failed to request this instruction, so, again, we review for plain error only. The trial court indicated that it had a duty to instruct on manslaughter in the

first degree and self-defense if there was any evidence, however slight, to support the instruction. The court, therefore, gave instructions on manslaughter and self-defense.

¶34 Re-establishment is relevant where a defendant, who was the original aggressor, regained the right of self-defense when the defendant withdrew or attempted to withdraw from the altercation and communicated his desire to withdraw. When the victim continued the altercation he becomes the aggressor and a defendant has the right of self-defense.

¶35 In this proposition, Appellant does not identify specific facts which would have entitled him to instructions on re-establishment. There is no evidence that Daniels was the aggressor or that Appellant attempted to withdraw from a confrontation. Appellant only theorizes that if the trial court instructed on self-defense, he must have been entitled to this instruction as well. This belief is an inappropriate measure of the law. The correct standard is that the instructions are warranted when self-defense has been properly raised. *Perez v. State,* 1990 OK CR 67 ¶ 9, 798 P.2d 639, 641. The evidence presented during trial must make out a *prima facie* case of self-defense in order to receive the benefit of the instructions. Appellant cites jail recordings and a Facebook post. The jail recordings are found in State's Exhibit 34A and the Facebook post is part of State's Exhibit 10. None of these exhibits make out a *prima facie* case of self-defense. There must be a *prima facie* case of self-defense. *Ball v. State*, 2007 OK CR 42, ¶ 29, 173 P.3d 81, 89. "*Prima facie* evidence is evidence that is 'good and sufficient on its face,' i.e., 'sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports.'" *Cuesta-Rodriguez v. State,* 2011 OK CR 4, ¶ 7, 247 P.3d 1192.

¶36 The jail recordings record Appellant claiming that he never owned a gun and that he didn't go there looking for trouble. He just wanted to "whoop his ass." He also claims on the recordings that he didn't know "how it came in my hands." He says that he must have taken it from Sean. His Facebook post shows that he moved his boys back to Florida; he asserts that it's "open season"; and he's not sure he will make it back. No reading of this evidence provides a *prima facie* case of self-defense on the day of the killing. There was positively no evidence that Daniel was the aggressor at any time on the day of his death.

¶37 Here, the trial court was overly generous in giving instructions on self-defense. Any instruction on self-defense went to the benefit of Appellant. *See Willingham v. State,* 1997 OK CR 62, ¶ 31, 947 P.2d 1074, 1082, *overruled on other grounds Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032. The jury was not presented with any *prima facie* evidence of self-defense, thus he was not entitled to instructions on self-defense. Appellant, therefore, cannot show that the failure to define re-establishment related to the self-defense instructions prejudiced him in any way.

¶38 Appellant, in proposition four, contends the trial court erred in allowing the State to reopen its case to present evidence of Appellant's attempted escape. Defense counsel objected and moved for a mistrial.

¶39 The reason for the trial court allowing the State to reopen its case to present more evidence was clear in the record. Appellant broke free from custody and ran out the backdoor of the courthouse. A deputy was in pursuit and was yelling for help. Appellant was ultimately apprehended after running about seventy-five yards. This incident occurred after the State had completed its case and had rested, but before the defense made any announcement regarding their case.

¶40 Title 22 O.S.2011, § 831 permits the introduction of additional evidence by the State on its original case "for good reason, in furtherance of justice, or to correct an evident oversight" as found by the trial court. We review the trial court's decision for an abuse of discretion. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (quoting *Stouffer v. State,* 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263).

¶41 Appellant claims that evidence of his running from the custody of peace officers was irrelevant as it did not constitute "flight" as outlined in OUJI-CR 2d 9-8. He claims, therefore, the trial court abused its discretion in allowing the State to reopen its case to present evidence.

¶42 This Court has identified evidence of a consciousness of guilt which may be shown by other circumstances not related to flight envisioned in the uniform flight instruction. In

Dodd v. State, 2004 OK CR 31, 100 P.3d 1017, this Court held that a defendant's attempted suicide while in custody about one month after his arrest constituted relevant evidence of an admission by conduct. *Id.* ¶¶ 31-33, 100 P.3d at 1030-31. In so holding, this Court identified several actions which might constitute consciousness of guilt evidence. This evidence includes attempts to intimidate, threaten or bribe witnesses; attempting to alter or destroy evidence; attempts to escape confinement, failure to honor bail agreements, or alter physical appearance. *Id.* ¶ 34, 100 P.3d at 1031 (and citations therein). Any attempt by a defendant to influence the proceedings against him may be relevant to show a consciousness of guilt. *Id.*

¶43 Here, Appellant's attempt to escape custody during trial is relevant to show a consciousness of guilt. The fact that such evidence is open to interpretation does not render it inadmissible. *Id.* ¶ 36, 100 P.3d at 1031. Here, Appellant might have believed that he was facing an inevitable fate and was helpless to prevent a believed miscarriage of justice. This belief, however, is one of the interpretations best left for the jury to consider. The trial court, therefore, did not abuse its discretion in permitting the State to reopen its case to introduce evidence of Appellant's attempt to escape custody. His argument regarding this evidence must fail.

¶44 Appellant argues in proposition five that the flight instruction given to the jury was improper because he (Appellant) offered no evidence explaining his acts. Appellant did not object to the instructions given, thus we review for plain error. We, therefore, must initially decide if the giving of the instruction constituted error at the outset.

¶45 Here, Appellant claims that the instruction was improper based on his departure to Arkansas after the killing and his attempted escape from the courthouse. Appellant is mistaken.

> We have held that flight instructions are improper if they (1) presume, as a matter of law, that unexplained departure from the crime scene demonstrates consciousness of guilt; or (2) assume that the person leaving the scene was the defendant, when that fact is in dispute. In either case, the court has invaded the province of the jury to determine the facts, and the conclusions to be drawn from them.

Dodd, 2004 OK CR 31, ¶ 39, 100 P.3d at 1032 [internal citations omitted]. There is no dispute that Appellant was the person leaving the scene of the shooting and the courthouse. We must, therefore, determine whether instruction presumes that the departure demonstrates consciousness of guilt.

¶46 The instruction given was as follows:

> Evidence has been introduced of the defendant's departure and or concealment and or attempted to [sic] escape from custody after the alleged crime was committed. You must first determine whether this action by the defendant constituted flight.
>
> The term "flight," as it is used in this instruction, means more than departure or concealment. To be in flight, a defendant must have departed and or concealed himself and or attempted to escape from custody with a consciousness of guilt in order to avoid arrest.
>
> To find that the defendant was in flight you must find beyond a reasonable doubt that:
>
> > First, the defendant departed and or concealed himself and or attempted to escape from custody,
> >
> > Second, with a consciousness of guilt,
> >
> > Third, in order to avoid arrest for the crime with which he is charged.
>
> If after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant was in flight, then this flight is a circumstance which you may consider with all the other evidence in this case in determining the question of the defendant's guilt. However, if you have a reasonable doubt that defendant was in flight, then the fact of any departure and or concealment is not a circumstance for you to consider.

OUJI-CR 2d 9-8. Flight instructions should only be given when a defendant interposes a plea of self-defense or justifiable homicide or otherwise explains his departure. *See Hancock v. State*, 2007 OK CR 9, ¶ 104, 155 P.3d 796, 820, citing *Mitchell v. State*, 1993 OK CR 56, ¶ 7, 876 P.2d 682, 684 *as corrected* 1994 OK CR 78, 887 P.2d 335. The conditions were met in this case. In the prior proposition, Appellant claims that he acted in self-defense and his shooting of the victim was justified. Under these circumstanc-

es, an instruction on flight is appropriate. *See Mitchell*, 1993 OK CR 56, ¶ 7, 876 P.2d at 684.

¶47 This Court has determined that Appellant did not make out a *prima facie* case of self-defense, nor did he explain his departure from the scene of the crime or from the courthouse. He did, however, raise this defense, however flawed it was. It was clear that he left the scene of the crime and traveled to Arkansas, rented a motel room, and stayed there until apprehended by authorities. We find, therefore, the instruction was appropriate.

¶48 The instruction given narrows a jury's consideration of the facts regarding a defendant's actions after the crime and allows them to determine whether the actions constitute flight. And if the jury so determines that a defendant was in flight, that flight is one circumstance they can consider in determining guilt.

¶49 The fact that Appellant did not offer a clear or valid explanation for his leaving the scene of the crime and driving to Arkansas, or attempting to flee the courthouse, did not make it inappropriate for the trial court to give the flight instruction. Appellant did claim that he was acting in self-defense because of earlier encounters with the victim. The instruction protected Appellant from the inappropriate assumption that he was presumed guilty for leaving the scene. The instruction, in fact, limits the fact of his leaving to another circumstance that the jury may consider in deciding guilt.

¶50 The evidence regarding his departure from the scene and his apprehension in Arkansas was clearly relevant to his identity as the perpetrator, as well as his consciousness of guilt. Furthermore, as outlined above, his departure from the courthouse was relevant evidence of a consciousness of guilt that the jury could consider in determining Appellant's guilt or innocence.

¶51 It seems our case law has strayed far afield from the intent of *Mitchell* where the defendant denied being at the scene of the crime. Here, the instruction did not improperly tell the jury to make an incorrect presumption that Appellant was at the scene, because Appellant admitted that he was at the scene and he killed the victim. In cases where a defendant places himself at the scene of the crime and departs from the scene the instruction may be appropriate. Any language in *Mitchell*, its progeny, and cases cited therein, that require an explanation of departure before the flight instruction is given are hereby overruled.[1]

¶52 Appellant, in proposition six, raises a claim of ineffective assistance of trial counsel. We review this claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that Appellant show not only that counsel performed deficiently, but that Appellant was prejudiced by it. *Id.*, 466 U.S. at 687. In this "highly deferential" inquiry, evidence of deficient performance must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.*, 466 U.S. at 689. Prejudice to the defense occurs when counsel's deficient performance creates a reasonable probability that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694.

¶53 Pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), appellate counsel has also submitted an application for evidentiary hearing to supplement the record on appeal. To obtain an evidentiary hearing and supplement the record on appeal with additional evidence of ineffective counsel, Appellant must present clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to identify or utilize the available evidence. Rule 3.11(B)(3)(b). This burden is less onerous than *Strickland's* required showing of deficient performance by counsel and resulting prejudice. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. The grant of an evidentiary hearing is not a finding that defense counsel actually was ineffective, but a preliminary finding of a strong possibility that warrants a further opportunity to support the claim. Conversely, the *denial* of a request for evidentiary hearing under Rule 3.11(B) necessarily embraces this Court's finding that Appellant has not shown a violation of the Sixth Amendment under *Strickland. Id.*, 230 P.3d at 906.

¶54 Appellant's proposition is divided into several sections. The first section argues that trial counsel failed to utilize available extra-record evidence which forms the foundation of his 3.11 motion. The exhibits attached to Appellant's motion for an evidentiary hearing contain documents which were in the possession of trial counsel.

¶55 The exhibits contain written statements by Kathy Minor and Gwen Devasier, a crime scene investigation report by OSBI Agent Michael Shufeldt, a report regarding jail recordings by Agent Kent, and two reports from the McCurtain County Sheriff's office regarding the earlier disputes and confrontations between Appellant and the victim.

¶56 The attachments to the application do not show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize this information. The information does not contradict evidence introduced at trial, nor does the information show that Appellant acted in self-defense. Appellant cannot show that counsel was ineffective for failing to use this evidence during trial; therefore, Appellant's application for evidentiary hearing is denied.

¶57 Next, Appellant claims counsel was ineffective for failing to utilize evidence which was available in the record in the form of evidence introduced, reports filed with the trial court, and preliminary hearing testimony. Appellant claims counsel was ineffective for failing to question Agent Whit Kent about the jail recordings where Appellant stated that he did not own a gun. These recordings were introduced as evidence to the jury.

¶58 He also claims counsel was ineffective in failing to question Agent Kent or call witnesses regarding a criminalist report which contains information that Appellant had blood stains on his blue Carhartt shirt found at the Tutt home and on the jeans he was wearing at the time he was arrested. The blood DNA matched Appellant. This later evidence, Appellant argues, would have prevented the State from arguing that Appellant didn't have a drop of blood on him; "does that look like self-defense?" The State used Tutt's testimony regarding the lack of blood on Appellant to support their argument about the lack of blood.

¶59 Appellant claims that counsel was ineffective for failing to cross-examine Agent Shufeldt about blood stains on the victim's motorcycle seat. Shufeldt testified there were blood stains, but the OSBI lab report states that no blood was detected on the seat swabs. Appellant argues that his self-defense claim would have benefited from the evidence that the victim was not shot as he sat on the motorcycle seat.

¶60 Appellant claims counsel was ineffective for failing to cross-examine Gwen Devasier and Gayla Alford with their preliminary hearing testimony. Devasier testified at trial that she did not see the victim do anything. At the preliminary hearing she testified that the victim who was on his knees was still moving until he received the final shot to the head. Appellant claims this is a key point in his self-defense claim. There is nothing in this testimony which would hint at the possibility that any reasonable person could believe that Appellant was justified in using deadly force in self-defense.

¶61 Gayla Alford testified during the preliminary hearing that she was not really sure why Appellant left her house just before this homicide occurred. At trial she testified that Appellant received a phone call just before leaving her house in a hurry. Appellant argues that the State used this testimony as part of its evidence of malice aforethought. Based on the testimony, the failure to cross-examine regarding the phone call is clearly a reasonable strategic decision that does not fall outside reasonable bounds of advocacy.

¶62 Appellant has not presented clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to identify or utilize this available evidence. The failure to utilize this evidence does not overcome the presumption that counsel's actions constituted sound trial strategy.

¶63 Next, Appellant argues that counsel failed to be a zealous advocate by failing to argue persuasively during closing argument. Counsel's argument was based on the evidence presented. His argument constituted a valid strategic decision and Appellant cannot show that he was prejudiced by counsel's closing argument.

¶64 Lastly, Appellant argues that counsel was ineffective for failing to preserve error in the record, by stipulating to evidence and failing to object to other evidence, and failing to object to improper jury instructions.

¶65 In the first instance, Appellant claims that counsel was ineffective for stipulating to the introduction of State's Exhibit 21, which is the victim's blood soaked shirt discussed in proposition two. As discussed in proposition two, the introduction of this shirt did not prejudice Appellant in any manner. He cannot,

therefore, overcome the prejudice prong of *Strickland's* ineffective assistance test.

¶66 Next, Appellant claims that counsel was ineffective for failing to object to the introduction of State's Exhibits 9 and 42-55. Exhibit 9 is the timeline prepared by Agent Kent, and discussed in Appellant's substantive argument in proposition two. Counsel stated, "without objection" when the State moved its introduction. This timeline was wholly consistent with the witnesses' testimony and the chronology of the events. Counsel's failure to object did not fall below the wide range of reasonable professional conduct. Moreover, Appellant has not shown that he was prejudiced by counsel's actions. Exhibits 42-55 are the numerous photographs of bullets and bullet fragments which were removed from the victim's body. In proposition two, this Court concluded that Appellant cannot show that he suffered any prejudice from the introduction of these photographs. Here, he cannot overcome the prejudice hurdle of *Strickland*.

¶67 Appellant claims that counsel was ineffective for failing to object to the testimony of Agent Kent. Appellant does not specifically point to the testimony which trial counsel should have objected to, but in proposition two, Appellant claimed that it was error for Kent to testify by summarizing other witnesses' testimony, utilizing the timeline he had prepared, and to testify regarding his perception of the jail recordings. We found no error in Agent Kent's testimony. Counsel's conduct here did not fall below reasonable professional conduct.

¶68 Lastly, Appellant claims that counsel was ineffective for failing to ensure that the instructions given by the trial court represented a correct, accurate statement of the law. Substantive claims regarding the jury instructions were raised in propositions three (self-defense instructions) and five (flight instruction). In the propositions we found that, under current law, the giving of the flight instruction was improper; however, an improper inference was not attached to the instruction, so Appellant was not prejudiced. We found that there was no error in the self-defense instructions as the trial court was overly generous in giving those instructions at trial. In no manner can Appellant show a reasonable probability, sufficient to undermine the confidence in the outcome, that the result of the proceeding would have been different. Appellant cannot show he was prejudiced by counsel's failure to object to the instructions.

¶69 This Court has examined each of Appellant's claims of ineffective assistance of counsel and has concluded that counsel was not ineffective under the *Strickland* test. This proposition, therefore, is denied.

DECISION

¶70 The Judgment and Sentence is **AFFIRMED**. Appellant's Application for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF McCURTAIN COUNTY

THE HONORABLE GARY L. BROCK, SPECIAL JUDGE

APPEARANCES AT TRIAL

Adam Haselgren, Joe Robertson, 610 S. Hiawatha St., Sapulpa, OK 74066, Attorneys for Defendant

Mark Matloff, District Attorney, Johnny Loard, Assistant District Attorney, 108 North Central Avenue, Idabel, OK 74745, Attorneys for State

APPEARANCES ON APPEAL

Meghan LeFrancois, P.O. Box 926, Norman, OK 73070, Attorney for Appellant

Mike Hunter, Attorney General, Theodore M. Peeper, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Attorneys for Appellee

OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Specially Concur
HUDSON, J: Concur
KUEHN, J.: Concur
ROWLAND, J.: Specially Concur

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

¶1 I compliment my colleague on a well written Opinion and agree that *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, *as corrected* 1994 OK CR 78, 887 P.2d 335, and its progeny must be overruled. I write further to emphasize that the jury should be given the uniform instruction upon flight each time the State presents evidence tending to show flight. *Mitchell*, 1993 OK CR 56, ¶ 2, 876 P.2d at 686-87 (Lumpkin,

P.J., concurring in part/dissenting in part). This instruction channels the jury's decision making process to ensure that this evidence is not given greater weight than it should receive. *Id.*, 1993 OK CR 56, ¶ 3, 876 P.2d at 687. Whether a defendant's departure from the scene of the crime constituted flight is a question properly left to the jury. *Id.*, 1993 OK CR 56, ¶ 5, 876 P.2d at 687. Therefore, when any evidence tending to show flight is introduced, the jury is to be instructed on the consideration to be given that evidence. *Id.*, 1993 OK CR 56, ¶ 4, 876 P.2d at 687.

¶2 I am authorized to state Judge Rowland joins in this writing.

LEWIS, VICE PRESIDING JUDGE

1. *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, *as corrected* 1994 OK CR 78, 887 P.2d 335; *see Ashton v. State*, 2017 OK CR 15, ¶ 36, 400 P.3d 887, 897 (the appellant claimed he panicked and left the scene); *Frederick v. State*, 2017 OK CR 12, ¶ 82, 400 P.3d 786, 813 (holding there was no error in failing to give the instruction because the appellant did not "present evidence explaining his departure."); *Andrew v. State*, 2007 OK CR 23, ¶ 115, 164 P.3d 176, 200, *as corrected* (July 9, 2007), *opinion corrected on denial of reh'g*, 2007 OK CR 36, ¶ 115, 168 P.3d 1150 (the appellant explained that she departed to Mexico for a little vacation); *Hancock v. State*, 2007 OK CR 9, ¶ 104, 155 P.3d 796, 820 (instruction approved when appellant claimed self-defense and gave evidence explaining his departure).

May

28 **OBA Closed** – Memorial Day

30 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272

June

2 **OBA Diversity Committee meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Telana McCullough 405-267-0672

5 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

7 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

8 **OBA Alternative Dispute Resolution Section meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

OBA Law-Related Education Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Peckio Garrett 918-895-7216

19 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melanie Christians 405-705-3600 or Brittany Byers 405-682-5800

20 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeffrey H. Crites 580-242-4444

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

21-23 **OBA Solo & Small Firm Conference;** River Spirit Casino Resort, Tulsa; Contact Jim Calloway 405-416-7000

21 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda Scoggins 405-319-3510

26 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

27 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272

OBA Financial Institutions & Commercial Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle 405-848-4810

July

4 **OBA Closed** – Independence Day

5 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

6 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

10 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

Court of Civil Appeals Opinions

2018 OK CIV APP 35

A.B. STILL WEL-SERVICE, INC., an Oklahoma corporation, Plaintiff/Appellant, vs. ANTINUM MIDCON I, LLC; DEVON ENERGY PRODUCTION COMPANY, L.P., an Oklahoma limited partnership; ENERVEST OPERATING, LLC, a limited liability company; HIGHMOUNT EXPLORATION AND PRODUCTION, LLC; HIGHMOUNT EXPLORATION & PRODUCTION MIDCONTINENT, LLC; HIGHMOUNT OPERATING, LLC; KAISER-FRANCIS ANADARKO LIMITED PARTNERSHIP, an Oklahoma limited partnership; QUINTIN AND CARRIE LOU FAMILY LIMITED PARTNERSHIP, an Oklahoma limited partnership; RAMCO, INC.; REPSOL E&P USA, INC.; SANDRIDGE EXPLORATION AND PRODUCTION, LLC; THE QUINTIN LITTLE COMPANY OIL & GAS LIMITED PARTNERSHIP, an Oklahoma limited partnership; TIPTOP ENERGY PRODUCTION US, LLC, a limited liability company; and TODCO PROPERTIES, INC., an Oklahoma corporation, Defendants/Appellees.

Case No. 113,755. December 22, 2015

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA

HONORABLE DOUGLAS W. GOLDEN, TRIAL JUDGE

AFFIRMED

Jessie V. Pilgrim, PILGRIM LAW FIRM, Tulsa, Oklahoma, for Plaintiff/Appellant

Mark D. Christiansen, McAFEE & TAFT, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Defendants/Appellees Antinum Midcon I, LLC, Repsol E&P USA, Inc. and Sandridge Exploration and Production, LLC

Laura J. Long, Timothy Bomhoff, McAFEE & TAFT, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Defendants/Appellees Devon Energy Production Company, LP and Tiptop Energy Production US, LLC

Charles L. Puckett, Jr., GUM, PUCKETT & MACKECHNIE, L.L.P., Oklahoma City, Oklahoma, for Defendants/Appellees EnerVest Operating, LLC, HighMount Exploration and Production, LLC, HighMount Exploration and Production Midcontinent, LLC, HighMount Operating, LLC, and Ramco, Inc.

Miriam LeeAnn Sweetin, FREDERIC DORWART LAWYERS, Tulsa, Oklahoma, for Defendant/Appellee Kaiser-Francis Anadarko Limited Partnership

F. Thomas Cordell, FRAILEY, CHAFFIN, CORDELL, PERRYMAN, STERKEL, McCALLA & BROWN LLP, Chickasha, Oklahoma, for Defendants/Appellees Quintin and Carrie Lou Family Limited Partnership and The Quintin Little Company Oil & Gas Limited Partnership

Verland E. Behrens, BEHRENS, WHEELER & CHAMBERLAIN, Oklahoma City, Oklahoma, for Defendant/Appellee TODCO Properties, Inc.

