THE OKLAHOMA BAR
Journal
Volume 89 — No. 11 — 4/14/2018

Court Issue

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PROGRAM PLANNER:

Ginger Decoteau,
Founder, Executive Director,
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Topics Covered:

- **Oklahoma Workplace Sexual Harassment Laws: Employer Liability under Title VII; the Oklahoma Anti-Discrimination Act**
  C. Scott Jones, Pierce Couch Hendrickson Baysinger & Green, LLP
- **Sexual Harassment at Work: What it IS and What it IS NOT!: The ME TOO Movement and Oklahoma.**
  Holly Waldron Cole, Equal Employment Opportunity Commission
- **The Effects of Sexual Harassment on Workers; Why Victims Don't Report Sexual Harassment; Characteristics of Offenders, and Why Sexual Harassment Should be Addressed and Treated**
  Leslie Bell, LCSW
- **Personal Perspectives: Worker and Employer Experiences**
  Ginger Decoteau, PHR, and Shawnae Robey, J.D., Bar S Foods
- **A Panel Discussion**
  Scott Jones, Holly Cole, Leslie Bell, Ginger Decoteau, and Shawnae Robey

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Journal

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Tulsa Area Fair Housing Partnership & the U.S. Department of Housing and Urban Development

Present A

FREE! Fair Housing Accessibility FIRST Policy Training

When:
May 1st, 2018
8:00AM – 4:15PM CST

Where:
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CONTINUING EDUCATION AIA

AGENDA—May 1st

8:00 – 8:30	Registration
8:30 – 8:45	Welcome & Opening Remarks
8:45 – 10:15	Fair Housing Act Accessibility Requirements Overview – Module I – Part I
10:15 – 10:30	Break
10:30 – 12:00	Fair Housing Act Accessibility Requirements Overview – Module I – Part II
12:00 – 1:00	Lunch (not provided, plan accordingly)
1:00 – 2:30	Disability Rights Laws – Module 3
2:30 – 2:45	Break
2:45 – 4:15	Making Housing Accessible Through Accommodations And Modifications – Module 11

Tulsa Area Fair Housing Partnership

Fair Housing Accessibility FIRST—our mission:
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Oklahoma Bar Association

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Supreme Court Opinions

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See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

2017 OK 44

In the Matter of the Suspension of Members of the Oklahoma Bar Association for Nonpayment of 2017 Dues

SCBD No. 6510. April 9, 2018

CORRECTION ORDER

The Court's order of suspension for nonpayment of 2017 dues, filed herein on May 30, 2017, is corrected by removing the name of Carie Dawn Martin Jones, OBA No. 21090.

Except as corrected by this order, the May 30, 2017 order shall remain unaltered.

DONE BY ORDER OF THE SUPREME COURT THIS 10th DAY OF APRIL, 2018

/s/ Douglas L. Combs
CHIEF JUSTICE

JOE SALINAS and PAULINE TAYLOR, Plaintiffs/Appellees, vs. TODD ALAN SHEETS, Defendant/Appellant.[1]

Case No. 115,158. February 20, 2018

ORDER

Appellant Todd Alan Sheets's Petition for Certiorari is denied. Court of Civil Appeals, Division III's opinion is accorded precedential value and approved for publication. Okla. Supreme Court Rule 1.200(d)(2), 12 O.S. Supp. 2014, app. 1; 20 O.S.2011, § 30.5.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 20th DAY OF FEBRUARY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

VOTE TO DENY CERTIORARI:
CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT and WYRICK, JJ.

VOTE TO PUBLISH COCA OPINION:
CONCUR: COMBS, C.J., GURICH, V.C.J., WINCHESTER, EDMONDSON, COLBERT and REIF, JJ.
DISSENT: WYRICK, J.
NOT VOTING: KAUGER, J.