JANE P. WISEMAN, JUDGE:

¶1 Plaintiff A.B. Still Wel-Service, Inc., appeals the trial court's order granting a motion to dismiss for improper venue filed by Defendants Antinum Midcon I, LLC; Devon Energy Production Company, LP; EnerVest Operating, LLC; Highmount Exploration and Production, LLC; Highmount Exploration & Production Midcontinent, LLC; Highmount Operating, LLC; Kaiser-Francis Anadarko Limited Partnership; Quintin and Carrie Lou Family Limited Partnership; Ramco, Inc.;[1] Repsol E&P USA, Inc.; Sandridge Exploration and Production, LLC; The Quintin Little Company Oil & Gas Limited Partnership; Tiptop Energy Production US, LLC; and TODCO Properties, Inc. After reviewing the record and applicable law, we affirm the order of the trial court dismissing Plaintiff's petition for improper venue.[2]

FACTS AND PROCEDURAL BACKGROUND

¶2 Plaintiff states in the petition that it "is the owner of the working interest and operator of an oil well known as the Myers #1 well" which "produces from the Mississippi Chat formation." Plaintiff states it "owns the contract rights to produce and reduce to possession oil and gas from the Myers #1 well."

¶3 Defendants own or owned working interests in, or operated, the Eggers 7-1H well, a horizontal well "intended to produce from the Mississippi Lime formation, which is a formation below the Mississippi Chat formation." According to Plaintiff, in the course of Defendants producing this well, "substantial volumes of water and fluids were used to 'frack' the Eggers 7-1H well" from January 28, 2013, and continuing until the filing of the petition. Plaintiff alleges that "[d]uring the course of fracking and producing the Eggers 7-1H well, water and fracking fluids were allowed to escape and invade the Mississippi Chat formation underlying the Myers #1 well, causing injury to [P]laintiff and resulting in conversion of hydrocarbons from the Mississippi Chat formation underlying the Myers #1 well." Plaintiff claims its "contract rights to produce and reduce to possession oil and gas have been injured as a result of such acts and omissions." Plaintiff alleges Defendants' acts and/or omissions constitute negligence, trespass, nuisance, and conversion. Plaintiff further contends Defendants have been unjustly enriched and Plaintiff is entitled to actual and punitive damages.

¶4 Defendants filed motions to dismiss for improper venue[3] requesting dismissal by the trial court pursuant to 12 O.S. § 2012(B)(3). Defendants argue that because this case involves "alleged damages to a well and subsurface formation," 12 O.S. § 131(2) requires it to be filed in Noble County where the Myers #1 well is located. Section 131(2) states, "For all damages to land, crops, or improvements thereon, actions shall be brought in the county where the damage occurs." 12 O.S.2011 § 131(2).

¶5 Plaintiff argues venue in Noble County is not proper because it "does not allege 'damages to land, crops, or improvements thereon,'" but instead seeks "damages for injury to [its] personal property rights granted [it] by virtue of an oil and gas lease." Plaintiff also claims "that the harm to its contract rights would permit recovery under the legal theory of conversion of personal property, as oil and gas are personal property once reduced to possession." Because it asserts injury to personal property rights, Plaintiff argues the action was properly brought in Creek County where Plaintiff resides.

¶6 After a hearing, the trial court dismissed Plaintiff's case for improper venue. Plaintiff appeals.

STANDARD OF REVIEW

¶7 Whether a motion to dismiss on the basis of improper venue was properly granted is a question of law that we review *de novo. Lee v. Bates*, 2005 OK 89, ¶4, 130 P.3d 226. "When reexamining a trial court's legal rulings, an appellate court exercises plenary, independent and non-deferential authority." *Id.*

ANALYSIS

¶8 Plaintiff's primary contention on appeal is that the trial court incorrectly dismissed this case for improper venue in Creek County.

¶9 In their motions to dismiss, Defendants argue 12 O.S.2011 § 131(2) applies because Plaintiff alleges damage to land requiring the action to be filed in the county where the damage occurs, *i.e.*, Noble County. Defendants contend the following:

> It is shown in the allegations in paragraphs 26, 27, 28 and 29 of the Petition that the Plaintiff contends that the injury and damage alleged in its Petition are the result of fracking fluids used in the fracking and production of the Eggers 7-1H well allegedly being allowed to escape and invade and damage the subsurface Mississippi Chat geologic formation underlying Plaintiff's Myers #1 well from which Plaintiff's lease and the Spacing Order give Plaintiff the right to extract oil and gas, and or damage to the Myers Well owned by Plaintiff. Damage to the geologic formation or Myers Well due to alleged migration of the frac medium is the only event that this case is based upon. The petition speaks to various counts, claims or remedies, but the petition sets out just one event or occurrence that allegedly gave rise to all these – the alleged damage to land (specifically the Mississippi Chat geologic formation) and the Myers Well, caused by the alleged migration of frac medium and fluid.

Defendants contend that Plaintiff's claim based on its oil and gas lease, giving it the right "to produce and reduce to possession oil and gas from the Myers #1 well," involves damage to land which constitutes "a local action with venue proper only in Noble County."

¶10 The Oklahoma Supreme Court in *Shields v. Moffitt*, 1984 OK 42, 683 P.2d 530, described an Oklahoma oil and gas lease as "the hybrid offspring of an intermarriage between real and personal property, an offspring which is nei-

ther entirely real nor personal property, yet which bears distinguishing characteristics of both." *Id.* ¶ 10. The Court stated that its "hydra-headed status is summarized" in *Hinds v. Phillips Petroleum Company*, 1979 OK 22, ¶ 5, 591 P.2d 697, as follows:

> The cluster of rights comprised within an instrument we refer to "in deference to custom" as an "oil and gas lease" includes a great variety of common-law interests in land. These fall under the rubric of *incorporeal hereditament or profit á prendre.* If granted to "one and his heirs and assigns forever", the interest is in fee. Where, as here, it is limited for a term of years, it is denominated a chattel real. Whatever the name used, *the interest represented is one in land*, although the lease itself does not operate as a conveyance of any oil or gas *in situ* but constitutes merely a right to search for and reduce to possession such of these substances as might be found. Rather than a true lease, it is really a grant in praesenti of oil and gas to be captured in the lands described during the term demised and for so long thereafter as these substances may be produced . . . . Although, as shown, an oil and gas lease creates an *interest or estate in realty*, it is not deemed *per se* real estate. In this respect a distinction is recognized in our law between *real estate* and an *estate in real property.*"

Id. (emphasis added and footnotes omitted); *see also Ranola Oil Co. v. Corporation Comm'n of Oklahoma*, 1988 OK 28, ¶ 9, 752 P.2d 1116 ("An oil and gas lease does not convey ownership of the oil and gas in situ but merely conveys a right to search for and reduce to possession any oil and gas as may be found."); *Halliburton Oil Producing Co. v. Grothaus,* 1998 OK 110, ¶ 15, 981 P.2d 1244; *James Energy Co. v. HCG Energy Corp.*, 1992 OK 117, ¶ 16, 847 P.2d 333 ("An oil and gas lease is interest in real property and must be in writing and signed by the party to be charged to be enforceable.").

¶11 Plaintiff cites *Brooks Hall Corporation v. Seay,* 1977 OK 212, 571 P.2d 462, to support its proposition that the oil and gas lease represents a personal property right giving the district court of Creek County proper venue. In *Brooks Hall*, oil and gas lessors brought an action against the lessee to recover royalty payments from "accrued oil runs" produced during a particular time period. *Id.* ¶ 1. Lessors filed their lawsuit for unpaid royalties pursuant to 12 O.S. § 131 in Hughes County where the well was located. *Id.* ¶¶ 1-4, 7. The oil and gas lessee objected to venue because "[lessors'] action is transitory and not local; that it had done nothing that would place venue in Hughes County; and that proper venue was in Oklahoma County, the place where [lessee] has its principal office and place of business." *Id.* ¶6. The Oklahoma Supreme Court agreed concluding:

> Accrued royalty and accrued oil runs are personal property and under no theory could they be considered real property. [Lessors'] action against [lessee] in the trial court is an action to recover additional royalty payments allegedly due and owing from accrued oil runs not an action "for the recovery of real property, or any estate, or interest therein." [Lessors] did not seek to establish their rights or interest in any real property and any judgment rendered by the trial court will not determine or affect any right, title or interest in real property. [Lessors'] action in the trial court is transitory and they are not entitled to maintain the action in Hughes County based on 12 O.S. 1971, sec. 131.

Id. ¶ 9. The Supreme Court issued a writ prohibiting the action from proceeding in Hughes County. *Id.* ¶ 14.

¶12 *Brooks Hall*, however, is distinguishable from this case. In *Brooks Hall,* lessors sought to recover royalty payments from accrued oil runs representing money from the sale of oil severed from the ground and reduced to possession. *Id.* ¶ 1.4 However, Plaintiff in the present case alleges that its "contract rights to produce and reduce to possession oil and gas have been injured as a result of such acts and omissions" such as "water and fracking fluids [being] allowed to escape and invade the Mississippi Chat formation underlying the Myers #1 well, causing injury to [P]laintiff." According to *Hinds*, 1979 OK 22, ¶ 5, "an oil and gas lease creates an interest or estate in realty" and the oil and gas lease "interest represented is one in land." "Lessee's easement in the surface, which is incident to or implied from the lease … extends to such parts of the demised premises as are reasonably necessary for the purpose of exploration and production." *Id.*

¶13 "A cause of action arises, in the nature of things, at the time when and place where the act is done or omitted which gives the plaintiff the cause of complaint." *Guaranty State Bank of Tishomingo v. First Nat'l Bank of Ardmore,* 1926

OK 1016, ¶ 11, 260 P. 508. Plaintiff's lawsuit arises from the alleged damage to land caused by the invasion of the Mississippi Chat formation underlying the Myers #1 well by "water and fracking fluids." According to Plaintiff, this damage to the land formation by Defendants has caused Plaintiff injury because it cannot produce and reduce to possession oil and gas from its well. The Supreme Court previously stated that "the Legislature has prescribed that actions concerning damages to land must be brought in the county where the land is situated." *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court of Creek County*, 1961 OK 290, ¶ 26, 368 P.2d 475.

¶14 Because this action concerns whether damage to land caused injury to Plaintiff, we conclude the trial court's decision on venue under the facts presented is proper pursuant to 12 O.S.2011 § 131(2) requiring actions for damage to land to be brought in the county where the damage occurs. Plaintiff's claim that it sustained injury to its contractual rights to produce and reduce to possession oil and gas depends on whether it can show Defendants damaged the land. The trial court's order dismissing Plaintiff's action for improper venue pursuant to 12 O.S.2011 § 131(2) is affirmed.

CONCLUSION

¶15 We conclude the trial court properly granted Defendants' motions to dismiss for improper venue and affirm.

¶16 **AFFIRMED**.

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

JANE P. WISEMAN, JUDGE:

1. Defendant Ramco, Inc., also filed a "Response to Summons and Request to be Withdrawn from Suit" prior to filing its motion to dismiss for improper venue.

2. Defendants filed a motion requesting Plaintiff's appeal be removed from the accelerated procedure prescribed by Rule 1.36 of the Oklahoma Supreme Court Rules, 12 O.S. Supp. 2015, ch. 15, app. 1, and reassigned "for disposition by the regular appellate process." We deny this motion.

3. Defendant TODCO Properties, Inc., filed a motion to dismiss for improper venue or alternatively a motion to transfer the case to Noble County.

4. "Oil and gas *in situ* are part of the realty, but when severed from the leasehold they become personal property." *Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶ 15, 981 P.2d 1244 (footnotes omitted). Thus, "oil in place is a mineral and part of the realty, but when severed from the ground and reduced to possession it is personal property." *Keystone Pipe & Supply Co. v. Crabtree*, 1935 OK 861, ¶ 8, 50 P.2d 1086; *see also Federal Deposit Ins. Corp. v. Sumner*, 1991 OK CIV APP 69, ¶ 9, 820 P.2d 1357 ("Oil and gas in place are part of the realty for so long as they remain unsevered.").

2018 OK CIV APP 36

JULI D. WARD, Plaintiff/Appellant, vs. SARA MORRISON, Defendant/Appellee.

Case No. 114,546. December 19, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE REBECCA BRETT NIGHTINGALE, TRIAL JUDGE

AFFIRMED

Tye H. Smith, Charles G. Smart, CARR & CARR, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Neil D. Van Dalsem, TAYLOR, RYAN, MINTON & VAN DALSEM, P.C., Tulsa, Oklahoma, for Defendant/Appellee

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Plaintiff Juli Ward appeals from the district court's order denying her motion for new trial, in which she had raised allegations of misconduct by jurors during voir dire. Ward has not demonstrated that the district court acted arbitrarily, abused its discretion, or materially and manifestly erred in denying her motion for new trial. The district court's order denying Ward's motion for new trial is affirmed.

BACKGROUND

¶2 Ward filed this action against Defendant Sara Morrison alleging that she had sustained injuries and damages in an automobile collision resulting from Morrison's negligent operation of her vehicle. The matter was tried to a jury, which returned a unanimous verdict in favor of Morrison on August 19, 2015. On September 22, the district court entered judgment on the jury's verdict. On the following day, Ward filed a motion for new trial.

¶3 Ward based her motion for new trial on 12 O.S.2011 § 651(2).[1] She claimed she had "circumstantial evidence" that she believed was sufficient to support a finding of juror misconduct. Ward alleged that six of the jurors – four who delivered the unfavorable verdict and two who were stricken by peremptory challenges – had been involved in prior litigation and failed to disclose that information when responding to the district court's initial questions during voir dire.[2] In support of her motion for new trial, Ward submitted copies of district court docket entries her counsel had printed following a post-trial online search of

all the jurors' names on the Oklahoma State Courts Network website. Ward claimed that the online investigation of the panel revealed district court case records containing the names, or names similar to, those of the identified jurors, indicating their involvement in litigation. She stated: "[I]t 'appears' that juror misconduct has taken place."

¶4 Ward's deliberate use of the phrase "it 'appears' that juror misconduct has taken place," acknowledged "the difficulty in conclusively knowing that the person named in the attached court records is the same as the person who sat as a juror or prospective juror in this case." Nevertheless, Ward maintained that jurors' untruthful responses deprived her of the right to adequately question them about prior litigation and inquire whether those lawsuits affected their ability to impartially consider her case. And for that reason, Ward argued that the district court was obligated to grant her a new trial, or at least set the matter for an evidentiary hearing, so that she could "subpoena those [identified] jurors and prospective jurors . . . to testify before the Court." Otherwise, Ward requested "direction on how the Court wishes to proceed to satisfy itself that the people named in the court documents are the same people who sat in this case."

¶5 In her response and objection to Ward's motion for new trial, Morrison pointed out that, even if it might appear that certain jurors had not disclosed their complete litigation history in response to the court's general inquiry, the district court records submitted by Ward did not reveal any cases similar to Ward's or any prior relationship with either party or their counsel. Morrison also pointed out that those court records related to attempted debt collection and foreclosure (including in rem) and had resulted in default judgments or dismissals. The court records also involved domestic matters, which the district court had discussed with the jurors during voir dire:

> I exclude those [from questions regarding involvement in litigation] unless something happened in your case involving a divorce or custody issue that was so traumatic that even just sitting here in the courtroom it's creating stress for you. If that's your situation, we probably want to know about it. Otherwise, I don't think you need to bring it up.

¶6 The district court denied Ward's motion for new trial without a hearing. Ward now seeks review in this Court, raising two propositions of error. She claims that the district court erred and a new trial is warranted due to misconduct by the jurors. In a related proposition, Ward argues that the district court should have held an evidentiary hearing on the issue of juror misconduct.

STANDARD OF REVIEW

¶7 "[T]rial courts are vested with broad legal discretion to grant or deny a new trial, and unless it clearly appears the trial court erred in some pure simple question of law or acted arbitrarily, its judgment will not be disturbed on appeal." *Smith v. City of Stillwater,* 2014 OK 42, ¶ 11, 328 P.3d 1192. "An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Id.* Unless the district court either clearly erred in resolving "some pure simple question of law or acted arbitrarily," the appellate court will not disturb the district court's refusal to grant a new trial. *Dominion Bank of Middle Tenn. v. Masterson*, 1996 OK 99, ¶ 16, 928 P.2d 291 (citing *Poteete v. MFA Mut. Ins. Co.*, 1974 OK 110, 527 P.2d 18).

¶8 Further, an appellate court will presume that the district court's ruling on a motion for new trial is correct and that the court made all findings necessary to support its ruling. Absent explanation of the ruling by the district court and absent a record demonstrating the contrary, this Court is under a duty to indulge the presumption of correctness with regard to the district court's ruling. *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 13, 9 P.3d 683.

ANALYSIS

¶9 A juror's failure to respond truthfully to questions during voir dire may be basis for the grant of a new trial. *See e.g., James v. Tyson Foods, Inc.*, 2012 OK 21, 292 P.3d 10; *Neumann v. Arrowsmith*, 2007 OK 10, 164 P.3d 116; *Dominion Bank of Middle Tenn. v. Masterson*, 1996 OK 99, 928 P.2d 291; *Kansas City Southern Ry. Co. v. Black*, 1964 OK 192, 395 P.2d 416; *Stillwell v. Johnson*, 1954 OK 189, 272 P.2d 365. Omission of litigation history, whether intentional, inadvertent or the result of a misunderstanding, can rise to a level of misconduct that warrants a new trial. *Neumann*, 2007 OK 10, ¶ 11 (noting that "[a] material omission can be just as pow-

erful an untruth as an affirmative material misstatement").

¶10 There is no absolute rule that identifies, or checklist that predetermines, whether a juror's involvement in a particular type of lawsuit is material for purposes of disclosure during voir dire, requiring the district court to conclude that an omission or misstatement of that litigation history constitutes juror misconduct warranting a new trial. The Oklahoma Supreme Court has made it clear, however, that a new trial does not automatically follow in every instance of a juror's false or misleading statement during voir dire. *See Ledbetter v. Howard*, 2012 OK 39, ¶ 21, 276 P.3d 1031 (emphasizing that "this decision should not be construed to stand for the proposition that a single untrue response to a question on voir dire will necessarily require a new trial").

¶11 We have surveyed the cases wherein the Oklahoma Supreme Court held that alleged juror misconduct during voir dire warranted a new trial, and note that the Court's determination of whether a juror's omission of litigation history has deprived a litigant of a fair trial depends on the particular facts and circumstances of each case. The Court has also recognized that the district court judge who presided at trial, observed the witnesses and had full knowledge of the proceedings is in a better position to address these issues. *James v. Tyson Foods, Inc.*, 2012 OK 21, ¶¶ 13-14, 292 P.3d 10.

¶12 Further, failure to reveal is not the controlling factor requiring reversal; rather, it is whether the failure to reveal involves material information, such as the juror's prior or existing relationship with parties or their counsel, or concealment of adverse litigation history or pending litigation involving issues related to the material issues to be tried in the case. In each of the surveyed cases, the Court detailed the facts and circumstances which led it to conclude that juror omissions denied a party the opportunity to explore whether juror attitudes, bias or prejudice would prevent that juror's impartial consideration of the case.

¶13 The facts in this case are different from the surveyed cases, so much so that we do not find that the cited authority dictates a finding of abuse of discretion by the district court. For example, in *Stillwell v. Johnson*, 1954 OK 189, 272 P.2d 365, the Court affirmed the district court's grant of new trial where a juror had provided false information about being a party in legal actions. The case involved an automobile collision with personal injuries, and the jurors were asked whether they had ever been a party in a lawsuit involving an automobile accident. One juror answered that he had not, but it was later discovered that he was a defendant in an action for damages resulting from an automobile collision, pending at the time in the same district court. The *Stillwell* Court found no clear abuse of discretion by the district court in granting the plaintiff a new trial, noting that the juror's false information had "naturally deprived the plaintiff of further inquiry as to the attitude of the prospective juror toward those who prosecute damage suits arising from automobile collisions." *Id.* ¶ 18.

¶14 In *Kansas City Southern Railway Co. v. Black*, 1964 OK 192, 395 P.2d 416, three jurors had concealed material information on voir dire. The Black case involved injuries to a worker, and one juror failed to disclose that her son had been hurt in a serious work-related accident and had recovered damages for his injuries. Another juror neglected to mention that he was related by marriage to the plaintiff. The third failed to note that he was the defendant's former employee, had sustained a work-related injury for which he had consulted a lawyer about filing a lawsuit "and had been released from [the defendant's] service under circumstances that were not calculated to leave a good feeling between [that juror] and the defendant." *Id.* ¶ 9. The Court held that the district court abused its discretion in refusing to grant a new trial because the three jurors had "concealed matters which would establish [their] disqualification or would lead the parties to challenge them." *Id.* ¶ 0 (Syllabus by the Court).

¶15 In *Dominion Bank of Middle Tennessee v. Masterson*, 1996 OK 99, 928 P.2d 291, the jurors were asked on voir dire if they knew any of the parties or their attorneys. One of the jurors, who was eventually elected foreman, indicated that he did not know the parties and that the only lawsuit he had been involved in was an easement dispute. Following a verdict for the plaintiff, the defendant learned that the juror had actually been a party to twenty-one (21) lawsuits including one in which defendant's counsel was the attorney of record for a party who obtained a judgment against the juror. And, the entire balance of that judgment was collected by a garnishment of the juror's bank account. Further, the Court noted that the defendant had hired a jury selection consultant to

assist in the selection of the jury for the trial. After the expert learned of the juror's involvement in other lawsuits besides the admitted easement dispute, the expert stated under oath that he would have recommended the juror be stricken from the jury panel. The expert further opined that "'there was a substantial risk that [the juror] could have or did influence the other jurors in a negative direction' during deliberations." *Id.* ¶ 5. The *Dominion* Court concluded: "Where, as here, the juror has had judgments entered against him and garnishment proceedings instituted by counsel of one of the parties to the case he is to hear, it is especially important that the juror's bias or partiality be determined." *Id.* ¶ 14.

¶16 *Neumann v. Arrowsmith*, 2007 OK 10, 164 P.3d 116, was a medical malpractice case, where the jury returned a verdict for the defendants. The district court granted the plaintiff's motion to vacate and ordered a new trial. In support of her motion, the plaintiff had submitted documents showing that the jury foreman had failed to disclose the fact that he had been the non-prevailing party plaintiff in a prior lawsuit involving tort claims, including a claim for tortious interference with prospective economic advantage. In a published opinion in the jury foreman's prior lawsuit, the Court of Civil Appeals had affirmed the summary judgment in favor of the defendant, and the Oklahoma Supreme Court denied certiorari.[3] In affirming the district court, the *Neumann* Court specifically noted that the "record supports that the [plaintiff] presented competent evidence to support the order," which evidence included the juror foreman's signature on a document in his tort case and on the verdict form in the plaintiff's case. *Id.* n.14. The Court further stated: "We find that [the jury foreman's] failure to mention that he was the unsuccessful plaintiff in an action for damages constituted sufficient grounds for the trial court to grant the new trial." *Id.* ¶ 15. The *Neumann* Court held that the district court had not abused its discretion in vacating the judgment and granting a new trial based on juror misconduct. *Id.* ¶ 16.

¶17 More recently, the Oklahoma Supreme Court retained an appeal and addressed, among other issues, the question of whether the defendant was entitled to a new trial under facts where jurors gave incomplete, untruthful, and/or misleading answers when they filled out questionnaire forms the district court provided to them. *James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 1, 292 P.3d 10. In its analysis, the *James* Court noted that the district court had prohibited the parties' attorneys from asking any questions already covered and answered in its questionnaire, and told the jurors "that the attorneys would be asking questions to 'supplement [the] questionnaire forms' and would be allowed to inquire into 'social, religious or moral issues that have not already been asked of you in the questionnaire.'" *Id.* ¶ 17. The Court found *Dominion* "instructive" on the is-sue before it. *Id.* ¶ 2. But in determining the defendant was entitled to a new trial, the *James* Court not only found substantial juror misconduct, but also that the district court had deprived the defendant's counsel of the opportunity to determine juror impartiality when it prohibited further investigation beyond the questionnaire. The Court concluded that juror concealment "coupled with the parties' inability to question the jurors on relevant issues" warranted a new trial. *Id.* ¶ 30. Based on that conclusion, the *James* Court held that where "the attorneys were effectively barred from investigating" it was constrained to remand the cause for a new trial. *Id.* ¶ 31.

¶18 The adverse verdict does not, without more, demonstrate that Ward was deprived of a fair trial. We note that all but two of the jurors seated in this case had prior involvement in automobile accidents, and they disclosed that information to the district court. Some of the jurors had sustained injuries and required medical care as a result of another driver's negligence. Other jurors had retained attorneys to pursue their automobile negligence claims. But, as they were questioned by the district court, the jurors in this case all answered "Yes," when asked if they could remain fair and impartial when considering Ward's automobile negligence claim against Morrison, indicating no bias or prejudice against a person bringing suit seeking damages for bodily injury arising from alleged automobile negligence.

¶19 Further, the district court did not limit the attorneys' follow-up questioning. We note that Ward's attorney questioned the jurors on such topics as rules of the road, defensive driving, pre-existing medical/physical conditions and their views on the significance of evidence of minor vehicle damage.

¶20 As the party alleging there was juror misconduct requiring a new trial, Ward had the burden to demonstrate such conduct to the district court. On appeal, Ward's burden is to

demonstrate that the district court abused its discretion either by making a clearly erroneous conclusion and judgment contrary to reason and evidence, or exercising its discretion to an end or purpose not justified by, and clearly contrary to, reason and evidence. *State of Oklahoma v. Torres,* 2004 OK 12, ¶ 10, 87 P.3d 572. On this record, we cannot conclude that the district court erred in denying Ward's motion for new trial or in declining to hold further proceedings on the matter.

CONCLUSION

¶21 The district court did not abuse its discretion in denying Ward's motion for new trial. Because the district court's order was an act within its discretion, we affirm its order.

¶22 **AFFIRMED**.

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

JOHN F. FISCHER, PRESIDING JUDGE:

1. Section 651 provides:
A new trial is a reexamination in the same court, of an issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:
. . .
2. Misconduct of the jury or a prevailing party . . . .

2. The exercise of peremptory challenges is not reported in the transcripts included in the appellate record.

3. The appealed tort case was *McNickle v. Phillips Petroleum Co.,* 2001 OK CIV APP 54, 23 P.3d 949.

2018 OK CIV APP 37

H. MICHAEL KRIMBILL, Plaintiff/Appellee, vs. LOUIS C. TALARICO, III, an individual; and LCT CAPITAL LLC, a Delaware Limited Liability Company, Defendants/Appellants.

Case No. 114,777. October 27, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE LINDA G. MORRISSEY, TRIAL JUDGE

AFFIRMED

John J. Carwile, Clayton J. Chamberlain, MCDONALD, MCCANN, METCALF & CARWILE, L.L.P., Tulsa, Oklahoma, for Plaintiff/Appellee

Joel L. Wohlgemuth, Ryan A. Ray, NORMAN WOHLGEMUTH CHANDLER JETER BARNETT & RAY, P.C., Tulsa, Oklahoma, for Defendants/Appellants

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

¶1 Defendants/Appellants, Louis Talarico, III (Talarico), and LCT Capital, LLC (LCT)(collectively, Defendants or Talarico Defendants), appeal from the trial court's order denying their motion to dismiss the petition of Plaintiff/Appellee H. Michael Krimbill (Krimbill), pursuant to the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §§ 1430 through 1440 (OCPA or the Act). For the reasons discussed below, we affirm.

BACKGROUND

¶2 The parties are involved in protracted litigation in the state of Delaware, where LCT has filed claims of breach of contract, unjust enrichment, and fraudulent misrepresentation against Oklahoma-based, publicly traded NGL Energy Partners, LP, and its general partner, NGL Energy Holdings, LLC (collectively, NGL), resulting from a transaction known as the "TransMontaigne acquisition." In October 2015, Talarico sent the following email to James Kneale, the head of NGL's audit committee:

From: Lou Talarico
Sent: Thursday, October 8, 2015 1:51 PM
To: jimckneale@gmail.com
Subject: NGL Litigation
Attachments: Amended Complaint (as filed, 9-29-15).pdf

Jim,

I am contacting you regarding a complaint that LCT Capital has filed against NGL Energy Holdings and NGL Energy Partners regarding fees due in connection with the TransMontaigne transaction. An amendment to the original complaint was filed on September 29 and is attached for your review. Given the materiality of the claim as well as the nature of the events detailed in the complaint, I thought it important that the audit committee and board of directors be aware of the complaint.

We believe the misrepresentations made to LCT Capital, as detailed in the Complaint, are illustrative of broader, more systemic issues at the company under Mike's leadership – issues that have affected the accuracy of NGL's public filings and Mike's public statements about the business.

We are available to discuss the complaint or other issues with you and the audit committee or the board at your convenience.

Regards,
Lou Talarico
LCT Capital, LLC

¶3 On October 16, 2015, Krimbill filed a petition in Tulsa County District Court alleging the email had libeled him personally. On October 30, 2015, Defendants moved to dismiss Krimbill's petition with prejudice, pursuant to, inter alia, the OCPA. On February 26, 2016, the district court denied this motion. Defendants now appeal.

STANDARD OF REVIEW

¶4 There is no established appellate standard of review in this case.[1] It is clear that the OCPA provides a new summary process/dismissal procedure in certain cases, however, and that, traditionally, Oklahoma appellate courts have reviewed decisions pursuant to such procedures by a *de novo* standard. The OCPA also requires dismissal if a plaintiff fails to show a *prima facie* case, and is hence similar to a motion for directed verdict. Directed verdict challenges also are reviewed *de novo*. Finally, Texas, which has an almost identical act, has adopted a *de novo* standard of review.[2] Hence, we find a *de novo* standard indicated by existing precedent and persuasive authority, and we adopt that standard here.

ANALYSIS

¶5 Oklahoma's Act, which became effective in 2014,[3] mirrors that of the Texas Citizens' Participation Act (TCPA or Texas Act), enacted in 2011 under the title, "Actions Involving the Exercise of Certain Constitutional Rights," Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001 through 27.011. The Texas Act has been the subject of numerous decisions by the Texas courts,[4] which we may look to as persuasive authority in resolving this matter. *See, e.g., In re Fletcher's Estate*, 1957 OK 7, ¶ 25, 308 P.2d 304 (general rule, with some exceptions, is that a statute adopted by Oklahoma from another state which at the time of adoption has been construed by the highest court of the first state, is presumed adopted as so construed; however, if decisions by the highest court of the other state occurred after adoption of the statute in Oklahoma, such decisions are persuasive only).

I. "ANTI-SLAPP" ACTS

¶6 The legislature enacted the OCPA "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of [persons] to file meritorious lawsuits for demonstrable injury." 12 O.S. Supp. 2014 § 1430.

A. The Purpose of "Anti-SLAPP" Acts

¶7 The legislation is an example of "anti-SLAPP" (Strategic Lawsuit Against Public Participation) legislation, the purpose of which is to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). Anti-SLAPP legislation appears to be the result of an increasing tendency by parties with substantial resources to file meritless lawsuits against legitimate critics, with the intent to silence those critics by burdening them with the time, stress, and cost of a legal action. To carry out this purpose, anti-SLAPP acts typically provide an accelerated dismissal procedure, available immediately after a suit is filed in order to weed out meritless suits early in the litigation process.

¶8 Anti-SLAPP acts may be generally characterized as "narrow" or "broad." *See* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val. U.L. Rev. 1235, 1236 (2007). A narrow act protects only certain speech made in limited circumstances, often when the speech is discussing a political or municipal issue.[5] The acts of Texas, Oklahoma and California are, by comparison, "broad" acts, directed at protecting a wide spectrum of First Amendment speech, with limited exceptions.[6]

B. The OCPA Procedure

¶9 In an OCPA proceeding, the initial burden is on the defendant seeking dismissal to show that the plaintiff's claim "is based on, relates to, or is in response to the [defendant's] exercise of the right of free speech, the right to petition, or the right of association." 12 O.S. Supp. 2014 § 1434(B). The burden then shifts to the plaintiff to show "by clear and specific evidence a *prima facie* case for each essential element of the claim in question." *Id.*, § 1434(C). If § 1434(C) is satisfied, the burden shifts back to the defendant to show "by a preponderance of the evidence" a defense to the plaintiff's claims. *Id.*, § 1434(D). If the plaintiff's *prima facie* case fails, or the defendant shows a defense by a preponderance of the evidence, the suit is dismissed.

¶10 The three basic issues thus presented by the text of the Act, and by this appeal, are (1) whether the defendant has shown the plaintiff's action is based on, relates to, or is in response to the defendant's exercise of rights protected by the Act; (2) whether the plaintiff has demonstrated a *prima facie* case; and (3) if so, whether the defendant shown a "valid defense by a preponderance of the evidence."

II. INTERPRETING THE OCPA

¶11 Interpreting the OCPA requires balancing the unusual judgment/dismissal provisions of § 1434 against two other OCPA provisions, §§ 1430 and 1440. The tension between these sections is immediately evident.

¶12 Section 1434(C) appears to introduce a new evidentiary standard of "clear and specific evidence" that has no prior history in Oklahoma. Section 1434(D) appears to allow a court to dismiss a case with prejudice based on the judge's *weighing of the evidence* on the merits of the case. Read in isolation, § 1434 appears to provide for a summary form of bench trial on the merits before a defendant has answered.

¶13 However, OCPA § 1440 provides that the Act "shall not abrogate or lessen any other defense, remedy, immunity or privilege available under other constitutional, statutory, case or common law or rule provisions," and § 1430 states the legislative purpose of the OCPA is to weed out meritless suits while protecting "the rights of a person to file meritorious lawsuits for demonstrable injury." Tension between the § 1434 procedure and the Act's statements of legislative intent is inescapable, and requires the resolution of several issues in a manner giving effect to legislative intent before we can analyze the facts in this case. The first such issue is the requirement that a plaintiff establish "a *prima facie* case for each essential element of the claim in question" by "clear and specific evidence."

III. THE "*PRIMA FACIE* CASE" AND "CLEAR AND SPECIFIC EVIDENCE"

¶14 Once a defendant has shown that the Act applies, the burden shifts to the plaintiff to show "by clear and specific evidence" the requirements of § 1434(C). The Act does not define "clear and specific evidence," and that phrase has not previously appeared in published Oklahoma appellate case law.

A. *Prima Facie* Case Under the Act

¶15 Oklahoma jurisprudence does define *prima facie* case. *See, e.g., Hill v. State*, 1983 OK CR 161, ¶ 3, 672 P.2d 308, quoting Black's Law Dictionary, 4th Rev. Ed., 1968, and defining "*prima facie* case" as, "Such as will suffice until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded." Because the Legislature would not have stated two contradictory standards in the same sentence, we presume that its definition of "clear and specific evidence" in § 1434(C) is in harmony with the established standard for *prima facie* case.

¶16 The Texas courts have recognized this issue, and reached the same conclusion regarding the TCPA. In *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015), the Texas Supreme Court noted:

> The statute . . . requires not only "clear and specific evidence" but also a "*prima facie* case." In contrast to "clear and specific evidence," a "*prima facie* case" has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.

Id. at 590.

¶17 We find such reasoning consistent with Oklahoma law. We hold that, even though the Oklahoma Act initially demands more information about a plaintiff's underlying claim by requiring a showing of a *prima facie* case, "the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence." *Id.* at 591.

B. What Evidence Should the Court Consider while Examining for a *Prima Facie* Case?

¶18 Defendants argue that, in determining whether a *prima facie* case has been shown, the court may not consider the pleadings. We disagree.

¶19 The OCPA is clear that a district court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." 12 O.S. Supp. 2014 § 1435. In contrast, the minimal requirements of notice pleading do not mandate that a petition state sufficient facts to establish a *prima facie* case, but only an allegation of general facts supporting the elements of a cause of action. Hence, a petition, if pled to the

minimum standard of notice pleading, may not provide sufficient "clear and specific evidence" for purposes of the OCPA. Nevertheless, the Act clearly contemplates that the pleadings may be *considered*.[7]

IV. "VALID DEFENSES" SHOWN BY A "PREPONDERANCE OF THE EVIDENCE"

¶20 One of the most unique features of the Act is the structure of § 1434(D), which allows dismissal if "valid defenses" are shown by a "preponderance of the evidence" *even if a prima facie* case has been established. This section appears to provide for a pre-answer bench trial on the merits. Such a procedure would be unprecedented in Oklahoma law.

¶21 The Legislature stated in § 1440 of the Act that it did not intend to "abrogate or lessen any other defense, remedy, immunity or privilege available under other constitutional, statutory, case or common law or rule provisions." Unless we interpret the Act as transforming any action at law that may be subject to the OCPA – and there are likely many affected actions[8] – into a case that would allow the trial judge to decide disputed questions of material fact in a dismissal procedure, § 1434(D) must be more narrowly construed. Accordingly, for the following reasons, we find that disputed questions of material fact cannot be resolved in an OCPA dismissal proceeding.

A. Violation of § 1440 of the Act

¶22 As noted above, OCPA § 1440 is clear that the Legislature intended any remedy afforded by the Act to be limited in its effect on other remedies and defenses. However, if read literally, § 1434(D) provides for a pre-answer bench trial on the merits of a claim by providing that a judge may dismiss an action if a movant establishes each element of a valid defense by a preponderance of the evidence.

¶23 The existence of a *prima facie* case inherently establishes the existence of disputed questions of fact, in that it shows "sufficient proof to that stage where it will support findings if evidence to contrary is disregarded." In all other actions where the burden of proof is by a preponderance of the evidence, once a plaintiff shows a *prima facie* case, summary judgment is available only on issues of law. If read literally, however, § 1434 would allow dismissal based on the trial court's view of the weight of the evidence. As such, the Act would make dismissal far easier to achieve than summary judgment for defendants who may be protected by the Act. Such a result is entirely incompatible with the clear directive of § 1440.

¶24 The Court in *In re Lipsky* noted that the Texas Act should "not impose a higher burden of proof than that required of the plaintiff at trial." 460 S.W.3d at 591. We find this principle sound, and adopt it here. Since disputes of fact on the required elements of a tort prevent summary judgment, *those same disputed facts cannot warrant dismissal under the OCPA.*

B. Right to Jury Trial

¶25 In addition to rejecting a literal interpretation of § 1434(D) that would allow a judge to decide disputed facts traditionally reserved for a jury, we note that a literal interpretation also implicates constitutional safeguards regarding the right to jury trial. Oklahoma law previously has allowed judges to act as triers of fact in equitable cases, but has reserved this function to the jury in cases at law unless a jury is waived. Read literally, § 1434(D) would require a judge to act as the finder of fact in some cases at law that are subject to jury trial. Such an interpretation would impact the right to jury trial for the benefit of certain types of defendants, which also violates the directive of § 1440.

C. "Special law" Pursuant to Oklahoma Constitution, art. 5, § 46

¶26 A literal interpretation of § 1434(D) also could render the OCPA a special law prohibited by the Oklahoma Constitution, art. 5, § 46. That provision states:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings.

¶27 "The terms of art. 5, § 46 command that court procedure be symmetrical and apply equally across the board for an entire class of similarly situated persons or things." *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 13, 152 P.3d 861. "In a special laws attack under art. 5, § 46, the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things." *Id.* "The test is whether the provision fits into the structured regime of established procedure as part of a symmetrical whole. If an

enactment injects asymmetry, the § 46 interdiction of special law has been offended." *Id.*

¶28 An interpretation of § 1434(D) that essentially denies a jury trial to certain groups of plaintiffs, transforms some actions at law into equitable ones, and creates a special category of dismissal or summary judgment applicable only to certain defendants across a broad variety of tort cases runs afoul of Okla. Const. art. 5, § 46. The reach of the OCPA is not likely confined simply to libel plaintiffs, but could reach into any tort involving speech. The number of different legal actions that might be "based on, relate[d] to or [] in response to a party's exercise of the right of free speech, right to petition or right of association," appears to be substantial.[9]

¶29 "By mandating uniformity of procedure, the terms of art. 5, § 46 command that all citizens of the state shall have equal access to legal institutions for application of the general ordinary forensic process." *Zeier* at ¶ 18. If the OCPA's evidentiary requirements herald a more stringent test for a special class of claims than generally applied to demurrers to the evidence and motions for directed verdict or summary judgment, and thus changes the fact-finder for an apparently arbitrary group of plaintiffs, the law also may run afoul of art. 5, § 46.[10]

D. The Right to File a Meritorious Lawsuit for Demonstrable Injury

¶30 We finally note the OCPA's clearly stated legislative purpose is to weed out *meritless* suits while protecting "the rights of a person to file meritorious lawsuits for demonstrable injury." 12 O.S. Supp. 2014 § 1430. The concept that a suit must be *meritless* to be dismissed is reinforced by the Act's "sanctions for deterrence" provision, § 1438, which allows "[s]anctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in the [OCPA]."

¶31 Oklahoma jurisprudence previously has not countenanced sanctions for acts that are neither frivolous nor without reasonable basis. **If genuine questions of material fact or law exist as to the right of recovery, and it is necessary to *weigh the evidence* in order to decide the case on the merits, it appears highly improbable that the case was meritless from the outset.** A cognizable legal theory and a disagreement of material fact, supported by evidence on both sides, pursuant to the common law standard presupposes that the suit is not meritless, and that it should not be subjected to immediate summary dismissal or a sanction. The OCPA specifically prohibits the abrogation of these common law principles.

¶32 If more than one interpretation is possible, this Court will not interpret an act of the Legislature so as to render it unconstitutional. In combination with the directives of §§ 1430, 1440, and 1438, we are called upon to interpret § 1434(D) to fit the broader scheme and purpose of the Act of providing for the early dismissal of *meritless or frivolous suits*, and to avoid constitutional infirmity. Adhering to our constitutional mandate, we therefore hold that disputed questions of fact cannot be resolved in an OCPA dismissal proceeding. If a plaintiff has established a *prima facie* case in the second-stage inquiry, the court may only properly consider *defenses that turn solely on a question of law.* It may not weigh and decide truly disputed questions of fact as "defenses" in this third stage.

¶33 Having established these basic principles, we turn now to the facts of the case at hand.[11]

V. THE INITIAL BURDEN TO SHOW THE ACT APPLIES

¶34 Defendants were initially required to show that Krimbill's libel suit relates to Defendants engaging in activity protected by the OCPA, i.e., the exercise of the right of free speech; the right to petition; or the right of association. The Legislature has defined these protected activities in 12 O.S. Supp. 2014 § 1431 as follows:

> 2. "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue or defend common interests;
> 3. "Exercise of the right of free speech" means a communication made in connection with a matter of public concern;
> 4. "Exercise of the right to petition" means any of the following: . . .[12]

¶35 Subsection 1431(7), in turn, defines a "matter of public concern" as meaning an issue related to:

> a. health or safety,
> b. environmental, economic or community well-being,
> c. the government,

d. a public official or public figure, or
e. a good, product or service in the marketplace;

¶36 The district court found that Defendants' speech was "a communication made in connection with a matter of public concern regarding a good, product or service in the marketplace," pursuant to §§ 1431(3) and 1431(7), and that the communication was covered by the Act. However, speech involving "goods, product or services in the marketplace" may also be exempt from the Act under § 1439(2), concerning "commercial speech." Because this case arose from a commercial dispute, we examine this exemption.

A. The "Commercial Speech" Exemption

¶37 If speech is made in connection with a matter of public concern regarding a good, product or service in the marketplace, as found by the trial court here, the speech must cross a second threshold before the Act applies. Pursuant to § 1439(2), the OCPA shall not apply to:

> 2. A legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct the action is based upon arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer[.]

¶38 Oklahoma has not attempted to reconcile the covered speech noted by § 1431(7), i.e., "speech on a matter of public concern related to a good, product or service in the marketplace," with the speech exempted by § 1439(2). The two clauses raise substantial questions, including such issues as the difference between speech "related to a good, product or service" and speech that "arises out of the sale or lease of goods [or] services"; and the difference between speech aimed at "an actual or potential buyer or customer" rather than "the public." Texas cases examining the exemption have developed certain rules related to it.

1. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71 (Tex. App. 2013)

¶39 In *Newspaper Holdings*, an assisted-living hotel and its owner sued a newspaper and its source, alleging that the paper had published defamatory statements about the hotel. The court stated that in determining whether a speech falls under the commercial speech exemption to the TCPA, courts should examine whether the following circumstances exist:

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
>
> (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;
>
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and
>
> (4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

Id. at 88 (quoting and following *Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117 (Cal.2010)).

¶40 The Court in *Newspaper Holdings* decided that "although it was undisputed that the Newspaper was in the business of reporting community events, the Hotel's complained-of statements do not arise out of the lease or sale of the goods or services that NHI sells – newspapers." Essentially, the Court held the newspaper could invoke the Texas Act because the newspaper was not in the same business as the hotel, the newspaper's articles concerned whether the hotel met public licensing requirements and standards, and the intended audience was the public generally rather than the hotel's existing or potential customers. *See id.* at 81.