2018 OK 15

In Re: Rules Creating and Controling the Oklahoma Bar Association

SCBD 4483. February 26, 2018

ORDER

This matter comes on before this Court upon an Application to Amend Art. VI, Section 5 of the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. ch. 1, app. 1, as proposed and set out in Exhibit "A" attached hereto. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 26th day of February, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

Combs, C.J., Gurich, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif and Wyrick, JJ., concur.

EXHIBIT "A"

Oklahoma Statutes Citationized
Title 5. Attorneys and the State Bar
Chapter 1 - Attorneys and Counselors
Appendix 1 - Rules Creating and Controlling the Oklahoma Bar Association
Article Article VI
Section Art VI Sec 5 - Report of Executive Director
Cite as: O.S. §, __ __

~~On or before the tenth day of each month the Executive Director shall mail to each member of the Board of Governors and the Chief Justice of the Supreme Court a detailed account showing the receipts and disbursements of the preceding month; such statement shall contain any additional information requested by the Board of Governors. On or before the 21st day of January of each year an annual financial report shall be prepared by the Executive~~

~~Director. It shall be submitted to the Board of Governors no later than the regular February meeting of the Board. After approval thereof by the Board of Governors the same shall be published promptly in the Bar Journal.~~

The Executive Director shall cause to be prepared for each month a statement showing the financial condition of the Association and such other financial reports requested by the Board of Governors. Such monthly financial statement shall be provided to the Oklahoma Supreme Court liaison and the Board of Governors within sixty (60) days from the end of each calendar month. Additionally, the Executive Director shall cause a copy of the Financial Audit of the Association to be provided to the Oklahoma Supreme Court liaison and the Board of Governors for review prior to being placed upon the agenda for approval by the Board of Governors.

2018 OK 16

In Re: Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship

SCBD 2109. February 26, 2018

ORDER

This matter comes on before this Court upon an Application to Amend the Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship (hereinafter "Rules"). This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective immediately.

DONE IN CONFERENCE this 26th day of February, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

Combs, C.J., Gurich, V.C.J., Winchester, Edmondson, Colbert, Reif and Wyrick, JJ., concur;

Kauger, J., concurs in result

EXHIBIT A

RULE 1 PURPOSE OF THE LICENSED LEGAL INTERNSHIP RULES

Rule 1.1 Purpose

The purpose of these rules is to provide supervised practical training in the practice of law, trial advocacy, and professional ethics to law students and to law graduates who have applied to take the first Oklahoma Bar Examination after graduation. The Legal Internship Program is not for the purpose, nor to be used solely as, a vehicle to secure new or additional clients for the supervising attorney (see Interpretation 96-1).

RULE 2 ELIGIBILITY FOR A LIMITED LICENSE

Rule 2.1 Law Student Applicant

The law student applicant must meet the following requirements in order to be eligible for a limited license as a Licensed Legal Intern:

(a) Have successfully completed half of the number of academic hours in a law school program leading to a Juris Doctor Degree required by the American Bar Association Accreditation Standards. Those hours must include the following courses: Professional Responsibility, Evidence and Civil Procedure I & II. A law student may apply when he or she is enrolled in courses which upon completion will satisfy this requirement (see Interpretations 98-2 and 2002-1). (Amended October 25, 2011)

(b) Have a graduating grade point average at his or her law school.

(c) Have approval of his or her law school dean.

(d) Have registered and been accepted as a law student with the Board of Bar Examiners of the Oklahoma Bar Association. Provided, that students from outside Oklahoma who are attending law school in Oklahoma, are exempt from registering as a law student in Oklahoma upon a satisfactory showing of similar registration and approval in a state whose standards for admission are at least as high as those for Oklahoma. The determination of the equivalence of standards is to be made by the Legal Internship Committee (see Interpretation 98-3).

(e) Be ~~a regularly~~ an enrolled student at an accredited law school ~~located in the State of Oklahoma~~.

Rule 4 Law School Internship Programs

Rule 4.1 Approved Law School Internship Programs

A law school may create an internship training program as part of its regular curriculum which uses Licensed Legal Interns licensed by

the Supreme Court of the State of Oklahoma. These programs may be of two types:

(a) A program directly supervised by the faculty of the law school, which may also use Academic Legal Interns. (Amended May 16, 2011)

(b) A program directly supervised by practicing attorneys with indirect supervision through the faculty of the law school.

Rule 4.2 Minimum Criteria for Law School Programs

Each law school shall be responsible for the creation of its own criteria for the establishment of a Licensed Legal Internship Program. Each law school may impose requirements more stringent than these rules; however, the program must meet the following minimum criteria:

(a) All Licensed Legal Internship Programs shall be directed toward assuring the maximum participation in ~~court~~ the practice of law by the Licensed Legal Intern.

RULE 5 PROCEDURE TO OBTAIN LIMITED LICENSE

Rule 5.1 Documentation

A law student or a law graduate may obtain a limited license to practice law as a Licensed Legal Intern in the State of Oklahoma in the following manner:

(a) Application Form

(1) File an application form that is provided by the Executive Director of the Oklahoma Bar Association.

(b) Law School Certificate

(1) A law student applicant shall have his or her school furnish to the Executive Director of the Oklahoma Bar Association a certification that the student has completed sufficient academic hours to comply with the eligibility requirements and that the student does have a graduating grade point average. The law school shall also provide a letter from the dean stating that in the opinion of the dean the student is aware of the professional responsibility obligations connected with the limited license and that in the dean's opinion the applicant is capable of properly handling the obligations which will be placed upon the student through the use of the limited license.

(2) A law graduate applicant shall request his or her law school to furnish to the Executive Director of the Oklahoma Bar Association a certificate that the student has graduated from law school and attach the certificate to the application.

(c) Supervising Attorney Form

(1) The law student applicant and the law graduate applicant must attach to their application the supervising attorney form signed by an approved supervising attorney certifying that the supervising attorney:

(a) Will employ applicant under his or her direct supervision;

(b) Recommends the applicant for a limited license;

(c) Has read and understands the Licensed Legal Internship Rules; and

(d) Agrees to provide the opportunity for the applicant to obtain the required number of monthly in-court practice hours.

(2) The law student applicant may take the Licensed Legal Internship Examination without filing the Supervising Attorney Form but may not be sworn in as a Licensed Legal Intern until the Supervising Attorney Form is filed and approved.

(d) ~~Enrollment~~ Certification Form

(1) The law student applicant shall ~~provide proof that he or she~~ have his or her school furnish to the Executive Director of the Oklahoma Bar Association a certification that the student is ~~enrolled~~ participating in an approved law school internship program prior to being sworn in as a Licensed Legal Intern. (See Interpretation 2017-2)

RULE 7 PRACTICE UNDER THE LIMITED LICENSE

Rule 7.1 Applicable to Courts of Record, Municipal Courts and Administrative Agencies

Subject to the limitations in these Licensed Legal Internship Rules, the limited license allows

the Licensed Legal Intern to appear and participate in the State of Oklahoma before any Court of Record, municipal court, or administrative agency. The Licensed Legal Intern shall be subject to all rules applicable to attorneys who appear before the particular court or agency.

Rule 7.2 In-Court Practice Requirement

The Licensed Legal Intern who is working for a practicing attorney, district attorney, municipal attorney, attorney general, or state governmental agency shall have at least ~~eight (8)~~ four (4) hours per month of in-court experience. Such experience may be obtained by actual in-court participation by the Licensed Legal Intern or by actually observing the supervising attorney or other qualified substitute supervising attorney in courtroom practice.

Rule 7.6 Civil Representation Limitations

Representation by the Licensed Legal Intern in civil cases is limited in the following manner:

(a) In civil matters where the controversy does not exceed the jurisdictional limit specified in Title 20 Oklahoma Statutes, Section 123(A)(1), exclusive of costs and attorneys' fees, a Licensed Legal Intern may appear at all stages without a supervising attorney being present (see Interpretations 97-1, 97-2 and 2010-1).