2. *Backes v. Misko*, 486 S.W.3d 7 (Tex. App. 2015), and *Whisenhunt v. Lippincott*, 474 S.W.3d 30 (Tex. App. 2015)

¶41 *Backes* and *Whisenhunt* expanded on the meaning of the *Newspaper Holdings'* element that "the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services." *Backes* and *Whisenhunt* clarified that, for the commercial speech exemption to apply, a statement regarding "securing sales in the person's goods" required

that the statement must be made for the purpose of "securing sales in the goods or services *of the person making the statement." Backes* at 21 and *Whisenhunt* at 42 (emphasis added).

3. *Epperson v. Mueller*, 01-15-00231-CV, 2016 WL 4253978 (Tex. App. 2016)

¶42 Most recently, in *Epperson v. Mueller,* memorabilia dealers *Epperson* and *Mueller* sued one another for defamation. Epperson moved to dismiss Mueller's counterclaim pursuant to the TCPA.[13] The trial court cited the test used in *Newspaper Holdings* but reached the conclusion that the commercial speech exemption applied, holding that Epperson and Mueller were in the same business (memorabilia), and that Epperson's intended audience was comprised of the parties' actual or potential customers rather than the general public. Hence, the Court held Epperson's statements were not protected by the Texas Act. *Id.* at *12. The Court emphasized that Epperson and Mueller were in the same business and that Epperson's statements were not merely criticisms of Mueller but also were intended to promote Epperson's own goods/services over Mueller's. *Id.* at *11.

B. Interpreting the "Commercial Speech" Exemption

¶43 For the TCPA "commercial speech" exemption to apply, the Texas cases discussed above appear to require that (1) the parties are involved in the same general area of business; and (2) the statements forming the basis of the suit were made at least partially for the purpose of promoting sales of the goods or services of the person making the statement. If both of these requirements are met, the Courts held the TCPA does not apply and cannot be interposed as a defense.

¶44 In the case at hand, the speech at issue appears to be "on the border" of these principles, and may be "commercial speech" exempt from the Act. However, based on the limited evidence adduced in the trial court, it would be speculative at best for this Court to determine that Defendants and Krimbill are involved in the same business, or that Defendants made the statements at issue to promote their business aims. We therefore do not base our decision on an interpretation of the OCPA's "commercial speech" exemption, but instead presume that Defendants met their initial burden and that the Act applies in this case.

VI. THE *PRIMA FACIE* CASE AND AFFIRMATIVE DEFENSES

¶45 The Act's requirement that a plaintiff show a *prima facie* case to avoid dismissal raises a further question concerning the line of demarcation between the "elements" necessary to a *prima facie* case and the "defenses" to a libel claim. This question has received little attention by the courts because its significance was limited. Since early statehood, Oklahoma has statutorily defined "libel" as follows:

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

12 O.S.2011 § 1441.

¶46 Section 1441 can be interpreted as stating that it is the duty of a plaintiff to show *unprivileged* publication as part of a *prima facie* case. In 1981, however, the legislature enacted § 1444.1 (Pleading – Proof – Defenses), which states:

> In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby. **As a defense thereto** the defendant may deny and offer evidence to disprove the charges made, **or** he may **prove** that the matter charged as defamatory **was true** and, in addition thereto, that it was published or spoken under such circumstances as to render it **a privileged communication**. (Emphasis added).

¶47 Section 1444.1 makes two statements regarding defenses: first, the "defendant may deny and offer evidence to **disprove** the charges made" – i.e., present ordinary defenses – "or" the defendant may **prove** *truth* and *privilege* as defenses. This separation together with the use of the word "prove" makes clear that, at least since 1981, "truth" and "privilege" are affirmative defenses to a libel or slander claim, rather than the opposites of those defenses being elements that must be shown by a plaintiff.[14] Inasmuch as the OCPA states that it does not

abrogate prior statutes, common law, or rules, we hold that while § 1441 defines libel, § 1444.1 defines *truth* and *privilege* as affirmative defenses. Hence, the burden to show these defenses lies with the defendant in an OCPA proceeding, just as it would in any other proceeding.

A. The Affidavit

¶48 Krimbill presented the pleadings and his own affidavit to show a *prima facie* case. Defendants argue, however, that Krimbill presented no evidence whatsoever. They contend the pleadings cannot be considered, and that this Court should disregard the affidavit because "the [trial] court did not rely on it," and also because it was inadmissible. If neither the pleadings nor a personal affidavit may be used, then showing a *prima facie* case under the Act presents a substantial burden for a plaintiff.

¶49 As discussed in Part IIIA above, the pleadings may be considered. We therefore reject Defendants' contention otherwise.

¶50 Defendants' first argument concerning the affidavit is based on their observation that the district court did not refer to the affidavit in its decision. While it is true that the court did not specifically identify the evidence it considered, there is no requirement in the Act that it do so. Legal error may not be presumed from a silent record; it must be affirmatively demonstrated. *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496. We find no merit in the argument that we should not consider the affidavit because the district court "did not rely on it." Such a restriction is not consistent with the *de novo* standard of review. Furthermore, "[this] Court is not bound by the trial court's reasoning and may affirm the judgment below on a different legal rationale." *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 17, 324 P.3d 399.

B. The Admissibility of the Affidavit

¶51 Defendants next argue that Krimbill's affidavit must be disregarded because it is conclusory, citing as authority the cases of *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015), and *Concorde Res. Corp. v. Kepco Energy, Inc*., 2011 OK CIV APP 39, ¶ 29, 254 P.3d 734. The Court in Concorde noted, "The party responding to a motion for summary judgment has an obligation to present something which shows that, when the date of trial arrives, he will have some proof to support his allegations. . . . A general statement in a summary judgment affidavit *opining liability, without providing any information and without offering any reason for the conclusions*, [is] not sufficient." *Id.* (emphasis added; citations omitted).

¶52 The Texas Court in *Lipsky* addressed the sufficiency of an affidavit stating that a libel plaintiff had "suffered direct economic losses and lost profits" without elaborating on the cause of that harm. *Lipsky* at 592-93. The opinion did not dispute that the affidavit served as evidence of alleged losses, but found that it did not connect the losses to the plaintiff's activities. The affidavit was thereby found to be insufficient as evidence of the element the defendants sought to prove, which was that the *plaintiff's activities had caused defendants losses* rather than simply that the *defendants had suffered losses.*

¶53 *Concorde* and *Lipsky* are both distinguishable from the present case. The affidavit in Concorde opined conclusively as to the *ultimate legal issue of liability* without supplying any facts to support that conclusion. If Krimbill's affidavit had simply stated, "I have been libeled," without further elaboration, the result here would be the same as in *Concorde*. That situation is not present here, however. The holding in *Lipsky* is even more distinguishable, because the Court did not reject the affidavit for being conclusory, but for being so insufficient that, even if true, it failed to show a required element.

¶54 As noted above, OCPA § 1440 is clear that the Act "shall not abrogate or lessen any other defense, remedy, immunity or privilege available under other constitutional, statutory, case or common law or rule provisions." Thus, the proper question is whether Krimbill's testimony normally would be admissible at trial or in a summary judgment proceeding. If so, it is admissible for purposes of the Act.

¶55 Oklahoma law also is clear that a witness may testify about any matter of which the witness has personal knowledge, and that "[e]vidence to prove personal knowledge may consist of the witness's own testimony." 12 O.S. 2011 § 2602. "Relevant evidence" means 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. 12 O.S.2011 § 2401. Unless it is clear that Krimbill has no personal knowledge of whether NGL has made inaccurate public filings and public statements, his denial is admissible. The fact that the denial is self-interested goes to its

weight at trial, not to its admissibility for dismissal purposes. We find that Krimbill's affidavit was generally admissible to the same extent Krimbill's same testimony would be admissible at trial. The district court did not err to the extent it considered it.

C. "Malice"

¶56 Defendants argue that Krimbill is a "public figure," and as such, he must show a *prima facie* case for the additional element of malice. Assuming without deciding that the "public figure" status applies here, the actual malice standard requires proof that a defendant acted with knowledge that a publication was false "or with reckless disregard of whether it was false or not." *Martin v. Griffin Television, Inc.*, 1976 OK 13, ¶ 28, 549 P.2d 85 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964)); *see also Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000).

¶57 Reckless disregard is a subjective standard, focusing on a defendant's state of mind. *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002). Mere negligence is not enough. *Id.* Rather, the plaintiff must establish "'that the defendant in fact entertained serious doubts as to the truth of his publication,'" or had a "'high degree of awareness of . . . [the] probable falsity'" of the published information. *Id.* (quoting *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678 (1989)). Actual malice generally consists of "'[c]alculated falsehood.'" *Bunton* at 591 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209 (1964)). When a defendant's words are reasonably subject to more than one interpretation, the plaintiff must establish either that the defendant knew the words would convey a defamatory message or had reckless disregard for their effect. *See Bunton* at 603.

¶58 The "actual malice" element presents an especially difficult problem when it becomes part of the procedure mandated by the Act, inasmuch as malice is decided by a subjective standard, focusing on the defendant's state of mind, knowledge, and intent. The difficulty to a plaintiff of showing a *prima facie* case for a subjective belief or knowledge by the defendant in a "trial" held before discovery cannot be overestimated. "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *See Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, ¶ 15, 256 P.3d 1021, (citing *Harte–Hanks Commc'ns*). Unless a defendant includes his/her mental processes and subjective understanding as part of a motion to dismiss, a plaintiff would appear to have little chance of adducing any direct proof whatsoever of this element beyond the plaintiff's own belief that the defendant acted with actual malice. Given the practical improbability of direct evidence, unless the Oklahoma Legislature's intention was to effectively abolish defamation actions by public figures, it appears that a *prima facie* case for this element may be shown by circumstantial evidence.

¶59 The Texas appellate courts appear to have adopted the latter approach in cases under the TCPA:

> A defendant's state of mind "can – indeed, must usually – be proved by circumstantial evidence." *Campbell*, 471 S.W.3d at 629; *see also Lipsky*, 460 S.W.3d at 584 (concluding "clear and specific evidence under the" TCPA "includes relevant circumstantial evidence"). The evidence must be viewed in its entirety. *Campbell*, 471 S.W.3d at 629. "In addition, the supreme court has stressed that proof of actual malice is not defeated by a defendant's self-serving protestation of sincerity." *Id.*

MacFarland v. Le-Vel Brands LLC, 05-16-00672-CV, 2017 WL 1089684, at *12 (Tex. App. Mar. 23, 2017).

¶60 In the case at hand, the trial court found that the limited circumstantial evidence indicated the possibility of actual malice. We find no error in this holding. We find that Krimbill presented a *prima facie* case of libel, and that the burden therefore shifted to Defendants to show an absolute defense to that *prima facie* case, as allowed by the Act.

D. The "Privilege" Question

¶61 Defendants argue that Krimbill was required to provide evidence that Defendants' statements were "not privileged" as part of establishing a *prima facie* case. As discussed above, however, privilege is an affirmative defense pursuant to 12 O.S. 2011§ 1444.1. Thus, Defendants bear the burden of showing privilege as a matter of law in order to obtain summary dismissal of Krimbill's suit.

¶62 Defendants also argue that their statements were in fact privileged, and that they therefore have a valid defense pursuant to the

OCPA. Whether a communication is privileged is initially a question of law to be determined by the court. *Samson Inv. Co. v. Chevaillier,* 1999 OK 19, 988 P.2d 327. As set forth in 12 O.S.2011 § 1443.1, on which Defendants rely:

> A. A privileged publication or communication is one made:
>
> First. In any legislative or judicial proceeding or any other proceeding authorized by law;
>
> Second. In the proper discharge of an official duty;
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.

¶63 Defendants first contend that their statement was privileged because it was made "in the course of . . . a legislative or judicial or other proceeding authorized by law."

¶64 The courts have generally restricted the reach of § 1443.1 to reports of things *actually stated or discussed* in court proceedings or records, or during other official proceedings. *See Grogan* at ¶ 38, (statement implying that teacher has acted as a terrorist is not privileged by § 1443.1 because there was no evidentiary material in this record showing that terrorism was discussed in any official proceeding). In *Kirschstein v. Haynes*, 1990 OK 8, ¶ 2, 788 P.2d 941 (superseded by rule on other grounds, as stated in *Dani v. Miller,* 2016 OK 35, n.1, 374 P.3d 779), however, the Court extended the law beyond the strict wording of the text of § 1443.1, stating:

> We have determined we will recognize an absolute privilege for communications made preliminary to proposed judicial or quasi-judicial proceedings in favor of attorneys, parties and witnesses generally **under the standards set forth at the Restatement (Second) of Torts §§ 586, 587 and 588 and the comments thereto**. (Em-phasis added).

¶65 The main focus of *Kirschstein* was placing reports, documents or other statements made in anticipation of, or in preparation for, litigation inside the privilege granted by § 1443.1. By stating that the privilege operated pursuant to "the standards set forth at the Restatement (Second) of Torts §§ 586, 587 and 588 and the comments thereto," *Kirschstein* expanded the standards set by § 1443.1 to include the common law "as embodied in the Restatement," rather than simply placing certain statements made before suit was filed under the protection of § 1443.1. *See Kirschstein* at ¶ 13.

¶66 Restatement § 587 states:

> A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another . . . during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Comment 'c' further notes that:

> c. Relation of statement to proceedings. **It is not necessary that the defamatory matter be relevant or material to any issue before the court.** It is enough that it have **some reference to the subject of the inquiry**. Thus, while a party may not introduce **into his pleadings** defamatory matter that is **entirely disconnected** with the litigation, he is not answerable for **defamatory matter volunteered or included by way of surplusage in his pleadings** if it has any bearing upon the subject matter of the litigation. The fact that the defamatory publication is an unwarranted inference from the alleged or existing facts is not enough to deprive the party of his privilege, if the inference itself has some bearing upon the litigation. (Emphasis added.)

¶67 This standard suggests that material otherwise irrelevant to the subject matter of litigation may still be a legitimate part of the pleadings or proceedings, and therefore privileged, if it has "any bearing upon the subject matter of the litigation." Precisely how a court should determine whether material with no relevance to the question under litigation still has a "bearing upon the subject matter of the litigation" is not explained, and we find only three reported cases addressing the issue covered by "Comment c."[15] Clearly, however, the inquiry is highly fact-based, and extremely difficult to perform accurately in a summary dismissal procedure held before a defendant has even filed an answer.

¶68 The factual questions presented in the case at hand include whether the allegations of false public statements and inaccurate filings contained in Talarico's email are in fact a part of the pleadings or proceedings in the underlying Delaware case, and whether such statements had some bearing on the subject of the case. If so, the email may qualify as a "fair and true report of a judicial proceeding." Defendants argue that paragraphs 75, 87-91, 94, 99, 102, 104 and 119-20 of the amended petition cover the same allegations made in the email, and that the comments in the email therefore are privileged as a report of a pleading.

¶69 Although two of the cited paragraphs do allege some form of inaccurate public filing, we agree with the trial court that, absent a much more extensive overview of the Delaware litigation, some of the email appears to have no bearing upon the subject matter of the Delaware litigation. We therefore find that pursuant to the limited record before us, we cannot determine if the statement central to this case was covered by a litigation privilege.

E. Opinion

¶70 Defendants next contend that the statements in question were opinions rather than statements of fact. The First Amendment provides protection for statements that cannot "'reasonably be interpreted as stating actual facts'" about an individual. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S. Ct. 2695 (1990), (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876 (1988)). As a general rule, statements which are opinionative and not factual in nature, and which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law. *See, e.g., Miskovsky v. Oklahoma Pub. Co.*, 1982 OK 8, ¶ 32, 654 P.2d 587. However, if the defendant expresses a derogatory opinion without disclosing the facts on which it is based, there may be liability "if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts." *McCullough v. Cities Serv. Co.*, 1984 OK 1, 676 P.2d 833, citing Restatement (Second) of Torts § 566 (1977); *see also Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1529 (W.D. Okla. 1992)(fact that a statement claims to be an opinion is not conclusive of whether the statement is actionable; if the statement implies the existence of a fact susceptible of being proved true or false, it may be actionable). Whether a statement is one of fact or opinion, for purposes of determining defamation liability, is a question of law. *Metcalf*, *id.*

¶71 The statements in this case alleging inaccurate public filings appear to be inherently factual and capable of verification. Defendants argue that, even if the allegation of inaccurate filings is not opinion, its statement that, "We believe the misrepresentations made to LCT Capital, as detailed in the Complaint, are illustrative of broader, more systemic issues at the company under Mike's leadership" is a statement of opinion. Even if this is so, however, we find no provision in the Act for some form of "partial dismissal" at a pre-answer stage.

F. The "Falsehood" Element

¶72 Talarico stated in the email that Krimbill's behavior had "affected the accuracy of NGL's public filings and [Krimbill's] public statements about the business." Defendants argue that it is Krimbill's burden under the OCPA to produce evidence that the implication of inaccurate public filings and statements is false in order to demonstrate a *prima facie* case for libel. We disagree pursuant to our analysis of 12 O.S.2011 §1444.1 above. As noted there, truth appears to be an *affirmative defense*. Further, Krimbill stated by affidavit that it was his responsibility to ensure that NGL's public filings were accurate, that any filings he had certified in his position at NGL were accurate, and that Talarico's implication that NGL's public filings or statements were inaccurate was false. We find a disputed question of fact as to the "truth" of this statement, and pursuant to our interpretation of §1434(D), this question cannot be resolved in a summary proceeding.

G. Common Law Fair Comment

¶73 Defendants argue that the statements in question were also covered by the "common law fair comment" privilege.

> The common law fair comment privilege extends to fair expressions on matters of public interest. It differs from both: (1) the common law fair report privilege – which affords a qualified or conditional privilege to the media when they republish defamatory material in an account of a public or official proceeding, i.e., judicial proceedings, legislative sessions, judicial hearings, or official news conferences; and 2) its statutory counterpart, 12 O.S.2001 § 1443.1 – which embodies a similar statutory privilege as a complete defense to libel. Although

> all three concepts overlap, the scope of the common law fair comment privilege, encompassing expressions of opinion on all matters of public opinion, is broader than either the common law fair report doctrine or the terms of the statute – both of which have their roots in political speech concepts and encompass public interest reports of official actions or proceedings.

Grogan, 2011 OK CIV APP 34at ¶ 39 (quoting *Magnusson v. New York Times Co. d/b/a KFOR*, 2004 OK 53, ¶ 10, 98 P.3d 1070, for the principle that the common law fair comment privilege developed as a defense to actions for defamation, invasion of privacy and intentional infliction of emotional distress). *Grogan* further notes that the fair comment defense "protects statements that (1) involve matters of public concern, (2) *are based on true or privileged facts*, (3) represent the opinion of the speaker, and (4) are not made for the sole purpose of causing harm." *Grogan* at ¶ 39, citing *Magnusson* (emphasis added).

¶74 As we have already found, the record here reveals questions of fact as to the truth of Talarico's statements, and because, on the limited record before us, we cannot determine whether the email statements are privileged as a matter of law, we cannot determine if the "fair comment" privilege currently applies in this case.

CONCLUSION

¶75 The OCPA as written has certain inherent contradictions. It may be interpreted as radically changing the mode of procedure in many cases, and establishing an unprecedented system of mandatory bench trials on the merits before an answer is even filed. However, the Act also contains clear legislative statements that it "shall not abrogate or lessen any other defense, remedy, immunity or privilege" and that the purpose of the OCPA is to weed out *meritless* suits while protecting "the rights of a person to file *meritorious* lawsuits for demonstrable injury." We have interpreted the Act in a manner consistent with these principles while at the same time avoiding an interpretation that the Act is unconstitutional. We find that the district court did not err in denying the motion to dismiss pursuant to the OCPA in this case.

¶76 **AFFIRMED**.

WISEMAN, J., and RAPP, J. (sitting by designation), concur.

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

1. The Oklahoma Supreme Court cases to date that have addressed the current version of the Act, *Anagnost v. Tomecek*, 2017 OK 7, 390 P.3d 707, and *Steidley v. Singer*, 2017 OK 8, 389 P.3d 1117, did not establish a full standard of review because the sole issue in each of those cases concerned whether the Act applied retroactively.

2. "We apply a *de novo* standard of review when deciding whether a non-movant has satisfied her burden under the Anti–SLAPP statute." *Deaver v. Desai*, 483 S.W.3d 668, 676 (Tex.Ct.App. 2015)(abrogated on other grounds in *In re Lipsky*, 460 S.W.3d 579 (Tex.2015)).

3. "The [OCPA] was amended/re-written in 2014 to become effective on November 1, 2014." Anagnost, 2017 OK 7 at ¶ 8; see also, Laura Long, Slapping Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implication on the Right to Petition, 60 Okla. L.Rev. 419 (2007), for a discussion of the state's "anti-SLAPP" act as it existed at that time, at 12 O.S. § 1443.1.

4. A cursory search of the Texas reporters reveals over one hundred appellate cases involving the Texas Act in the previous five years.

5. *See, e.g.*, Ariz. Rev. Stat. §§ 12-751 – 12-752 (2006), protecting "[s]tatements that are . . . made as part of an initiative, referendum or recall effort, before or submitted to a government body, concerning an issue under review by that body, to influence government action or result are protected." The article cited above describes Oklahoma's 2007 anti-SLAPP statute as narrowly drawn because it applied only to claims of libel. 41 Val.U.L.Rev. at 1249-1251.

6. *See* 12 O.S. Supp. 2014, § 1432(A), stating that "[i]f a legal action is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association, that party may file a motion to dismiss the legal action." *See also* Cal. Civ. Pro. Code § 425.16(b)(1), which provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

7. Although this Court stated, in *Anderson v. Wilken*, 2016 OK CIV APP 35, ¶ 4, 377 P.3d 149, that a plaintiff may "not rely on the facts pled in an OCPA dismissal proceeding," this statement was made in the context of a discussion of the unique procedural difficulty posed by OCPA § 1437. Section 1437 requires that, if a district court fails to set a hearing on an OCPA motion within a specified time, the motion is deemed denied and the matter may be immediately appealed *without hearing any evidence below*. We noted the problem created by requiring an appellate court to review a decision before any evidence is taken in the district court, and that due process would likely require the appellate court to take evidence and conduct a *de novo* trial of the issues, a function that Oklahoma's appellate courts have not previously performed, and that is traditionally outside our jurisdiction. It was in this context that we stated this Court and the parties could not simply rely on the pleadings at the appellate level, because the parties may need to present other facts beyond those required by minimal notice pleading.