(b) In civil matters where the controversy exceeds the jurisdictional limit specified in Title 20 Oklahoma Statutes, Section 123(A)(1), a Licensed Legal Intern may appear without a supervising attorney being present only in the following situations:

(1) Waiver, default, or uncontested divorces.

(2) Friendly suits including settlements of tort claims.

(3) To make an announcement on behalf of a supervising attorney.

(4) Civil motion dockets, provided that a Licensed Legal Intern may prosecute but not defend motions and/or pleadings that may or could be the ultimate or final disposition of the cause of action.

(5) Prosecute or defend contested motions to modify child support orders or decrees except when a change of custody of minor child is involved (see Interpretation 89-1).

(6) Depositions.

(7) Uncontested probate proceedings, provided that the supervising attorney has reviewed and signed the proposed pleading that will be presented to the Judge for approval.

(c) In all other civil legal matters, including but not limited to contested probate, contested divorces, ~~and~~ adoption proceedings, and ex-parte matters, such as temporary orders in divorce cases, restraining orders, temporary injunctions, etc., the Licensed Legal Intern shall ~~only~~ appear only when accompanied by and under the supervision of an approved supervising attorney (see Interpretations 91-2, 96-2, 97-1 and 2010-1).

2018 OK 27

BERRY AND BERRY ACQUISITIONS, LLC, d/b/a PARK HILL NURSERY, BURL R. BERRY, and BOB R. BERRY, Plaintiffs and Counter-Defendants/Appellants and Counter-Appellees, v. BFN PROPERTIES LLC, and BFN OPERATIONS LLC, Defendants and Counter-Plaintiffs/ Appellees and Counter-Appellants.

Case No. 114,442. April 3, 2018

ON APPEAL FROM THE DISTRICT COURT OF CHEROKEE COUNTY, STATE OF OKLAHOMA, HONORABLE DARRELL G. SHEPHERD

¶0 On December 7, 2010, Insight Equity, a private-equity firm headquartered in Southlake, Texas, purchased Berry Family Nurseries, a nationwide wholesale nursery company headquartered in Tahlequah, Oklahoma, for $160 million. The Purchase Agreement entered into by the parties contained a Texas choice-of-law provision. The Agreement also contained a five-year non-compete provision, prohibiting the owners of Berry Family Nurseries, Bob Berry and Burl Berry, from owning a competing wholesale nursery company until December 7, 2015. Park Hill Nursery, a nursery also located in Tahlequah, Oklahoma, and owned by the Berrys, was not included in the Agreement, but the Agreement allowed the Berrys to continue to own and operate Park Hill Nursery so long as it did not compete with the newly formed BFN Operations. The parties performed under the terms of the Agreement for approximately three years until the Berrys,

through Park Hill Nursery, began selling to several of BFN's largest customers. The Berrys filed an action in the District Court of Cherokee County, seeking a declaration that the restrictive covenants were unenforceable and void under Oklahoma law. BFN filed a counterclaim, seeking injunctive relief and monetary damages for the Berrys' breach of the covenants. Upon review, we conclude the Texas choice-of-law provision is valid, and the non-compete is enforceable under Texas law. The Berrys breached the non-compete, and Park Hill Nursery tortiously interfered with the parties' Agreement. BFN was entitled to injunctive relief through December 7, 2015, and is also entitled to monetary damages. The trial court's determination that BFN is entitled to attorney's fees is not a final judgment, and appeal of that issue is premature.

TRIAL COURT'S ORDER AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

David E. Keglovits, Amelia A. Fogleman, Justin A. Lollman, GableGotwals, Tulsa, OK, for Plaintiffs and Counter-Defendants/Appellants and Counter-Appellees

Wayne Bailey, Bailey Law, PLC, Tahlequah, OK, for Plaintiffs and Counter-Defendants/Appellants and Counter-Appellees

James M. Reed & John T. Richer, Hall, Estill, Hardwick, Gable, Golden, & Nelson PC, Tulsa, OK, for Defendants and Counter-Plaintiffs/Appellees and Counter-Appellants

Robert K. Wise & Thomas F. Lillard, Lillard Wise Szygenda PLLC, *Pro Hac Vice*, Dallas, TX, for Defendants and Counter-Plaintiffs/Appellees and Counter-Appellants

GURICH, V.C.J.