8. In 2016 alone, Texas appellate courts considered TCPA claims involving **intentional infliction of emotional distress** (*Ana Sophia SPENCER & William Alex Spencer, Appellant v. Jennifer Overpeck, Appellee*, 04-16-00565-CV, 2017 WL 993093, at *3 (Tex. App. Mar. 15, 2017)); **harassment by a homeowners' association** (*Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 03-15-00498-CV, 2017 WL 875314, at *1 (Tex. App. Mar. 3, 2017)); **the disclosure of the identity of a person making a complaint** (*Int'l Ass'n of Drilling Contractors v. Orion Drilling Co., LLC*, 01-16-00187-CV, 2016 WL 7104019, at *1 (Tex. App. Dec. 6, 2016)); **rights under federal labor law arising out of demonstrations near stores** (*United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 02-15-00374-CV, 2016 WL 6277370 (Tex. App. Oct. 27, 2016)); **a suit brought by the Unauthorized Practice of Law Committee for the Supreme Court of Texas** (*Booker v. Unauthorized Practice of Law Comm. for Supreme Court of Texas*, 05-16-00039-CV, 2016 WL 5724898, at *1 (Tex. App. Oct. 3, 2016); **tortious interference with contract** (*Deuell v. Texas Right to Life Comm., Inc.*, 508 S.W.3d 679 (Tex. App. 2016), reh'g overruled (Dec. 29, 2016)); **violations of the Texas Uniform Trade Secrets Act (UTSA), business disparagement and invasion of privacy** (*Miller v. Talley Dunn Gallery, LLC*, 05-15-00444-CV, 2016 WL 836775, at

*2 (Tex. App. Mar. 3, 2016). It would be a mistake to consider the Act as applying only to classic libel suits.

9. *See* footnote 8, *supra*.

10. A further curious question arises if the Act requires a trial court to judge a defense on the merits pursuant to a preponderance standard before an answer has even been filed: *what is the effect of a denial of such judgment?* The court has considered the stated defenses on the merits, and found them inapplicable pursuant to a preponderance of the evidence. If the defendant raises *no additional evidence or defenses*, is it precluded from attempting to litigate these same defenses in a subsequent proceeding?

11. We cannot help noting that this legislation intended to provide a *rapid and simple procedure* has generated an appeal raising at least 12 factual/legal questions of defamation law and has delayed proceedings for some 18 months, before the defendant has answered. It appears that many types of suits potentially covered by the Act will now make trips to the appellate courts before they are at issue in the district courts.

12. The definition of "exercise of the right to petition" continues with numerous examples that we will not list because they are not implicated in our analysis.

13. The irony of this situation is difficult to escape.

14. "An affirmative defense is established when the publication is substantially true." *Akins v. Altus Newspapers, Inc.*, 1977 OK 179, 609 P.2d 1263. The general rule is that the 'truth of the communication is a complete defense to a civil action for libel.'" Grogan v. KOKH, LLC, 2011 OK CIV APP 34, ¶ 11, 256 P.3d 1021, citing *Oklahoma Publ'g Co. v. Kendall*, 1923 OK 999, ¶ 35, 221 P. 762.

15. *See Milliner v. Enck*, 709 A.2d 417 (Pa. Super. Ct. 1998); *Green Acres Trust v. London*, 688 P.2d 658 (Ariz. Ct. App. 1983); and *Harman v. Belk*, 600 S.E.2d 43 (N.C. Ct. App. 2004).

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DERRICK BLACK, an individual, Plaintiff/Appellant, vs. FERRELLGAS, INC., a Delaware Corporation, FERRELLGAS L.P., a Delaware Corporation, and JIMMY CHILDS, an individual, Defendants/Appellees.

Case No. 114,915. December 19, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE CAROLINE E. WALL, TRIAL JUDGE

AFFIRMED

Robert L. Rode, David C. Bean, RODE LAW FIRM, P.L.L.C., Tulsa, Oklahoma, for Plaintiff/Appellant

Jennifer D. Ary, FRANDEN/FARRIS/QUILLIN GOODNIGHT+ROBERTS, Tulsa, Oklahoma, for Defendants/Appellees

JERRY L. GOODMAN, JUDGE:

¶1 Plaintiff Derrick Black appeals the trial court's March 22, 2016, Journal Entry of Judgment, entered on a jury verdict, in Plaintiff's vehicle negligence case. Based on our review of the facts and applicable law, we affirm the judgment.

BACKGROUND

¶2 Plaintiff was severely injured on March 6, 2009, in a single-vehicle, non-contact accident, when he struck a curb while riding his motorcycle. He alleged he was forced to take evasive action when a truck, driven by Defendant Childs, and owned by Defendants Ferrellgas, Inc. and Ferrellgas, L.P., entered his lane from a cross street in order to make a left turn.[1] Plaintiff sued Defendants, alleging negligence.

¶3 A key disputed fact, which forms the basis of this appeal, is whether Defendant Childs, who was operating the Ferrellgas truck, had actually entered the intersection, causing Plaintiff to take evasive action. Plaintiff testified he did, and Childs testified he did not.

¶4 What is undisputed is that Childs exited an expressway and had driven to the end of the off ramp, stopping at a stop sign, with the intention of turning left. The off ramp had a single right turn lane and two left turn lanes. Childs stopped his truck in the left lane of the double left turn lanes. What happened next is in dispute.

¶5 Plaintiff and his motorcycle approached the intersection from Defendant Childs' left, at a disputed rate of speed.[2] Childs testified he first stopped at the wide, painted white stop lines, just before the two narrower, white crosswalk lines. He testified he moved his truck forward from the wide white line to the narrower pedestrian line, and stopped once again. Not seeing Plaintiff approaching because of the curvature of the road, Childs wrote a statement at the scene of the accident at the request of the investigating officer in which he stated:

> I was turning left from left hand left turn lane, inter-section was clear until motorcycle passed east bound on Apache stricking [*sic*] meadian [*sic*] becomeing [*sic*] airborn [*sic*] at high rate of speed. When motorcycle approach [*sic*] from my left I stopped. ...[3]

¶6 In a sworn deposition taken 18 months later and again at trial, Childs stated that he had: "stopped behind the first white line... ."[4] Then, "I proceeded to the crosswalk once I knew it was clear and stopped there ... to look again to make sure there wasn't any further traffic."[5] Childs continues, "So I pulled up to the line of the crosswalk to look left and back to the right and then looked left again ... and that's when I saw the motorcycle approaching."[6] Childs concluded, "When I stated that I had pulled out, I did not specify [to the investigating officer] how far I had pulled out. I had proceeded from the broad white line to the edge

of the crosswalk to make sure that the intersection was still clear from both directions."[7]

¶7 It was at this point that Plaintiff, riding the motorcycle, encountered the intersection. He testified:

> A All I can remember is seeing something moving from that stop sign as I was coming out from under that highway, and ... all I can remember is just seeing something white. That's all I can remember.
>
> Q Was it in your lane?
>
> A Yes.[8]

¶8 There was no collision between the motorcycle and the Ferrellgas truck, but Plaintiff lost control of the motorcycle and crashed into a curb, suffering severe injuries. Whether the truck moved into the intersection became the focus of much testimony.

¶9 Plaintiff cross-examined Childs extensively regarding the apparent contradiction between Childs' written statement and his testimony at trial regarding whether Childs' vehicle was moving into the intersection or merely moving up to the curb before turning.

¶10 Defendant's expert, Reynolds, is an expert in accident reconstruction. However, Plaintiff sought to disqualify Reynolds from testifying as an expert for the reason that the facts chosen by Reynolds, upon which he based his expert analysis, consisted of the "self-serving testimony provided by Childs at his deposition nearly eighteen months after the collision for which this testimony was contradictory to Childs' hand written statement at the scene of the collision as well as [Plaintiff's] trial testimony."[9]

¶11 At trial, Reynolds was asked:

> Q Why did you put Mr. Childs' vehicle starting right there?
>
> A This is the position taken from his deposition that he stopped at the stop bar... .[10]
>
> Q Have you been presented or provided Mr. Childs' statement he gave to the police?
>
> A Yes, I have.
>
> Q Does it in that statement state where he stopped?
>
> A I don't believe – no, it does not.
>
> Q So have you been provided his trial testimony?
>
> A Yes, I have.[11]
>
> Q [] You've read Mr. Childs' trial deposition, haven't you?
>
> A The trial transcript?
>
> Q Yes.
>
> A Yes.
>
> Q And you've read his deposition, correct?[12]
>
> A That's correct.
>
> Q And you used the deposition to formulate your opinion, correct?
>
> A That is correct.
>
> Q And both his trial testimony and his deposition testimony both say he stopped at the stop line.
>
> A They were consistent, yes.
>
> Q Does the statement he gave to the police mention where he stopped at any particular point?
>
> A No, he does not.
>
> Q Why did you use ... his deposition testimony as to where he stopped?
>
> A The reason is when you're doing a calculation, you have to have a known starting point somewhere and ... in some accidents where there's actually a collision, you have marks there that you can go back from, known points. In this particular case, there was no collision. We have no known contact point for Mr. Childs' vehicle, so what I have to rely on is his stated position there at the stop line, which is also a legal requirement to stop at the stop line or the stop bar.[13]

¶12 The trial court denied Plaintiff's attempt to disqualify Reynolds' testimony. The matter was submitted to a jury, which deliberated five hours before it returned a verdict. Nine jurors found Plaintiff was 69 percent contributorily negligent, and Defendant Childs was 31 percent negligent. The trial court therefore entered judgment in favor of all Defendants. Both Plaintiff and Defendants appealed the judgment.[14]

STANDARD OF REVIEW

> We must affirm a jury verdict if there is any competent evidence reasonably tending to support it, evidence which is relevant and material to the issue to be determined. *Jos. A. Coy Co. v. Younger*, 1943 OK 160, 192 Okla. 348, 136 P.2d 890. We do not weigh the evidence. We consider all the evidence tending to support the verdict, together with every reasonable inference from it, and must affirm unless there is an entire absence of proof on a material issue.

Covel v. Rodriguez, 2012 OK 5, ¶ 11, 272 P.3d 705, 710.

ANALYSIS

¶13 The sole issue on appeal is whether Defendant's expert witness was improperly allowed to testify. We review this trial court decision using the clear abuse of discretion appellate standard. *Christian v. Gray*, 2003 OK 10, ¶ 42, 65 P.3d 591, 608.

¶14 Plaintiff's first allegation of error in this regard is that the trial court erred in its *Christian/Daubert* "gatekeeping" role[15] when it permitted Defendants' expert witness Reynolds to testify because he "inappropriately gave expert opinion on the placement of [Defendant] Childs' vehicle for which he had no scientific bases [*sic*]."[16] Plaintiff further argues "the placement of Childs' vehicle was a heavily contested fact in issue, and there was no scientific or physical evidence to pinpoint the position of Childs' vehicle... ."[17] Plaintiff's second allegation of error regarding this witness closely aligns with the first, and centers on the allegation that the expert's testimony failed four foundational challenges set out in *Christian* and *Daubert*.[18]

¶15 Those questions are set out in *Christian*:

> *Daubert* provided a list of factors for the trial judge to consider when determining the admissibility of evidence. They include: 1. Can the theory or technique be, or has it been, tested; 2. Has the theory or technique been subjected to peer review and publication; 3. Is there a "known or potential rate of error ... and the existence and maintenance of standards controlling the technique's operation;" and 4. Is there widespread acceptance of the theory or technique within the relevant scientific community. *Daubert,* 509 U.S. at 593-594, 113 S. Ct. 2786. The inquiry is a flexible one, and focuses on the evidentiary relevance and reliability underlying the proposed submission, and not on the conclusions they generate. *Id.* 509 U.S. at 595, 113 S.Ct. 2786.

Christian v. Gray, 2003 OK 10, ¶ 8, 65 P.3d 591, 597 – 98. *Christian* set out the proper use of the Daubert analysis:

> We agree ... that a *Daubert* inquiry will be limited to circumstances where the reliability of an expert's method cannot be taken for granted. Thus, a *Daubert* challenge includes an initial determination of whether the expert's method is one where reliability may be taken for granted.

Christian, at ¶ 11, at, 599 – 600 (footnote omitted). The *Christian* Court then explained the trial judge's gatekeeping role:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether *that reasoning or methodology* properly can be applied *to the facts in issue*.

Christian, at ¶ 9, at 598 (emphasis added). In other words, a *Christian/Daubert* analysis presupposes there are facts in issue, and looks to determine whether the reasoning or methodology used by the expert to arrive at his opinion is properly applied to those preexisting disputed facts. A *Christian/Daubert* analysis is not applied to the underlying facts themselves, nor to the "conclusions they generate" (*Christian*, at ¶ 8, 597 – 98), but rather is applied only to the expert's methodology or analysis used to account for the disputed facts and render a conclusion that could be helpful to the jury.

¶16 Inconsistency in an expert's testimony relating to which facts the expert relied on – apart from the underlying scientific methodology used to analyze those facts – should be resolved by the finder of fact after both sides have had the opportunity to point out or defend those inconsistencies. Nowhere do we find that allegedly inconsistent factual testimony of an expert is part of a *Daubert* analysis. The validity of the underlying facts, upon which the expert relies for his analysis, is the

province of the jury, but not part of the trial court's gatekeeping action.

> The conclusions and opinions of the expert witnesses were in conflict. ... When the evidence is conflicting, it is for the jury to decide.

Covel v. Rodriguez, 2012 OK 5, ¶ 17, 272 P.3d 705, 712.

> Credibility of witnesses and effect and weight to be given to conflicting or inconsistent testimony are questions of fact to be determined by trier of facts, whether court or jury, and not questions of law for the Supreme Court on appeal. *Video Independent Theatres, Inc. v. Cooper,* 421 P.2d 833 (Okl.1966), 26 A.L.R.3d 1308.

Cent. Plastics Co. v. Goodson, 1975 OK 71, ¶ 29, 537 P.2d 330, 335.

¶17 With this framework in mind, we now examine the issue raised by Plaintiff.

¶18 Prior to giving his testimony to the jury, Reynolds was asked, out of the presence of the jury, to describe what evidence he used upon which to arrive at his opinion. Reynolds stated he used Childs' sworn deposition and trial testimony as the basis for his accident reconstruction calculations, rather than the written statement given immediately after the accident.

¶19 Plaintiff's attorney then asked:

> Q In your field, when one witness gives two separate statements, is there anything in your field, any methodology or scientific basis to pick one statement over the other when you incorporate it into a major conclusion?
>
> A Not that I'm aware of.
>
> Q And that hasn't been tested, has it?
>
> A Not that I'm aware of.
>
> Q Has that ever been subject to peer review?
>
> A Not that I'm aware of. ...[19]

¶20 Moments later, the trial court stated:

> []The way I hear the testimony from Mr. Reynolds is that he applied his scientific calculations, which the calculations, themselves, I did not hear testimony that the calculations are not scientifically accepted. The issue is using as the basis of the calculation the defendant's own exact location as a – there has to be a point at which the calculation has to begin, otherwise there can be no calculation. ... I think it is very reasonable that a juror could infer that the statement – the testimony of Mr. Childs is inconsistent.
>
> The fact that Mr. Reynolds chose to assign a location based on what Mr. Childs said in his deposition, I'm going to permit the opinion and overrule the motion to exclude it.[20]

¶21 The trial court correctly admitted the testimony. Plaintiff misapplied the *Christian/Daubert* analysis by attempting to shift the focus of that analysis from the methodology used by Reynolds (which is not in dispute), to the underlying facts chosen by Reynolds, upon which he based his unquestioned analysis.[21] His choice of which of Childs' statements to use in his analysis is a proper cross-examination subject, but not the subject of a *Christian/Daubert* analysis, which "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be *applied to the facts in issue." Christian*, ¶ 9, at 598 (emphasis added). The trial court's gatekeeping role is designed to test the expert or scientific means by which the expert arrives at a conclusion, not a test of the underlying facts upon which the expert relies. Plaintiff's question, set out above, clearly asked the expert why he chose one statement over another, but then incorrectly applied the *Christian/Daubert* test to the expert's reason why that choice was made. The trial court correctly understood this and permitted the expert to testify. We find no error.

¶22 The expert was then subjected to extensive cross-examination by Plaintiff regarding the expert's choice of facts, thereby revealing to the jury any conflicts between Childs' written statement and his testimony at trial. The jury was free to either accept or disregard all, some, or parts of the expert's opinion. Plaintiff admits in his brief-in-chief that the jury had as much information as did the expert regarding the position of Childs' vehicle.[22]

¶23 We disagree with Plaintiff's assertion on appeal that the five hours between submission of the case to the jury and the rendition of the verdict suggests Defendant's expert witness' testimony injected confusion into the deliberations. We note that the jury's contributory negligent verdict was unusually precise: 69-31

percent, and that during the five-hour deliberation, the jury asked for: a large photograph of the intersection;[23] tape to affix photographs to the wall;[24] the bailiff to notify a juror's family members that they would be in deliberation;[25] and ordered pizza and soft drinks.[26] We can equally infer from these requests the jury took their role seriously and gave due consideration to the well-tried case.

> In an action at law, a jury verdict is conclusive as to all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, this Court will not disturb the jury's verdict or the trial court's judgment based thereon. *Hames v. Anderson*, 571 P.2d 831, 833 (Okla.1977); *Wat Henry Pontiac, Inc. v. Pitcock*, 301 P.2d 203, 204 Fourth Syllabus (Okla.1956). Where such competent evidence exists, and no prejudicial errors are shown in the trial court's instructions to the jury or rulings on legal questions presented during trial, the verdict will not be disturbed on appeal. *Lawton Refining Co. v. Hollister*, 86 Okla. 13, 205 P. 506 Second Syllabus (1922). In an appeal from a case tried and decided by a jury an appellate court's duty is not to weigh the evidence and determine which side produced evidence of greater weight [*Tapley v. Patton*, 349 P.2d 507, 508 (Okla. 1960)], *i.e.* it is not an appellate court's function to decide where the preponderance of the evidence lies – that job in our system of justice has been reposed in the jury. In a jury-tried case, it is the jury that acts as the exclusive arbiter of the credibility of the witnesses. *Holley v. Shepard*, 744 P.2d 945, 947 (Okla.1987). Finally, the sufficiency of the evidence to sustain a judgment in an action of legal cognizance is determined by an appellate court in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it. *Park v. Security Bank and Trust Company*, 512 P.2d 113, 118 (Okla.1973).

Florafax Int'l, Inc. v. GTE Mkt. Res., Inc., 1997 OK 7, ¶ 3, 933 P.2d 282, 287.

¶24 Finding no trial court error occurred, and finding competent evidence exists supporting the verdict, the trial court's judgment on the verdict is without error.

CONCLUSION

¶25 The trial court's March 22, 2016, Journal Entry of Judgment is affirmed.

¶26 **AFFIRMED**.

FISCHER, P.J., and RAPP, J., concur.

JERRY L. GOODMAN, JUDGE:

1. R. 1.
2. Plaintiff's expert calculated his speed as 44.18 MPH (Transcript Vol. II, p. 144, l. 22). Plaintiff testified his speed was 35-38 MPH (Transcript, Vol IV, p. 396, l. 13), and Defendant's expert calculated his speed at 70.32 MPH (Transcript, Vol. IV, p. 499, l 21.) The speed limit at this intersection is 40 MPH.
3. R. 156.
4. R. 349, Transcript of Jury Trial, March 1, 2016, vol. 2, p. 199, ll 23.
5. *Id.* p. 201, l. 5-8.
6. *Id.* p. 201, ll.24-25; p. 202, ll. 1-3.
7. *Id.* p. 209, ll. 4-8.
8. R. 351, Transcript of Jury Trial, vol. IV, March 3, 2016, p. 402, ll. 9-15.
9. Brief-in-Chief, October 20, 2016, p. 2.
10. R. 351, Transcript March 3, 2016, vol. IV, p. 481, ll. 22-25.
11. *Id.*, p. 482, ll. 6-10.
12. *Id.* p. 482, ll. 20-25.
13. *Id.* p. 483, ll. 1-22.
14. Defendants' counter-appeal raised issues that would only be relevant in the event this Court granted Plaintiff a new trial. Because we find no reversible error occurred, we need not address any issues raised in Defendants' counter-appeal. Therefore, Appellant's September 29, 2016, motion to dismiss Appellees' counter-petition is denied.
15. *Christian v. Gray*, 2003 OK 10, 65 P.3d 591, noted the trial court's gatekeeping capacity already existed in Oklahoma, and stated *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Patrick Carmichael et al.*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), were but refinements to existing Oklahoma law.
16. Brief-in-Chief, October 20, 2016, p. 10.
17. *Id.*
18. *Id.* at 16.
19. R. 351, Transcript of Jury Trial, March 3, 2016, Vol. IV, p. 435, ll. 12-21
20. R. 351, Transcript of Jury Trial, March 3, 2016, Vol. IV, p.442, ll. 12-25, p. 443, ll. 1-4.
21. His analysis consisted of applying well-established physics principles of speed, time, length, and acceleration to fixed points at the scene of the accident, such as skid marks, line of sight measurements, and where the motorcycle came to rest.
22. Brief-in-Chief, p. 10-11; 16.
23. Jury Question No. 1.
24. Jury Question No. 2.
25. Jury Question No. 3.
26. Jury Question No. 4.

2018 OK CIV APP 39

STATE OF OKLAHOMA, ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellee, vs. WADE PENNINGTON and SHARON PENNINGTON, husband and wife; and PENNINGTON PROPERTIES, L.L.C., Defendants/Appellants, The Pontotoc County Board of Commissioners, Defendant.

Case No. 115,103. April 12, 2018
As Corrected April 19, 2018

APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY, OKLAHOMA

HONORABLE C. STEVEN KESSINGER, JUDGE

AFFIRMED

C. Bart Fite, FITE LAW FIRM, Muskogee, Oklahoma, for Appellee,

Brett Agee, Logan Beadles, GARVIN AGEE CARLTON, Pauls Valley, Oklahoma, for Appellants.

Larry Joplin, Judge:

¶1 Defendants/Appellants Wade Pennington and Sharon Pennington, husband and wife, and Pennington Properties, L.L.C. (collectively, Defendants), seek review of the trial court's order granting judgment on a jury's verdict which determined the value of Defendants' property taken by eminent domain and condemned for construction of highway improvements by Plaintiff/Appellee State of Oklahoma, ex rel. Department of Transportation (State). In this appeal, Defendants complain the trial court erred (1) in excluding evidence of State's "preliminary" construction plans, different from the "current" plans, (2) in refusing to instruct the jury concerning State's commitment to follow the "current" plan, and (3) in excluding rebuttal testimony undermining the credibility of State's appraiser.

¶2 Defendants own property on Highway 19 in Pontotoc County, Oklahoma. On the property, Defendants operate a used-car lot and salvage operation, a truck-and-trailer repair shop, offices of Pennington Transportation, and a convenience store. State sought to condemn a portion of Defendants' property – 1.27 acres for highway right-of-way, .01 acres for a utility easement, and .09 acres for a temporary construction easement – to widen Highway 19 adjacent to Defendants' property. Defendants objected to State's plans as restricting ingress and egress to their businesses, impairing the operation of their truck-and-trailer repair operation, limiting the view of their used-car lot from the highway, and requiring the relocation of their diesel fuel pump.

¶3 Commissioners were appointed to appraise and determine just compensation for the value of Defendants' property actually taken and the damage to the remainder. The Commissioners returned their report assessing damage to Defendants' property in the amount of $342,000.00. State deposited assessed sum, which Defendants withdrew with the trial court's permission. State objected to the Commissioners' report, and demanded a jury trial on the issue of just compensation.

¶4 Prior to trial, and as a result of negotiations between the parties, State agreed to a revised plan for construction of the highway improvements, addressing some of Defendants' grievances. Particularly, State agreed to construct five new entrances to Defendants' property. The week before trial, the trial court disposed of the numerous motions in limine filed by State, by which the trial court excluded, inter alia, the admission of any evidence or testimony concerning the "preliminary" construction plans prior to the negotiated changes embodied in the "current" plans, as well as any testimony or evidence concerning the amount of the Commissioners' award.

¶5 On the day of trial, Defendants announced their intention to offer evidence of the billing practices of Mr. Grace, an expert witness and the appraiser for State in this and other cases, said to demonstrate the witness's gross overbilling of time in other cases and, consequently, undermining his credibility in the present case, which the trial court denied admission. The Defendants also requested the jury be allowed to view the property, which request the trial court denied. The trial court again refused to permit the admission of any testimony or evidence concerning damage to Defendants' property under the "preliminary" plans.

¶6 At trial, Defendants first presented the testimony of their appraiser, Mr. Hoyt. Mr. Hoyt appraised Defendants' total damages for the property taken and consequential damages to the remainder – including construction of a building, paving and relocation of the diesel fuel pump – in the sum of $161,700.00. Defendant Wade Pennington then testified concerning the impaired access to his businesses resulting from the highway improvements, and the changes to the property made necessary by the highway improvements.

¶7 State then offered the testimony from the head of its Civil Engineering Division, Mr. McIntosh. Mr. McIntosh testified and presented evidence showing that the new driveways as depicted in the "current" plans would be more than sufficient to allow trucks-and-trailers to enter the property and would permit the enjoyment of the property as used prior to the highway improvements. State also presented the testimony of its appraiser, Mr. Grace, who

assessed total damage to Defendants' property and remainder in the sum of $18,600.00.

¶8 Upon instruction, the jury returned its verdict for Defendants, and fixed their recovery of just compensation in the amount of $55,600.00. The trial court granted judgment on the jury's verdict to Defendants in that sum and, based on the Defendants' withdrawal of the $342,000.00 deposited by State in accord with the Commissioners' report, held that Defendants owed State the difference between the sum withdrawn and the jury's verdict, in the amount of $286,400.00. Defendants appeal.

¶9 The trial court is vested with wide discretion in determining what information it receives in a condemnation proceeding. *See, e.g., State ex rel. Dep't. of Transp. v. Little*, 2004 OK 74, ¶11, 100 P.3d 707, 712. The "admissibility of evidence of value in condemnation cases is more largely within the trial court's discretion than is the determination of other issues, so that error predicated upon the exclusion of certain evidence will not be sustained except in cases of manifest error." *State ex rel. Dept. of Transportation. v. Lamar Advertising of Oklahoma, Inc.*, 2014 OK 47, ¶¶ 8-9, 335 P.3d 771, 774 (citations omitted). *See also, Myers v. Missouri Pacific R. Co.*, 2002 OK 60, ¶36, 52 P.3d 1014, 1033.[1]

¶10 "On appeal in eminent domain proceedings, the verdict of the jury may be set aside only when it manifestly appears that it is unjust and not supported by any competent evidence." *State ex rel. Dept. of Transportation. v. Lamar Advertising of Oklahoma, Inc.*, 2014 OK 47, ¶8, 335 P.3d 771, 774. (Citations omitted.) "An appellate court's duty is to ensure that there is 'competent evidence reasonably tending to support the verdict of the jury and no prejudicial errors are shown in the trial court's instructions to the jury or on legal questions presented during trial.'" *Id*. (Citations omitted.) *See also, Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶15, 139 P.3d 897, 902.[2]

¶11 Defendants first complain the trial court erred in excluding evidence and testimony of the damage to Defendants' property under the State's "preliminary" plans. Particularly, Defendants argue that a condemnee's damages are determined at the time of the "taking," and the "taking" occurs on the date when the condemnor pays the amount of the commissioners' award into court. *State ex rel. Department of Transp. v. Post*, 2005 OK 69, ¶15, 125 P.3d 1183, 1188.3 So, say Defendants, they were entitled to present evidence of the damage to their property on the date of the taking, i.e., the date the commissioners' award was deposited in court, pursuant to the "preliminary" plans then in effect. *See also, Oklahoma Turnpike Authority v. Burk,* 1966 OK 113, ¶13, 415 P.2d 1001, 1005.[4]

¶12 However, both *Post* and *Burk* are clearly distinguishable from the present case: in neither *Post* nor *Burk* had the condemnor and condemnee negotiated and agreed to a change of the planned improvements *after the commissioners' award had been paid into court*.

¶13 It seems to us that, where the condemnor and the condemnee agree to a change in the planned improvements to address the concerns of the condemnee *after the commissioners' award has been paid into court*, the question becomes, what are the condemnee's damages under the plan for improvements which were changed to address the concerns of the property owner?

¶14 This is an evidence question. Forty years ago, the Court of Appeals held that the actual plans by which the condemnor would build the highway improvements were admissible to determine the extent of the condemnee's damages, and that the trial court erred in refusing to admit such plans for consideration by the jury. *State ex rel. Dept. of Highways v. Maloney*, 1975 OK CIV APP 35, ¶¶18, 22, 537 P.2d 464, 467, 468.[5]

¶15 In the present case, the damage to Defendants' property cannot fairly be determined by reference to the "preliminary" plans. This is necessarily so because, pursuant to the parties' negotiations, the "preliminary" plans were modified to accommodate at least some of the Defendants' complaints regarding the impaired driveway access from the new highway. The "current" plans, providing for the construction of five driveways for ingress and egress to Defendants' businesses, more accurately reflect the true state of ingress and egress which will exist after construction of the improvements, and consequently, constitute a more accurate representation of the damage to Defendants' property resulting from the construction of the highway improvements. We therefore hold the trial court did not abuse its discretion in refusing to admit evidence of Defendants' damages under the "preliminary" plans.

¶16 In this vein, Defendants sought to introduce the deposition testimony of Ron Brown and Carl Cannizzaro, concerning the impaired

access under the "preliminary" plans, and the location of the highway vis-a-vis Defendants' buildings, but neither their testimony, nor the offered rebuttal testimony of Defendant Wade Pennington, addressed the affect of the highway improvements under the "current" plan. We again hold the trial court did not abuse its discretion in excluding any testimony and evidence concerning the extent of Defendants' damages under the "preliminary" plans.

¶17 Defendants also complain the trial court abused its discretion in refusing to permit the jury to view the property. Whether to allow the jury to view the property was a question addressed to the discretion of the trial court. *See, e.g., City of McAlester v. Delciello*, 1966 OK 58, ¶0(1), 412 P.2d 623, 624.6 State asserts that the location of the driveways under the "current" plan was not marked. If the location of the driveways as planned was not marked, an inspection of the property by the jury would not be helpful, and might very well confuse the jury. In this particular, we cannot say the trial court abused its discretion in refusing to allow the jury to view the property.

¶18 Defendants also complain the trial court abused its discretion in refusing to admit a video, said to demonstrate the impaired access to the property by trucks-and-trailers resulting from construction of the highway improvements. However, it was conceded the video was made by reference to the location of the driveways under the "preliminary" plans, not the "current" plans, and we have held the trial court did not abuse its discretion in refusing to admit any testimony and evidence concerning the effect of the "preliminary" plans on the value of Defendants' property.

¶19 Defendants also complain the trial court erred in refusing to instruct the jury that State had committed to construct the highway improvements pursuant to the "current" plan. Such an instruction was required, say Defendants, given the testimony of Mr. McIntosh and the representation by the attorney for State that the State was bound by the testimony and evidence offered at trial concerning State's obligation to construct the highway improvements according to "current" plans.

¶20 "It is the trial court's duty to instruct on the fundamental issues of a case." *Taliaferro v. Shahsavari*, 2006 OK 96, ¶25, 154 P.3d 1240, 1247-1248. "[T]he test upon review of an instruction urged as improperly given or refused is whether there is a probability that the jury was misled into reaching a result different from that which would have been reached but for the error." *Myers*, 2002 OK 60, ¶29, 52 P.3d at 1028-1029. (Footnotes omitted.)

¶21 Whether the State might or might not change its "current" plans for construction of the highway improvements was wholly speculative and, according to the testimony of Mr. McIntosh, the head of State's Civil Engineering Division, construction plans are not ordinarily subject to change. We cannot say the jury was misled or reached a different conclusion than they reached but for the trial court's failure to instruct as Defendants requested in this particular.

¶22 In their second proposition, Defendants complain the trial court abused its discretion in refusing to admit the testimony of Judy Connolly, said to demonstrate the over-billing of State by State's appraiser, Mr. Grace, and thus casting his credibility into doubt. However, the testimony and evidence Defendants sought to introduce through Ms. Connolly concerned Mr. Grace's billing practices in other cases, not the present case. Mr. Grace's billing practices in the present case were not at issue.

¶23 Moreover, Ms. Connolly was not listed as a witness for Defendants, and the evidence Defendants sought to elicit through Ms. Connolly was neither listed in the pre-trial order, nor provided to State prior to trial within the time frame specified by the pre-trial order. The trial court is granted broad discretion in the enforcement of the pre-trial order, and the trial court's judgment will not be disturbed unless affected by an abuse of discretion. *See, Sims v. Travelers Ins. Co.*, 2000 OK CIV APP 145, ¶14, 16 P.3d 468, 472.7 The trial court did not abuse its discretion in this particular.

¶24 We have reviewed the transcript of the trial and the record in the present case. The trial court did not abuse its discretion in the particulars urged by Defendants. The verdict of the jury is free of legal error and is supported by competent evidence. The order of the trial court granting judgment on the jury's verdict is AFFIRMED.

BELL, P.J.; and BUETTNER, J., concur

Larry Joplin, Judge:

1. "A trial court has discretion in deciding whether proffered evidence is relevant and, if so, whether it should be admitted, and a judg-

ment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion."

2. "A judgment on a jury verdict is reviewed for competent evidence reasonably tending to support the verdict and for the absence of prejudicial error in the jury instructions and legal rulings. A reviewing court may not set aside a jury verdict or grant a new trial for misdirection of the jury or error in any matter of pleading or procedure unless the error has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right." (Citations omitted.)

3. "A condemnee's damages are judged by the conditions existing when the property is taken. The Oklahoma Constitution art. 2, §24, statutory provisions governing condemnation proceedings and this Court's jurisprudence, all support a determination that the 'date of taking' is established when the condemnor pays the commissioners' award into court." (Citations omitted.) (Footnotes omitted.)

4. "Improvements or changes proffered by the condemnor after taking, as a means of attempting to mitigate the damages, provide no basis for reducing the damages, which must be determined as of the time of the taking."

5. "'[T]he plans, specifications, or stipulations of the condemnor as to the nature of the improvements to be construed on or about the premises sought to be condemned, or the use to be made of such premises, are admissible in evidence to enable the jury to fix the damages of the owner of the premises with more precision.' . . . [W]e hold that the trial court committed reversible error in not allowing plaintiff to introduce the testimony proffered by plaintiff, together with the plans and specifications by which the road would be built."

6. "A view by the jury of property, the subject of the [condemnation] action, is discretionary with the trial court, and his ruling thereon will not be reversed on appeal in the absence of a showing of abuse of discretion."

7. "The trial court excluded the evidence because the Sims failed to list the documents on the pre-trial order. A trial court has the power to enforce its own pre-trial order which is designed to prevent surprise evidence. The trial court's ruling will only be reversed if an abuse of discretion is found. We find no abuse of the trial court's discretionary power." (Citation omitted.)

2018 OK CIV APP 40

FARMERS INSURANCE COMPANY and CAROL LYNCH, Plaintiffs/Appellees, vs. CHARMIN VANWINKLE and EAGLEMED LLC, Defendants/Appellees, and CHOCTAW EMS, Defendant, and PARKLAND HEALTH & HOSPITAL SYSTEM, Defendant/Appellant.

Case No. 115,746. April 13, 2018

APPEAL FROM THE DISTRICT COURT OF PUSHMATAHA COUNTY, OKLAHOMA

HONORABLE JANA WALLACE, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Shena E. Burgess, SMILING, SMILING & BURGESS, Tulsa, Oklahoma, for Plaintiffs/Appellees

Gerald C. Dennis, Antlers, Oklahoma, for Defendant/Appellee Charmin VanWinkle

Douglas Turek, THE TUREK LAW FIRM, PC, The Woodlands, Texas, for Defendant/Appellant

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Parkland Health & Hospital System (Parkland) appeals a decision of the district court apportioning pro rata the proceeds of an insurance settlement between injured party Charmin VanWinkle[1] and lienholder Parkland. On review, we reverse the decision of the district court and remand with directions.

BACKGROUND

¶2 This appeal has its roots in an automobile accident between VanWinkle and Carol Lynch in Hugo, Oklahoma. VanWinkle sustained injuries, and was transported to Parkland Hospital in Dallas. Parkland filed a Texas hospital lien (the Parkland lien) of $191,922 for treatment. VanWinkle alleged some $200,000 in damages. Lynch carried $25,000 in liability insurance with Farmers Insurance Company (Farmers). Farmers and Lynch filed an interpleader action in district court, seeking to interplead the $25,000 and have the court distribute it. Parkland argued that, as a medical lien claimant, it has a statutory priority of payment over VanWinkle. The court split the $25,000 over the objection of Parkland as follows: $11,666 to VanWinkle; $11,194 to Parkland; and $2,139 to the ambulance provider, EagleMed LLC. The claim and award of funds to the ambulance provider is not disputed.

STANDARD OF REVIEW

¶3 An interpleader proceeding is essentially equitable in nature. "[W]here the request for interpleader is approved, the questions to be considered are equitable in nature." *Welch v. Montgomery*, 1949 OK 80, ¶ 11, 205 P.2d 288. Equitable decisions are reviewed for abuse of discretion. "An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, ¶ 13, 171 P.3d 890 (emphasis omitted). Here, our review may encompass both claims of legal error and claims of the lack of an evidentiary basis for the court's decision. We review the district court's conclusions of law *de novo. Nat'l Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc.*, 1997 OK 36, n. 18, 946 P.2d 662.

ANALYSIS

¶4 An initial oddity that presents itself is that Farmers' motion appears to be some form of "conditional interpleader" made on behalf of more than one party. In a traditional interpleader action, the plaintiff is a mere disinter-

ested stakeholder, and the contest is strictly between the claimants to the fund. *Magnolia Petroleum Co. v. Ouart*, 1947 OK 117, 192 P.2d 698. The plaintiff has no interest in the relative merits of the parties or the disposition, and merely seeks to avoid liability for distributing the funds to the wrong party or the expense of participating in the litigation of such claims.[2] In this petition, however, the same counsel was apparently representing both Farmers Insurance and tortfeasor Carol Lynch, and both were listed as plaintiffs. Because of this, the petition sought not to simply implead the funds, but stated that Farmers was only prepared to implead *provided* that both the injured party and the medical lienholders would release tortfeasor Lynch from any further liability resulting from the collision.

¶5 The petition appears to meet none of the traditional requirements of interpleader because the interpleader was not disinterested, there had been no settlement, and there had been no adjudication of liability. Although the record indicates that VanWinkle did settle with Lynch more than three months *after* the interpleader was filed, we think it quite clear that the proper procedure is to first obtain a settlement, and *then* file a petition for interpleader if necessary. Any error appears harmless in the circumstances of this case, however.

I. "IN-STATE" VERSUS "OUT-OF-STATE" LIENS

¶6 This appeal raises two questions of law: (1) whether a court is required to give priority to a lien filed by a medical provider over the claim of an injured plaintiff, and (2) does this result change if the medical provider holding a lien is not a "hospital in this state"? Title 42 O.S. Supp. 2012 § 43 provides in part:

> Every hospital in this state, which shall furnish emergency medical or other service to any patient injured by reason of an accident not covered by the Workers' Compensation Code, shall, if such injured party shall assert or maintain a claim against another for damages on account of such injuries, have a lien upon any recovery or sum had or collected or to be collected by such patient . . ..

¶7 "The obvious purpose of the hospital lien statute is to encourage hospitals to care for accident victims who might otherwise be non-paying patients." *Kratz v. Kratz*, 1995 OK 63, ¶ 12, 905 P.2d 753. The Oklahoma Supreme Court recognized in *Vinzant v. Hillcrest Med. Center,* 1980 OK 50, ¶ 7, 609 P.2d 1274, that "the legislatures of several states have enacted hospital lien statutes" in an attempt to lessen the burden imposed on hospitals by non-paying patients by giving hospitals liens on "any recovery a patient might obtain from a tortfeasor." This lien is given second priority to that of an attorney in the case. "The apparent legislative intent is to provide a certain degree of protection to the lawyer while he effectuates a recovery for his client." *Id.*, ¶ 6. In this case, however, the plaintiff's attorney has made no claim, and no lien is recorded.

¶8 Parkland's lien was filed pursuant to the Texas hospital lien statute, Tex. Prop. Code § 55.002, which provides:

> (a) A hospital has a lien on a cause of action or claim of an individual who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person. For the lien to attach, the individual must be admitted to a hospital not later than 72 hours after the accident.

¶9 The Texas Legislature passed the hospital lien statute "to provide hospitals an additional method of securing payment for medical services, thus encouraging the prompt and adequate treatment of accident victims" and reducing hospital costs. *McAllen Hosps., L.P. v. State Farm Cty. Mut. Ins. Co. of Tex*., 433 S.W.3d 535, 537 (Tex. 2014). Hence, the public policy underlying the Oklahoma and Texas statutes is strongly similar. Parkland argues that, given the comparable and similar public policies of the two adjoining states, Oklahoma should give comity to Texas hospital liens that are incurred in providing accident treatment to Oklahomans.

¶10 Comity does not compel a state to follow another's policy but, instead, constitutes an expression of a state's voluntary decision to defer to the policy of another jurisdiction. *Burrell v. Burrell,* 2007 OK 47, n. 4, 192 P.3d 286, notes that comity is:

> The most appropriate phrase to express the true foundation and extent of the obligation of the law of one nation within the territory of another. It is derived altogether from the voluntary consent of the latter, and it is inadmissible when it is contrary to its known public policy or prejudicial to its interests . . . (quotation marks omitted).

¶11 In this case, the public policies of the two states have a clear and substantially identical aim: to encourage the treatment of the state's citizens who have been injured in an accident. The aim is achieved by providing a treating hospital with a lien on any subsequent recovery from a tortfeasor. Given this legislative recognition that an enforceable lien encourages treatment, failure to give comity to Texas liens incurred in the treatment of Oklahoma citizens could undermine this public policy by discouraging "border" medical facilities from treating injured citizens of an adjoining state. In this case, therefore, giving comity is not only *consistent* with the public policy of Oklahoma, but a failure to give comity might *undermine* that policy. We find that the public policy of Oklahoma expressed in 42 O.S. § 43 is properly served by giving comity to the Texas lien in this case.[3]

¶12 Finally, if we were to interpret 42 O.S. § 43 as giving a special or unique priority to liens filed against Oklahoma citizens by "hospitals in this state" to the detriment of those filed against Oklahoma citizens by hospitals in other states in otherwise identical circumstances, a potential Fourteenth Amendment problem arises. The basic principle of equal protection of law examines whether a state law discriminates against out-of-state actors relative to similarly situated in-state actors. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1143 (10th Cir. 2016). Because we find that the Texas liens should be given comity in this case, however, we need not address this issue.

II. THE DISTRICT COURT'S DECISION

¶13 The conclusion that the district court should have given comity to the Texas lien does not end our inquiry. The district court appeared to *recognize the Texas lien as valid*. It further (correctly) recognized that the "make whole" rule did not apply in this situation. The court made no finding that the status of the Parkland lien was different in any way because it was a Texas lien. The court, however, evidently concluded that VanWinkle's claim on the tendered policy limits as an injured plaintiff held an *equal priority to the lien claim* of the hospital, and ordered a pro rata distribution.

¶14 In its appellate brief, Farmers argues that, if funds are insufficient to cover all valid claims, the "common fund" doctrine applies and that equity will "regard all demands as standing on an equal footing," overcoming the lien's priority of payment over an unsecured debt. Farmers cites for this doctrine the 10th Circuit case of *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957).[4] The *Burchfield* case, however, was decided more than ten years before 42 O.S. § 43 was first enacted, and does not appear to address a hospital lien at all. The "common fund" doctrine primarily concerns the right to recover attorney fees from parties benefitting from litigation who have no contractual relationship with the attorney securing the recovery.[5] *Burchfield* cited to a 1932 Connecticut case (*Century Indem. Co. v. Kofsky*, 161 A. 101 (Conn. 1932)) that described the doctrine as requiring a pro rata distribution of a fund that is insufficient to satisfy all claimants. The crucial distinction is that, in both *Burchfield* and *Kofsky,* the claims were *equally situated* in terms of priority. In both *Burchfield* and *Kofsky* the claimants were all parties injured by the same act of negligence. We find no principle that this doctrine applies between a medical lienholder and a plaintiff if settlement funds are insufficient to satisfy the medical lien. Nor do we find any case law indicating that the claim of a plaintiff against a settlement is equally situated to that of a lienholder.

¶15 Farmers' citation to general equity principles stated in 48 C.J.S. *Interpleader* § 45 is likewise of little value. We must be mindful of the maxim *aequitas sequitur legem* – "equity follows the law." If the law establishes that a lien has priority over the otherwise unsecured damages claim of an injured party, that rule will not change simply because the question arises in an equitable interpleader action. We find that the court could not order a pro rata distribution that included the injured party under the facts of this case.