Facts & Procedural History

¶1 Bob Berry, who resides in Tahlequah, Oklahoma, has been a nurseryman and businessman for more than fifty years. In the 1960s, Bob began working in the nursery business in Tahlequah, and in the early 1970s, he founded Midwestern Nursery. Bob grew and developed Midwestern Nursery, which later became American Nursery Products, and eventually took the company public. Upon his departure from American Nursery Products in the early 1990s, Bob and his son, Burl Berry, who also lives in Tahlequah, formed Tri-B Nursery. The Berrys purchased land near Hulbert, Oklahoma, and began operations in 1992. Wal-Mart was Tri-B Nursery's first customer in the spring of 1993.

¶2 In the late 1990s, Tri-B Nursery purchased its first out-of-state nursery, Judkins Nursery, with one location in Tennessee. The Berrys then acquired a nursery in Quincy, Florida, and subsequently bought Zelenka Nursery out of bankruptcy, thereby acquiring another nursery in Tennessee and nurseries in both Michigan and North Carolina. The Berrys then purchased an Oregon nursery, Zelenka West, out of bankruptcy. With such acquisition, Tri-B Nursery, or Berry Family Nurseries as it became known, emerged as one of the largest, if not the largest wholesale nursery business in the United States. Berry Family Nurseries specialized in the sale of trees, shrubs, rose bushes, and perennials to national and regional retailers including Wal-Mart, Home Depot, Lowe's, Sam's Club, K-Mart, ShopKo, Rural King, and Meijer, and generated hundreds of millions of dollars in sales. Berry Family Nurseries maintained offices in Tahlequah, Oklahoma, and Grand Haven, Michigan, and employed more than 400 people at seven nurseries in six states.

¶3 The Berrys also owned Sanders Nursery and Distribution Center, a retail nursery business with locations in Wagoner County and Rogers County, Oklahoma. Bob also owned an interest in a California wholesale nursery, Rosetree Nursery, that specialized in rose sales. In 2009, the Berrys purchased Park Hill Nursery (Park Hill), a nursery located in Tahlequah. At the time of the purchase, Park Hill was roughly 300-350 acres, and the Berrys paid just over $3 million for the sale. Park Hill was a supplier to Berry Family Nurseries and employed about 150 people. Until recent events, Park Hill was not a competitor to Berry Family Nurseries.

¶4 In early 2010, Berry Family Nurseries was heavily indebted and facing pressure from its lenders to infuse more than $20 million of equity into the business. The Berrys engaged a business broker to find an investor for Berry Family Nurseries. In the spring of 2010, the broker for the Berrys approached Insight Equity, a Texas investment company with headquarters in Southlake, Texas, about investing in Berry Family Nurseries. Insight Equity, a private-equity firm specializing in the acquisition of middle-market companies, was interested in Berry Family Nurseries because of its national scope and customer base. Insight Equity saw

the opportunity to expand Berry Family Nurseries by acquiring other wholesale nurseries and to make Berry Family Nurseries more profitable by strengthening management and consolidating decentralized administrative functions.

¶5 In mid-2010, Insight Equity sought to purchase Berry Family Nurseries and negotiations began. The Berrys were represented by counsel from both Oklahoma and Texas, and Insight Equity was represented by counsel from Texas. Negotiations were conducted primarily by phone calls and email exchanges and took the better part of six months to finalize. During Insight Equity's due diligence efforts, Insight Equity partners traveled to each of the nurseries owned by Berry Family Nurseries in Oklahoma, Florida, Michigan, Oregon, Tennessee, and North Carolina. In August of 2010, the Berrys met with Insight Equity partners at their Southlake, Texas office and signed a Letter of Intent regarding the eventual purchase of Berry Family Nurseries.