CONCLUSION

¶16 We find no authority for a pro rata distribution of the settlement in this case to the injured party, and hold that Oklahoma would give comity to the Parkland lien. We do not hold that any and all medical liens from foreign states should be given comity, and make no comment on situations that do not involve the three critical facts in this case. These are: (1) citizens of Oklahoma; (2) injured in an accident that took place in Oklahoma; and (3) treated in a state that has a similar lien statute and similar public policy aims. Under these circumstances, however, we find that the court should give comity to the Parkland lien. We therefore reverse the district court's decision, and remand for a distribution order awarding all of

the insurance proceeds on a pro rata basis to Parkland and EagleMed.

¶17 **REVERSED AND REMANDED WITH DIRECTIONS**.

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

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. It should be noted that VanWinkle did not file an answer brief in this appeal.

2. The classic examples are bank accounts or life insurance policies that have multiple claimants. The holder of the funds has no interest in which claimant receives them, but only wishes to avoid liability for a wrongful distribution.

3. Without specifically addressing the comity issue, we reached the same result in *Ramirez v. Dallas County Hospital District*, 2010 OK CIV APP 146, 245 P.3d 627. Since *Ramirez* was decided, the Legislature has not amended the relevant portions of 42 O.S. Supp. 2012 § 43. Failure of the Legislature to change the law after judicial construction amounts to "ratification of the construction placed upon the statute by the *Court." Couch v. Int'l Bhd. of Teamsters*, 1956 OK 239, ¶ 6, 302 P.2d 117.

4. Farmers' brief is somewhat odd, in that it maintains a federal citation format throughout, rather than the required Oklahoma format, and cites persuasive federal law in preference to state precedent.

5. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79, 100 S. Ct. 745, 62 L.Ed.2d 676 (1980) (in accord with traditional practice in courts of equity, a litigant or an attorney who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole).

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 3, 2018

F-2017-304 — Wayne Duke Kalbaugh, Appellant, was tried by jury for the crimes of Count 4 - Aggravated Attempting to Elude an Officer; Count 5 - Possession of Methamphetamine; Count 6 - Possession of a Firearm After Conviction of a Felony and Count 8 - Possession of an Offensive Weapon in the Commission of a Felony, all after Conviction of Two or More Felonies in Case No. CF-2014-8557 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 30 years imprisonment on Count 4, 15 years in Count 5, 25 years in Count 6 and 30 years in Count 8. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Wayne Duke Kalbaugh has perfected his appeal. Judgment and Sentence AFFIRMED; Motion to Supplement and/or for an Evidentiary Hearing DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., recuse.

F-2017-52 — Lonnie Lee Wilson, Appellant, was tried by jury for the crimes of Count 1 - Trafficking in Cocaine Base After Conviction of Two or More Felonies; Count 2 - Possession of a Firearm After Conviction of a Felony, After Conviction of Two or More Felonies; Count 4 - Possession of Marijuana, Subsequent Offense; and Count 6 – Possession of Drug Paraphernalia in Case No. CF-2013-3707 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 30 years imprisonment and a $25,000 fine on Count 1, three years on Count 2, two years and a $5,000 fine on Count 4, and one day in county jail and a $100 fine in Count 6. The trial court sentenced accordingly. From this judgment and sentence Lonnie Lee Wilson has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

C-2017-898 — Martin Lee Jamison, Petitioner, entered unnegotiated guilty pleas to the crimes of Count 1 - Second Degree Felony Murder, After Conviction of Two or More Felonies; Count 4 – Driving Under the Influence of Intoxicants and Causing Great Bodily Injury and Count 5 – Leaving the Scene of an Accident Involving Property Damage in Case No. CF- 2016-920 in the District Court of Tulsa County. At a July 25, 2017, the Honorable William J. Musseman sentenced him to 30 years imprisonment on Count 1, 15 years with the last five years suspended on Count 4 and one year in county jail on Count 5. Judge Musseman or-dered the sentences in Counts 4 and 5 to be served concurrently but consecutively to Count 1. On August 4, 2017, Petitioner filed a *pro se* request to withdraw his pleas. Conflict counsel was appointed, and at an August 17, 2017, hearing, the trial court denied the request. From this denial of his motion to withdraw guilty pleas, Martin Lee Jamison has perfected his certiorari petition. The trial court's denial of motion to withdraw guilty plea AFFIRMED; Petition for Certiorari DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-397 — Trent Gene Veasey, Appellant, was tried by jury for the crime of Trafficking in Methamphetamine in Case No. CF-2015-490 in the District Court of Kay County. The jury returned a verdict of guilty and recommended as punishment four and one-half years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Trent Gene Veasey has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2016-875 — In the District Court of Tulsa County, Case No. CF-2002-5066, Appellant, Kevin Bailey, while represented by counsel, entered a plea of guilty to one count of Lewd Molestation. On May 28, 2003, the Honorable Jesse Harris, District Judge, sentenced Appellant to sixteen (16) years imprisonment, with all but the first ten (10) years suspended under written rules of probation. On September 8, 2016, the Honorable William J. Musseman, District Judge, found Appellant violated the rules of his probation and revoked the suspension

order in full. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

F-2017-81 — Appellant, Jose Morales, Also Known As Reto Santillan, was tried by jury and convicted of Trafficking in Illegal Drugs (Methamphetamine) (Count 1) and Unlawful Possession of Drug Paraphernalia (Count 2) in District Court of Tulsa County Case Number CF-2015-5238. The jury recommended as punishment imprisonment for thirty (30) years and a $50,000.00 fine in Count 1 and a $1,000.00 fine in Count 2. The trial court sentenced Appellant accordingly and imposed a twelve (12) month period of post-imprisonment supervision. From this judgment and sentence Jose Morales a/k/a Reto Santillan has perfected his appeal. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, May 10, 2018

C-2017-485 — Geneva Sueveta Robinson, Petitioner, entered a blind plea of guilty in Oklahoma County District Court, Case No. CF-2015-112 before the Honorable Michele D. McElwee, District Judge, to five counts – Counts 1, 5, 6, 10 and 12 – of Child Abuse. Judge McElwee accepted Petitioner's plea and sentenced Petitioner to life imprisonment on each of the five counts. The court ordered Counts 1 and 5 to be served concurrently to one another, but consecutively to Counts 6 and 10. Judge McElwee further ordered Counts 6 and 10 to be served concurrently to one another, but consecutively to Count 12. Petitioner filed a written application to withdraw her guilty plea and after a hearing Judge McElwee denied the motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-110 — Victoria Lynn Lee, Appellant, was tried by jury for the crime of Child Abuse by Munchausen Syndrome by Proxy in Case No. CF-2013-2495 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment eight years imprisonment and a $5,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Victoria Lynn Lee has perfected her appeal. Judgment and Sentence AFFIRMED; Application to Supplement Appeal Record or in the Alternative Remand for Evidentiary Hearing on Sixth Amendment Claims DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

C-2017-760 — Petitioner, Norberto Cruz Cruz, was charged by Information in the District Court of Garvin County Case No. CF-2015-495 with Aggravated Trafficking in Illegal Drug (Cocaine) (Count 1) and Acquire Proceeds from Drug Activity (Count 2). On April 7, 2017, Petitioner entered a blind plea of no contest to both counts with the assistance and advice of appointed counsel. The Honorable Leah Edwards, District Judge, accepted Petitioner's pleas and set the matter for sentencing pending receipt of the pre-sentence investigation report. On June 2, 2017, Petitioner requested to withdraw his pleas and the District Court appointed conflict counsel to assist Petitioner. On June 12, 2017, the District Court held an evidentiary hearing and denied Petitioner's request. On June 16, 2017, the District Court sentenced Petitioner to imprisonment for twenty (20) years, a $200.00 fine, a $50.00 V.C.A. and court costs in Count 1, and imprisonment for ten (10) years, a $100.00 fine, a $50.00 V.C.A., and court costs in Count 2. The District Court ordered the sentences to run concurrently. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his motion to withdraw plea. The order of the District Court denying Petitioner's application to withdraw plea of guilty is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-08 — John Kyle Crandall, Appellant, was tried by jury for the crimes of Count 1, first degree murder; Count 2, knowingly concealing stolen property; and Count 3, possession of a firearm after former conviction of a felony in Case No. CF-2016-2001 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole in Count 1, ten years imprisonment in Count 2, and twenty years imprisonment in Count 3. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence John Kyle Crandall has perfected his appeal. The Judgment and Sen-

tence in Counts 1 and 3 is AFFIRMED. Count 2 is REVERSED and REMANDED with instructions to dismiss. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

C-2017-798 — Tony Steven Phillips, Jr., Petitioner, entered a negotiated plea of guilty to Count 1, domestic assault and battery – third or subsequent offense; Count 2, domestic assault and battery with a dangerous weapon; Count 3, domestic assault and battery by strangulation; Count 4, domestic assault and battery – third or subsequent offense; and Count 5, domestic assault and battery by strangulation, in the District Court of Tulsa County, Case No. CF-2016-5688. The Honorable Doug Drummond, District Judge, found Petitioner guilty and sentenced him in each count to thirty (30) years imprisonment to be served concurrently with each other, with credit for time served. Petitioner filed a timely application to withdraw his guilty pleas, which the court denied after evidentiary hearing. Petitioner now seeks a writ of certiorari. The petition for the writ of certiorari is DENIED. The Judgments and Sentences are AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, May 4, 2018

116,549 — Apache Corporation, a Delaware Corporation, Plaintiff/Appellant, vs. Bigie Lee Rhea, an individual, Defendant/Appellee. Appeal from the District Court of Dewey County, Oklahoma. Honorable Justin P. Eilers, Judge. Plaintiff/Appellant Apache Corporation appeals from the trial court's order dismissing its action for breach of contract, injunctive relief, and declaratory judgment against Defendant/Appellee Bigie Lee Rhea. Rhea was a member of the plaintiff class in a class action against Apache, in which the court approved a settlement agreement and entered an order releasing the claims. Many years later, Rhea filed a new class action against Apache, which is pending in federal court. Apache asserted res judicata and/or issue preclusion as affirmative defenses in federal court. Apache then filed this lawsuit seeking to enforce the terms of the settlement agreement and arguing that Rhea's claims in the new class action had been released in the prior class action. Rhea filed a motion to dismiss the claims based on another action pending between the same parties for the same claim, *see* 12 O.S. § 2012(B)(8), and failure to state a claim upon which relief may be granted, *see* 12 O.S. § 2012(B)(6). After *de novo* review, we hold the action should not be dismissed pursuant to 12 O.S. § 2012(B)(8) and that Apache's breach of contract claim should not be dismissed for failure to state a claim. However, Apache's claims seeking an injunction and declaratory judgment were properly dismissed. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,033 — James Blake Wilson, Plaintiff/Appellant, vs. Steven C. Anagnost, M.D. Defendant/Appellee, TOS d/b/a The Spine and Orthopedic Institute, AHS Hillcrest Medical Center, L.L.C., and Hillcrest Healthcare System, an Oklahoma corporation, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Judge. Plaintiff/Appellant James Blake Wilson seeks review of the trial court's order granting the motion for summary judgment of Defendant/Appellee Steven C. Anagnost, M.D. on Plaintiff's claim to recover damages for fraud and deceit allegedly arising prior to and during the Plaintiff's medical treatment by Defendant. We discern no evidence that Plaintiff's decision to submit to surgery was based on any false representations of Defendant concerning the prescription or failure of non-invasive physical therapy or injections, but rather was based on Plaintiff's own subjective evaluation of the severity of his back pain in spite of the non-invasive treatment by prescription pain killers. Plaintiff knew that, beyond narcotic pain killers, he had not participated in any non-invasive treatments for his back pain, and Plaintiff did not rely on any false representations of Defendant concerning the prescription, success or failure of any non-invasive treatments when he agreed to submit to surgical treatment of his back problems. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

Friday, May 11, 2018

115,291 — In Re The Marriage of Fleischer: John Michael Fleischer, Petitioner/Appellee, vs. Amanda Lee Fleischer, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Martha Oakes, Judge. The parties, John Fleischer and Amanda Fleischer, were granted a divorce upon John Fleischer's petition for separate maintenance, which was filed below on No-

vember 5, 2015. The trial court issued orders granting the parties' divorce, formulating a joint custody plan, issuing a parental proper conduct order and formulating a child support order, each signed by the trial court and filed on July 29, 2016. The trial court awarded the parents joint custody, formulated visitation between the parents in relatively equal proportions, and designated Father as the parent to make the final decision regarding the child's well being in the event the parents have a conflict for which they are unable to agree. Mother was awarded monthly child support in the amount of $51.89. From these orders, Amanda Fleischer, the Respondent/Mother, brings this appeal. The parties were married in 2011. There is one child of the marriage, L.F., born in March 2015. The parties separated in September 2015. Mother testified Father had mental health issues and she feared for her safety and that of the baby. Mother asked for fairly restrictive visitation for Father and requested Father be under the care of a psychiatrist. The trial court permitted parties access to Father's mental health records from 2014 to the point of trial, but prevented Mother's mental health expert from testifying regarding Father's mental health information that predated 2016. "The standard of review in custody proceedings is whether the decree is against the clear weight of the evidence. *Kahre v. Kahre*, 1995 OK 133, ¶ 19, 916 P.2d 1355, 1360. The appellate court will review a question of law under a *de novo* standard. *In re Marriage of Crouch,* 2010 OK CIV APP 144, ¶ 8, 247 P.3d 747, 748. Mother's first proposition of error alleges the trial court erred as a matter of law in awarding the parents joint custody in which Father was awarded final decision making authority in the event the parents were not able to agree. Mother also alleged in the first proposition that the court's visitation order was not in the child's best interests and contrary to the weight of the evidence. Upon the conflicting evidence presented, we do not find the trial court's decision regarding custody, Father's visitation and Father's decision-making authority to be against the clear weight of the evidence, nor is an error as a matter of law. Appellant's second proposition alleges her due process rights were violated and the court acted improperly when Mother's expert was not permitted to testify regarding Father's entire mental health history, particularly with respect to Father's mental health prior to the events that led to the couple's separation. In light of the trial court's considerable discretion in matters regarding the admission of evidence, we do not find the court's decision regarding the constraints put on the expert's testimony to be an abuse of the court's discretion. Mother's third allegation of error asserts the guardian ad litem (GAL) was permitted to testify beyond her expertise regarding Father's mental health records, while the trial court constrained the testimony of Mother's expert witness to only those mental health records from 2016 forward. Based on the record and the parameters outlined in the order appointing the GAL, we do not find Mother has demonstrated prejudice or that the trial court abused its discretion in the limitations it placed on Mother's mental health expert. Mother's fourth proposition of error asserts the trial court improperly delegated its judicial authority to the guardian ad litem, who failed the child's best interests and violated Mother's due process rights and her right to a fair trial. This record does not show the trial court delegated its responsibility to the GAL. *Daniel v. Daniel*, 2001 OK 117, ¶ 19, 42 P.3d 863, 870. Mother's fifth proposition of error takes issue with the trial court's proper conduct order which provides at item number two, "[d]o not expose your children to any member of the opposite sex with whom you may be emotionally involved, except in a lawful marriage relationship." The record indicates Mother has not shown how this issue was addressed below or how she has been aggrieved by this order, therefore we do not find relief is warranted on this proposition. *Assessments for Year 2005 of Certain Real Property Owned by Askins Prop., L.L.C.*, 2007 OK 25, ¶ 10, 161 P.3d 303, 310; *In re Guardianship of Berry*, 2014 OK 56, 335 P.3d 779; *In re Mayes-Rogers Counties Conservancy Dist. Formation*, 1963 OK 206, 386 P.2d 150, 151-52. Mother's final proposition of error asserts the trial court erred as a matter of law in imputing Mother's gross income for the purposes of applying the child support guidelines and calculating each parent's financial responsibility for child support in this case. At the time of trial, Mother was self-employed. The gross income attributed to Mother was listed in the Child Support Computation order without accounting for any deduction for the employer contribution portion of the F.I.C.A. tax. Title 43 O.S. Supp.2009 §118B(E)(3) addresses the computation for self-employment income and directs the court to apply a deduction "equal to the employer contribution for F.I.C.A. tax which an employer would withhold from an employee's earnings on an equivalent gross in-

come amount." Section 118B(E)(3) directs the court to apply the deduction using the word "shall," which indicates the deduction is required. *Clark v. Miller,* 1981 OK CIV APP 38, 631 P.2d 1343, 1344-45. This cause is reversed and remanded to address the issue of the application of 43 O.S. §118B(E)(3) and whether any deviation from the guidelines applies due to the factors outlined in *Lockhart v. Lockhart,* 1996 OK CIV APP 56, 919 P.2d 454, 456. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Joplin, J.; Buettner, J., concurs; Bell, P.J., concurs in part and dissents in part.

115,812 — Thanh Hoang d/b/a Thomas Roofing & Construction, Plaintiff/Appellant, vs. David Chiang Truong, an Individual d/b/a 16 MacArthur Center, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. In this breach of contract case, Plaintiff/Appellant, Thanh Hoang d/b/a/Thomas Roofing & Construction (Contractor), appeals from the trial court's judgment in favor of Defendant/Appellee, David Chiang Truong, an individual d/b/a 16 MacArthur Center (Owner). The trial court concluded there was no breach of contract and that Owner paid Contractor in full for any work done. We hold competent evidence supports the trial court's findings and affirm the trial court's judgment in favor of Contractor. Contractor also appeals from the trial court's order granting Owner's request for prevailing party attorney fees and costs. We affirm the trial court's determination that Owner is entitled to prevailing party attorney fees and costs. The trial court's judgments are affirmed. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 2)
Wednesday, May 2, 2018

115,738 — Tiffani N. Smith, Plaintiff/Appellant, vs. John Ashley Cantrell, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Howard R. Haralson, Trial Judge. Plaintiff (Mother) appeals from the trial court's order denying her motion to vacate an order on Mother's motion to modify custody and visitation regarding the parties' two children. Mother contends the trial court committed error by conducting a merits trial and entering an order modifying visitation after the parties appeared pro se for a pretrial conference on the pending motion to modify. The record does not disclose either party's objection to the trial court's proceeding in this manner, but the docket sheet reflects that the parties resolved the matter by settlement. The record also is silent as to what evidence, if any, the court considered in deciding that modification of visitation was in the children's best interests. Mother's timely motion to vacate was grounded both in irregularity of the proceedings pursuant to 12 O.S.2011 § 1031(3) and the lack of evidence. This appeal stands submitted on Mother's brief alone, and the record made available to us reasonably supports Mother's contention that the trial court abused its discretion by refusing to vacate its previous decision based on an irregularity in the proceeding. We therefore vacate that decision and remand for new trial in accordance with the views expressed herein. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Thursday, May 3, 2018

115,858 — Donald Sullins, Petitioner, vs. Helmerich & Payne, Inc., New Hampshire Insurance Company and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. David P. Reid, Trial Judge. Claimant Donald Sullins seeks review of an order of a three-judge panel which affirmed the trial court's order finding that he had not sustained a consequential injury to his right shoulder. Claimant alleged he sustained consequential injury to his right shoulder resulting from treatment he received for his adjudicated cervical spine injury, which had required two surgeries and physical therapy. Claimant alleged that while he was walking on the sidewalk to the front door of his home, he lost his balance, fell to the ground, hit his shoulder on the edge of the concrete and fractured his right proximal humerus. According to Claimant, his fall was the result of dizziness and problems with equilibrium that had developed following his surgeries. Review of Claimant's testimony and the medical evidence shows that he gave different descriptions of how he fell. He testified that the dizziness and loss of balance he was experiencing "started with the neck surgeries," the first of which was on November 19, 2013. But his testimony contradicts what he stated in a patient history form, which he completed in October 2012, more than one year before the

first surgery on his cervical spine. This 2012 health history, describing essentially the same complaints on which he currently relies in seeking recovery, contradicts Claimant's claim in this case that the injury to his right shoulder was a consequence of the 2013 and 2014 surgeries. SUSTAINED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, J., concur.

Friday, May 4, 2018

115,237 — The Estate of Kylie Johnston, Deceased, by and through Mary Melott, Personal Representative, Plaintiff/Appellant, v. SSM Healthcare of Oklahoma, Inc., d/b/a Saint Anthony Hospital; Tamara Holloway, D.O.; Purcell Municipal Hospital; Dwayne Roush, M.D.; Norman Regional Hospital Authority d/b/a Norman Regional Hospital; EagleMed, LLC and Purcell Emergency, PLLC, Defendants/Appellees. Appeal from an order of the District Court of Cleveland County, Hon. Leah Edwards, Trial Judge. Plaintiff Mary Melott, mother of Kylie Johnston, deceased, and the Personal Representative of the Estate of Kylie Johnston, appeals from a judgment on a jury verdict in favor of Defendants. Plaintiff contends she did not receive a fair trial because the trial court erred 1) regarding the admissibility of certain Facebook posts, 2) in "prohibiting Plaintiff's counsel from referring to established protocols and guidelines as 'patient safety rules' or 'patient safety standards'" and 3) allowing "multiple defense experts to testify on causation." We conclude the trial court did not abuse its discretion in its rulings, and we affirm the trial court's decisions on all three evidentiary issues appealed by Plaintiff. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

115,551 — In the Matter of the Guardianship of the Person and Estate of Sandra Gale Moody, aka Sandra Gale Jones: Sherri Hamilton and William Peck, III, Appellants, vs. Debbra J. Gottschalk, Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge. Sherri Hamilton and William Peck III, appeal the decision of the district court finding that they had failed to prove that a guardianship of Sandra Gale Moody was required. They also appeal the court's decision to award fees against them pursuant to 30 O.S. § 4-901, and its order requiring them to pay guardian ad litem fees. We find no error in the court's decision that Hamilton and Peck failed to show by clear and convincing evidence that a guardianship of Moody was necessary. We find a rational basis in evidence for a fee award pursuant to 30 O.S. § 4-901, and affirm this award. We find, however, no record of willful or negligent misconduct in the administration of Moody's estate or other financial resources by Hamilton and Peck during the temporary guardianship. We therefore reverse this decision ordering them to pay the GAL fees, and order that the GAL fees should be paid from Moody's estate. AFFIRMED IN PART AND REVERSED IN PART. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer J., concur.