¶6 In November of 2010, Insight Equity formed BFN Properties and BFN Operations (BFN) to make the acquisition.[1] All of BFN's officers were Insight Equity partners who lived, worked, and maintained offices in the Insight Equity Southlake, Texas office. BFN opened and maintained bank accounts with several Dallas-area banks, and although BFN registered to do business in Oklahoma, BFN's Application for Employer Identification Number, filed with the federal government shortly after BFN's formation, listed Tarrant County, Texas, as BFN's principal place of business.

¶7 On December 7, 2010, the deal closed with BFN electronically signing the Purchase Agreement (Agreement) in Texas and the Berrys electronically signing the Agreement in Oklahoma. Pursuant to the Agreement, BFN purchased Berry Family Nurseries for $160 million. Park Hill was not included in the sale, but the Agreement included a three-year option allowing BFN to purchase Park Hill.[2] Sanders Nursery and Rosetree Nursery were also not included in the sale. The $160 million purchase price included assets of the business, debt assumption by BFN, and the Park Hill Purchase Option. The Berrys received millions of dollars in cash at closing, an "earn out" pursuant to which they could have earned tens of millions of dollars more based on BFN's financial performance, and the right to receive a portion of the proceeds from any profitable sale of BFN. At closing, BFN also paid millions of dollars to the Berrys' creditors, repaid a $30 million term loan, which released Bob and Burl from personal liability, and paid $21 million on a revolver note reducing the Berrys' personal liabilities.

¶8 The Agreement entered into by the parties contained a choice-of-law provision that provides that the Agreement "shall be governed by and construed in accordance with the domestic Laws of the State of Texas …."[3] The Agreement also contained a five-year non-compete provision, prohibiting the Berrys from owning a company anywhere in the United States that competed with the business acquired by BFN, i.e., the wholesale nursery business, until December 7, 2015. The non-compete allowed the Berrys to continue to own and operate Park Hill, Sanders Nursery, and Rosetree Nursery so long as such entities did not compete with BFN *while being owned by the Berrys*.[4] The Agreement also contained a five-year non-solicit provision, prohibiting the Berrys from soliciting the customers acquired by BFN in the purchase until December 7, 2015. Pursuant to separate Employment Agreements, Burl stayed on with BFN as the Chief Operating Officer, and Bob stayed on as the Chief Executive Officer.[5]

¶9 For the next three years, both BFN and the Berrys performed under the terms of the Agreement, and business continued as usual for the Berrys. Burl remained largely responsible for BFN's on-the-ground nursery operations and remained intimately involved in BFN's sales to its largest customers. Burl continued to operate Park Hill as well, and in fact, Park Hill became profitable for the first time in large part because it became BFN's largest supplier.[6] In the spring of 2012, pursuant to the terms of the original Agreement, BFN refinanced its revolver loan, which released the Berrys from their guarantees of more than $100 million of bank debt. In June of 2012, the Berrys' employment contracts expired. Bob's contract was not renewed, but he stayed on with BFN as a consultant. Burl renegotiated his employment contract with BFN, and in the fall of 2012, he agreed to remain COO of BFN in exchange for BFN writing off yet another $2.7 million in Park Hill debt.

¶10 The three-year purchase option for Park Hill expired on December 7, 2013, with BFN opting not to purchase Park Hill. Less than three weeks later, on December 30, 2013, Burl notified BFN he would be resigning from BFN effective January 31, 2014. On February 21, 2014, BFN executives met with Burl to discuss his exit from the company. As we discuss in greater detail

below, four days after that meeting, Burl began selling plants, trees, and shrubs, through Park Hill, directly to BFN's largest customers, including Wal-Mart and Home Depot. Upon learning of Burl's actions, BFN sent letters to its customers on or around March 10, 2014, advising them that Bob and Burl Berry "and entities controlled by either of them" were subject to a non-compete agreement with BFN and that any business dealings with the Berrys were impermissible under such agreement.[7]

¶11 On March 11, 2014, Burl Berry, Bob Berry, and Park Hill Nursery filed this action in the District Court of Cherokee County, seeking a declaration that the covenants were unenforceable and void under Oklahoma law. BFN filed a counterclaim against the Berrys, seeking damages and to enjoin the Berrys from violating the covenants. The trial court held a five-day non-jury trial beginning on June 29, 2015, and issued Findings of Fact and Conclusions of Law on August 19, 2015, wherein the court found that the Texas choice-of-law provision was valid and that the covenants were enforceable under Texas law. The court found the Berrys had violated the covenants and enjoined the Berrys from further violations.[8] A Final Journal Entry of Judgment was filed on October 15, 2015.[9] The Berrys and Park Hill appealed, and BFN filed a counter-appeal. We retained the case, and stayed the enforcement of the trial court's injunction.[10] Briefing was completed on January 17, 2017, and we held oral argument in the case on June 5, 2017.[11]

Texas Choice-of-Law Provision

¶12 The trial court determined that the Texas choice-of-law provision was valid and should be enforced. The trial court's decision on a choice-of-law issue is reviewed de novo. Edwards v. McKee, 2003 OK CIV APP 59, ¶ 9, 76 P.3d 73, 76. Under de novo review, an appellate court claims for itself plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings. Kluver v. Weatherford Hosp. Auth., 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. Upon examination, we agree with the trial court that the Texas choice-of-law provision is valid and enforceable.

¶13 In Krug v. Helmerich & Payne, Inc., 2013 OK 104, ¶ 35, 320 P.3d 1012, 1022, we said:

> Parties initiate contracts to provide a degree of certainty in their business transactions. The courts cannot make a better contract for the parties than they executed themselves. The essential principle of contract law is the consensual formation of relationships with bargained-for duties. The obvious corollary is bargained-for liabilities for failure to perform those duties.

Parties to a contract are free to specify the rules by which a contract will be enforced, including specification of the law of a particular jurisdiction.[12] "Absent illegality, the parties are free to bargain as they see fit, and this Court will neither make a new contract, [n]or rewrite the existing terms."[13] "[W]e maintain a healthy respect for the power of independent persons to bargain for, or away, contractual provisions and maintain our position that it is not this Court's province to remake contracts to suit the changing whims of contracting parties." In re Kaufman, 2001 OK 88, ¶ 22, 37 P.3d 845, 855. However, "[f]ulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interest and for state regulation."[14] Thus, "[t]he general rule is that a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement is sought."[15]

¶14 In the case before us, the facts demonstrate a nexus to the state of Texas, thus providing sufficient justification for the parties' Texas choice-of-law provision.[16] In addition, the Berrys concede that if Texas law applies, the covenants are enforceable under that state's law.[17] Therefore, the only issue we must decide is whether application of Texas law violates the public policy of Oklahoma – a determination that hinges on the whether the non-compete is enforceable under Oklahoma law.[18]

¶15 Section 217 of Title 15 of the Oklahoma statutes provides that "[e]very contract by which any one is restrained from exercising a lawful profession, trade or business of any kind" is void.[19] However, § 218 provides a statutory exception specifically allowing parties to enter into a non-compete agreement *when selling the goodwill of a business*. Section 218 states:

> One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof, so long as the buyer, or any person deriving title to the

> goodwill from him carries on a like business therein. Provided, that any such agreement which is otherwise lawful but which exceeds the territorial limitations specified by this section may be deemed valid, but only within the county comprising the primary place of the conduct of the subject business and within any counties contiguous thereto.[20]