Wednesday, May 9, 2018

115,947 — In the Matter of the Income Tax Protest of Randolph S. Baskins and Beverly J. Baskins, Randolph S. Baskins and Beverly J. Baskins, Appellants, vs. Oklahoma Tax Commission, Appellee. Appeal from the Oklahoma Tax Commission, Hon. Jay L. Harrington, Administrative Law Judge. Randolph S. Baskins and Beverly J. Baskins (Taxpayers) appeal from a final order of the Oklahoma Tax Commission denying them a deduction for capital gains. The issue for the ALJ to decide was "[w]hether [Taxpayers] qualify for the Oklahoma Capital Gains Deduction, 68 O.S.2011, § 2358(F), as claimed on their amended 2011 Oklahoma income tax return." The more specific issue was whether "the Oklahoma Headquarters requirement contained in Section 2358(F)(2)(c) of Title 68 [is] a constitutional violation of the Commerce Clause to the United States Constitution." After review, we conclude the Oklahoma Supreme Court's decision in *CDR Systems Corporation v. Oklahoma Tax Commission,* 2014 OK 31, 339 P.3d 848, is dispositive of the issues presented by Taxpayers, and the decision of the Oklahoma Tax Commission is affirmed. AFFIRMED PURSUANT TO RULE 1.201. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Friday, May 11, 2018

114,498 — Adam Factor, Plaintiff/Appellee, vs. Western Express, Inc. and Thomas Schneider, Defendants/Appellants, and YRC, Inc., d/b/a YRC Freight, Old Republic Insurance Company, Yellow Transportation, Inc., f/k/a Yellow Freight Systems, Inc., James Crittenden, Mako Lines, Inc., Companion Property & Casu-

alty Insurance Co., Peoples Insurance, The Estate of Lubomir Tsisyk, National Casualty Company, Western Freight Carrier, Inc., Granite State Insurance Company, Acord Insurance Company, Augustin Sahagun, Mark Mckinley, Mckinley Ranches, Colorado Casualty Insurance Company, Jack Alexander, Gorgis H. Ori, Fischer Trucking, Inc., Harco National Insurance Company, Jeff Kramer, Cristian Transport, Inc., Progressive Northern Insurance Company, and Jose Vasquez, Defendants, and Cristian Transport, Inc., Third-Party Plaintiff, and Kerry Thomas, Transportation Logistics Corporation International d/b/a Wil.Trans, New Prime, Inc. d/b/a Prime Inc., and Payroll Plus Corporation, Third-Party Defendants. Appeal from Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Defendants Western Express and Thomas Schneider appeal the district court's order enforcing an alleged settlement agreement and determining that the parties had agreed to settle for $31 million. The record shows not only the parties' disagreement as to the amount of the purported settlement, but also as to whether a settlement agreement was even reached. For these reasons, it was error for the district court to enforce a settlement between the parties. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

(Division No. 3)
Friday, May 4, 2018

115,446 — Loren Wehrenberg and Norina C. Wehrenberg, Husband and Wife, Plaintiffs/Appellees, vs. Viann Garrison, Guardian of the Person and Property of Verlon Roggow, Defendant/Appellant, and Veritas Energy, LLC, a Texas Limited Liability Company and Brannon Land Services, LLC, an Oklahoma Limited Liability Company, Defendants. Appeal from the District Court of Garfield County, Oklahoma. Honorable Dennis Hladik, Trial Judge. Defendant/Appellant, Viann Garrison, appeals a judgment in favor of Plaintiffs/Appellees, Loren and Norina Wehrenberg, for damages based on unjust enrichment. The petition was filed more than three years after the claim accrued.The trial court applied the five year statute of limitations, 12 O.S. §95(A)(12). We reverse because actions for unjust enrichment are governed by the two year period of limitations set forth in 12 O.S. §95(A)(3). In their counter-appeal, Plaintiffs complain that the trial court improperly denied their motion for attorney fees pursuant to 23 O.S. 2011 §103. They argue that a prevailing party is entitled to attorney fees as an exception to the American Rule whenever overriding considerations, such as oppressive behavior on the part of a party, indicate the need for an award of attorney fees and that a court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Plaintiffs are not prevailing parties. Thus, they are not entitled to an award of attorney fees whether they seek them based upon statute or the equitable powers of the trial court. The trial court properly denied the Wehrenberg's motion for attorney fees. AFFIRMED IN PART, REVERSED IN PART. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,091 — Jeff Cannon, Plaintiff/Appellant, vs. City of Shawnee, a municipal corporation, Defendant/Appellee. Appeal from the District Court of Pottawatomie County, Oklahoma. Honorable John G. Canavan, Trial Judge. Plaintiff/Appellant Jeff Cannon (Cannon) appeals from an order granting summary judgment to Defendant/Appellee City of Shawnee (City) in an action filed by Cannon to recover property damages incurred as a result of City's SWAT team efforts to apprehend an individual who entered Cannon's property unlawfully. The City successfully argued below that it was immune from liability under the Oklahoma Governmental Tort Claims Act and because the SWAT team obtained written consent from the tenant. AFFIRMED. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

(Division No. 4)
Wednesday, May 2, 2018

115,656 — William E. Liebel, Plaintiff/Appellant/Counter-Appellee, v. Terri Robertson, Defendant, and Alexander L. Bednar, Defendant/Appellee/Counter-Appellant. Appeal from the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. This appeal pertains to the fraud theory asserted by Plaintiff (Liebel) against Defendant (Bednar). In a prior appeal in this case, this Court concluded genuine disputes of material fact remained regarding Bednar's liability for fraud, and we remanded for further proceedings. The matter was subsequently set for jury trial. Although properly notified, Bednar failed to appear at the jury trial. Default judgment was therefore entered against Bednar, and the matter was set

for a hearing on damages. Following the hearing on damages, the trial court issued its order finding, among other things, "a lack of credible evidence of any damages or actions on behalf of [Bednar] which caused damages . . . based on the evidence and testimony presented[.]" Liebel appeals from this order. The trial court also declined to award attorney fees and costs in favor of Bednar, and Bednar counter appeals from this ruling. We conclude competent evidence supports the trial court's determination that Liebel did not incur any damages. On this basis we affirm the trial court's order. We also conclude the trial court did not abuse its discretion in denying Bednar's request for an award of attorney fees and costs; thus, we also affirm this ruling. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Monday, May 7, 2018

114,270 — In re Marriage of: Jana Drummond Evans, Petitioner/Appellant, v. George Edward Evans, Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge, denying Wife's motion to correct, open, modify, or vacate a Decree of Dissolution of Marriage. In her motion to vacate, Wife asserted the trial court made several mathematical errors in the property division. We find the trial court erred in the valuation of certain debts. Those portions of the decree are remanded. Upon remand, the trial court shall divide the additional equity between the parties as provided by 43 O.S.2011 and Supp. 2012, § 121. We find no abuse of discretion by the trial court in its denial of the remaining issues raised in Wife's motion. Accordingly, the trial court's order denying Wife's motion to open, correct, or vacate the Decree of Dissolution of Marriage is affirmed in part, reversed in part, and remanded with directions. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,388 — The Key Finance, Inc., Plaintiff/Appellee, v. DJ Koon, Defendant/ Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, granting Key Finance, Inc.'s (Key) renewed motion to compel arbitration. Koon asserts the trial court erred in granting Key's motion. We find that, although the evidence in this case was contested, the trial court's conclusions are supported by the record. The trial court's order granting Key's renewed motion to compel arbitration is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,600 (Companion to Case Nos. 114,270 and 115,034) — In re the Marriage of: Jana Drummond Evans, Petitioner/Appellant, v. George Edward Evans, Respondent, and Kirk & Chaney, PLLC, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge, granting Kirk & Chaney's (Law Firm) application for an attorney's fee and costs. Jana Drummond Evans (Client) asserts no basis exists in the trial court for a fee award, contending that 42 O.S.2011, § 176 only applies to mechanic and materialmen's liens and not to an attorney's lien. We find Oklahoma courts have uniformly found entitlement to an award of fees under § 176 in actions brought to enforce liens other than mechanics and materialmen's liens. Accordingly, Law Firm is entitled to an award of fees under § 176 for the successful enforcement of its lien. Client also contends the trial court failed to properly apply *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, resulting in an unreasonable and excessive fee. A review of the trial court's order provides it carefully analyzed the issues presented in relation to the attorney's fee award, specifically applying the *Burk* criteria. We find no abuse of discretion occurred. Accordingly, the order granting Law Firm's application for an attorney's fee and costs is affirmed in its entirety. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, May 8, 2018

116,316 — Gerdau Ameristeel and Indemnity Insurance of North America, Petitioners, v. Jefferson Hampton and the Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge. Petitioners (collectively, Employer) seek review of the panel's order finding Jefferson Hampton (Claimant) sustained a compensable injury to his cervical spine as a result of cumulative trauma. Employer asserts the panel erred in rejecting its argument that, under 85 O.S. Supp. 2006 § 11(B)(5), Employer cannot be held liable for any injury Claimant may have sus-

tained because Claimant was injuriously exposed to neck trauma at a certain antique shop he operated following termination of his employment with Employer. However, we conclude competent evidence exists in the record in support of the panel's conclusion that Claimant was not exposed, injuriously, to neck trauma while operating the antique shop. Consequently, the panel did not err in rejecting this argument. Employer also asserts Claimant's date of last trauma occurred more than two years prior to the filing of the compensation claim and that the claim is therefore barred under the applicable two-year statute of limitations. However, we conclude competent evidence supports the panel's determination that Claimant, who worked for Employer until October 2009, experienced neck trauma within two years of the filing of the Form 3 in November 2010. Consequently, we conclude the panel did not err in rejecting Employer's statute of limitations defense. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

116,631 — Jerry T. Tillman, Plaintiff/Appellant, v. Jeremy Anglin, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Trial court plaintiff, Jerry T. Tillman, (Plaintiff) appeals the trial court's Journal Entry denying his Motion to Reconsider the trial court's grant of summary judgment of defendant, Jeremy Anglin (Defendant). Plaintiff failed to present any evidence to dispute Defendant's material facts establishing he was acting within the scope of employment and was not a proper party under the Oklahoma Governmental Tort Claims Act, 51 O.S. § 151 et seq. This Court finds the trial court did not err in granting summary judgment in favor of Defendant. This Court further finds the trial court did not err in denying Plaintiff's motion to reconsider. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 2)
Wednesday, May 9, 2018

115,981 — JPMorgan Chase, Plaintiff/Appellee, vs. James Leving and Margaret Levings, et al., Defendants/Appellants. Appellants' Petition for Rehearing is hereby *DENIED*.

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ESTABLISHED OKLAHOMA CITY LAW FIRM SEEKS ASSOCIATE for Personal Injury Department. Minimum 3 years of personal injury experience. Competitive salary, full health and dental, PTO and 401K match. Submit cover letter and resume to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

CITY OF BETHANY IS SEEKING AN ASSOCIATE CITY ATTORNEY. Part-time position with possibility of development into a full-time position. Job duties include: reports to city council; provides legal services and counsel to the city council, city administrator, department directors and all boards and commissions as requested; conducts legal research, handles litigation and communicates effectively; and attends numerous nightly meetings. Qualifications: requires a Juris Doctorate degree or equivalent from an accredited law school and two years of professional legal experience in government, administration and related areas preferred; must be a member in good standing of the Oklahoma Bar Association and be admitted to practice in all necessary courts; must possess a valid Oklahoma driver's license and be able to attend evening meetings in Bethany as directed; residence in Bethany is preferred; and intent of position is to provide a successor for incumbent upon his retirement. To apply, submit a letter of interest including a resume to City of Bethany, Attn: City Clerk, P.O. Box 219, Bethany, OK 73008 or email to susan.tate@bethanyok.org. Position open until filled. Compensation negotiable based upon experience. The City of Bethany is an equal opportunity employer.

APPLICATIONS ARE NOW BEING ACCEPTED FOR THE CITY ATTORNEY position at the City of Broken Arrow. In their role at the City of Broken Arrow, our city attorney will perform complex, executive and professional level work as a legal advisor to the city manager, the assistant city managers, the mayor, the city council, city staff and various boards, commissions and city departments. He/she will assist in ensuring that the city faithfully performs its functions pursuant to federal, state and local statutes, regulations and ordinances. He/she will be well versed in municipal practices, having significant experience and exposure in managing the expansive legal aspects of city utilities and capital improvement projects. He/she will advise on issues of law: review agendas, ensure compliance, represent the city in administrative and legal proceedings, conduct research, try cases, draft pleadings, etc. Our city attorney will oversee the city's Legal Department and department personnel and organize the efforts of the department toward successful completion of departmental assignments and tasks. Apply now: www.brokenarrowok.gov/jobs.

METRO AREA LAW FIRM SEEKING OIL AND GAS TITLE ATTORNEYS for its OKC and Norman offices. Great salary and bonus structure, plus health insurance and 401K benefits immediately available. Please send resume, references and writing sample to office@ballmorselowe.com.

POSITIONS AVAILABLE

THE CITY OF OKLAHOMA CITY IS CURRENTLY ACCEPTING APPLICATIONS for an assistant municipal counselor I. Qualified applicant will possess an Oklahoma license to practice law and be eligible for admission to practice in federal court. This is an entry level position which provides legal representation and guidance to the city, its officers, departments and trusts to ensure that all city operations are performed in a manner consistent with the requirements of federal and state laws and city ordinances. This position is located in the Litigation Division of the Office of the Municipal Counselor and experience in litigation and municipal law is desirable. Applications and resumes will be accepted through June 15, 2018. Apply online at http://www.okc.gov/jobs. Additional information may be obtained at Jobline: 405-297-2419 or TDD (Hearing Impaired) 405-297-2549. EEO.

MULLICAN & HART PC IS SEEKING A LITIGATION ATTORNEY with 2 to 7 years of experience for its growing downtown Tulsa practice. The ideal candidate will have excellent writing skills, solid communication skills and be able to flourish in a fast-paced environment. Experience in transportation law or insurance defense is a plus, but is not required. The compensation package is commensurate with experience and qualifications. The firm provides an outstanding benefit package including health insurance, life insurance and a 401K with profit sharing opportunities. Please submit a confidential cover letter and resume to office@mullicanhart.com.

RUBENSTEIN & PITTS PLLC, EDMOND LAW FIRM SEEKS an attorney with 5 years of experience to assist with business, employment law, transactions and litigation. Excellent writing, analytical skills, interpersonal skills, motivations and independent thinking is required. Full range of benefits and competitive compensation. Send cover letter, resume, references and writing sample to TheEdmondlawfirm@gmail.com.

DISTRICT ATTORNEY CRAIG LADD WITH THE 20th JUDICIAL DISTRICT in and for Carter, Love, Murray, Marshall, and Johnston counties, has an opening for an assistant district attorney position that needs to be filled as soon as possible. Please contact 580-223-9674 for details.

THE LEFLORE COUNTY DISTRICT ATTORNEY'S OFFICE IS SEEKING AN ASSISTANT DISTRICT ATTORNEY for its Poteau office. Primary responsibilities include the criminal prosecution of all domestic violence offences and juvenile delinquent and deprived dockets. Salary $53K plus, DOE. Applicant must have a J.D. from an accredited law school; prior jury trial experience and experience in criminal law preferred. Must be member of good standing with the Oklahoma State Bar. Applicants may submit a resume and writing sample, postmarked no later than July 6, 2018, to the following address: District Attorney's Office, 100 S. Broadway, Room 300, Poteau, OK 74953, or Fax 918-647-3209.

POSITIONS AVAILABLE

THE SECRETARY FOR THE COMMISSIONERS OF THE LAND OFFICE SEEKS APPLICANTS FOR THE POSITION OF GENERAL COUNSEL. This position, reporting directly to the agency's secretary and assistant secretary, is assigned overall responsibility for the direction of the agency legal division and its functions including staff activities and development and will work with management staff to define and lead agency strategic and tactical legal initiatives, provide senior management with effective advice on agency strategies and their implementation, manage the legal function, and obtain and oversee the work of outside counsel. The general counsel will be involved in complex agency transactions relating to negotiation of critical contracts, settlements and development of procedures and programs to ensure compliance with agency policy and state statutory requirements. The successful candidate shall be a member of the Oklahoma Bar Association, have a minimum of 10 years of experience in a law firm or state agency environment with exposure to and/or familiarity with areas of law relating to oil and gas and real estate property. Experience working on matters with a board of directors is required. Requires ability to communicate effectively with a variety of contacts, including outside attorneys, senior management, staff and lessees; excellent oral and written and interpersonal skills; ability to deal with and ability to work in a multi-cultural environment; strong organizational skills, thoroughness and attention to detail, as evidenced through prior experience; ability to set priorities and organize time efficiently; ability to handle multiple demands. State agency experience and experience in managing other attorneys and supervising support staff is required as well as experience with cost effective management of outside legal resources preferred. A complete job description as well as all necessary application information may be found on our website at www.clo.ok.gov/agency/careers. All information must be received by 4 p.m. on June 1, 2018.

POSITIONS AVAILABLE

ASSISTANT U.S. ATTORNEY - 14 MONTH APPOINTMENT. The U.S. Attorney's Office for the Western District of Oklahoma is seeking applicants for one or more assistant U.S. attorney positions which will be assigned to the Criminal Division, not to exceed 14 months, which may be extended. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction), and have at least two years post-J.D. legal or other relevant experience. See vacancy announcement 18-OKW-10214470-A-02 at www.usajobs.gov (Exec Office for US Attorneys). Applications must be submitted online. See "How to Apply" section of announcement for specific information. Questions may be directed to Denea Wylie, Human Resources Officer, via email at Denea.Wylie2@usdoj.gov. This announcement is open from May 24, 2018 through June 7, 2018.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: $1.50 per word with $35 minimum per insertion. Additional $15 for blind box. Blind box word count must include "Box ___," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

DISPLAY CLASSIFIED ADS: Bold headline, centered, border are $70 per inch of depth.

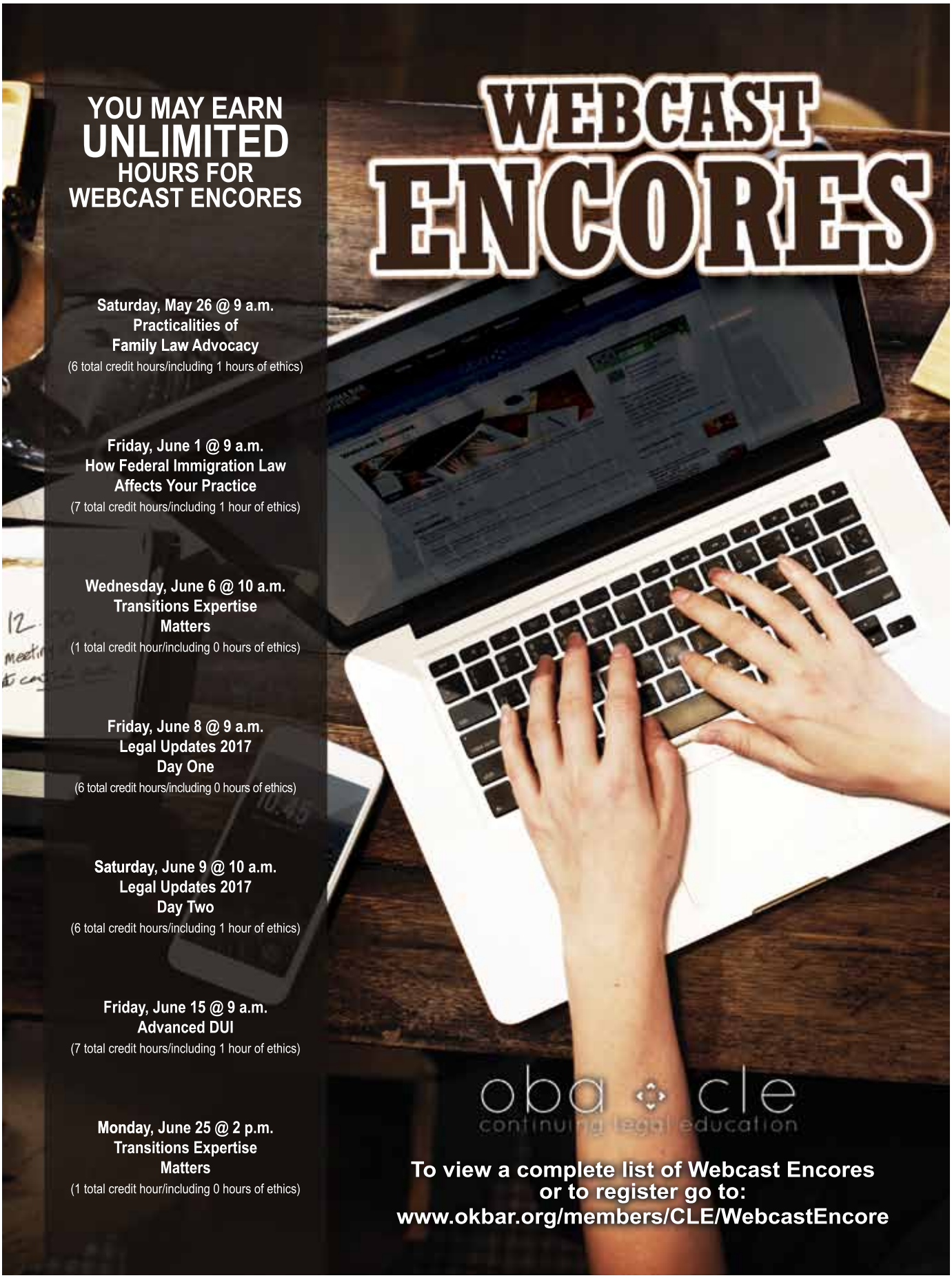
DEADLINE: See www.okbar.org/members/BarJournal/advertising.aspx or call 405-416-7084 for deadlines.

SEND AD (email preferred) stating number of times to be published to:

advertising@okbar.org, or
Mackenzie Scheer, Oklahoma Bar Association,
PO Box 53036, Oklahoma City, OK 73152.

Publication and contents of any advertisement are not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly nondiscriminatory.

DO NOT STAPLE BLIND BOX APPLICATIONS.


WEBCAST
ENCORES
YOU MAY EARN
UNLIMITED
HOURS FOR
WEBCAST ENCORES
Saturday, May 26 @ 9 a.m.
Practicalities of
Family Law Advocacy
(6 total credit hours/including 1 hours of ethics)
Friday, June 1 @ 9 a.m.
How Federal Immigration Law
Affects Your Practice
(7 total credit hours/including 1 hour of ethics)
Wednesday, June 6 @ 10 a.m.
Transitions Expertise
Matters
(1 total credit hour/including 0 hours of ethics)
Friday, June 8 @ 9 a.m.
Legal Updates 2017
Day One
(6 total credit hours/including 0 hours of ethics)
Saturday, June 9 @ 10 a.m.
Legal Updates 2017
Day Two
(6 total credit hours/including 1 hour of ethics)
Friday, June 15 @ 9 a.m.
Advanced DUI
(7 total credit hours/including 1 hour of ethics)
Monday, June 25 @ 2 p.m.
Transitions Expertise
Matters
(1 total credit hour/including 0 hours of ethics)
oba cle
continuing legal education
To view a complete list of Webcast Encores
or to register go to:
www.okbar.org/members/CLE/WebcastEncore