¶16 Section 218 has been in effect since statehood and has remained largely unchanged since that time.[21] This Court has said that the purpose of this statute is to "allow the parties to the transfer of a going business to mutually agree, as a part of the value of the business transferred, that the transferee will be protected from his transferor who might use his previously acquired experience, contacts and expertise to promote his own interests in the same field of business in competition with his transferee." Farren v. Autoviable Servs. Inc., 1973 OK 4, ¶ 5, 508 P.2d 646, 648. This Court has held that "[i] n Oklahoma restraints of trade are permitted in connection with the sale of business, trade, or professional practice, the permissible limits being fixed by statutes which declare such agreements void only as to an excess of time or space …." Wesley v. Chandler, 1931 OK 477, ¶ 0, 3 P.2d 720, 720. We have consistently upheld non-compete agreements to protect business goodwill pursuant to § 218.[22]

¶17 In the case before us, neither party disputes that the non-compete was included in the Agreement to protect the business's goodwill. Nor is there any doubt that the non-compete, as written, applied to the operations at Park Hill. The only concern then is that the non-compete prevents the Berrys from engaging in a competing business anywhere in the United States – as opposed to "a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof."[23] However, § 218 explicitly provides that boundaries "which exceed[] the territorial limitations" do not render the covenant invalid. Rather, we limit enforcement of the covenant to those areas authorized by the statute. In this case, Tri-B Nursery, one of the nurseries purchased in the Agreement, is in the same county as Park Hill (Cherokee County). Therefore, limiting the enforcement of the non-compete to its permitted extent would still encompass operations at Park Hill, and the non-compete would be enforceable under Oklahoma law.

¶18 Thus, we conclude that enforcement of the non-compete under Texas law does not violate Oklahoma public policy in this case. We need not address whether enforcement of the non-solicit under Texas law violates Oklahoma public policy because the non-solicit "was intended to be ancillary to and complement the [n]on-[c]ompete[]," [24] and the non-compete is enforceable. As we discuss in detail below, the Berrys breached the non-compete, and because the non-solicit was less restrictive than the non-compete, any breach of the non-solicit was also a breach of the non-compete. Accordingly, we affirm the trial court's decision to enforce the parties' Texas choice-of-law provision.[25]

Breach of the Non-Compete

¶19 After hearing five days of testimony, the trial court found the Berrys breached the covenants. "In a non-jury trial the court's findings are entitled to the same weight and consideration that would be given to a jury's verdict." Soldan v. Stone Video, 1999 OK 66, ¶ 6, 988 P.2d 1268, 1269. Because the trial court is in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence, we will defer to the trial court as to the conclusions it reaches concerning those witnesses and that evidence. Mueggenborg v. Walling, 1992 OK 121, ¶ 7, 836 P.2d 112, 114. On appeal, the trial court's findings will not be disturbed if there is any competent evidence to support them.[26] Upon review, we conclude the trial court correctly found the Berrys breached the non-compete.

¶20 As mentioned above, after Burl's resignation from BFN, BFN senior executives met with him on February 21, 2014, to discuss his exit from the company. *On that same day,* after meeting with BFN executives, Burl was contacted by Wal-Mart, BFN's third largest customer, about selling trees and shrubs, through Park Hill, for a Wal-Mart promotion *for which BFN was supposed to be the supplier*. Burl met with Wal-Mart buyers at Park Hill less than a week later wherein Wal-Mart purchased more than 250,000 trees and shrubs from Park Hill for its promotion for almost $2 million. The trees and shrubs sold to Wal-Mart that day had previously been offered by Park Hill to BFN to help fulfill its obligation to Wal-Mart for that promotion. In fact, the record indicates that on the same day Burl met with Wal-Mart buyers at Park Hill, Burl received a text message from someone at BFN asking if BFN needed to put in a purchase order with Park Hill to "hold all

the shrubs, roses and other things they usually get from Parkhill," indicating that had Burl not sold the Park Hill inventory to Wal-Mart for its tree and shrub promotion, BFN would have purchased the inventory and remained the supplier for that promotion.[27]

¶21 After Wal-Mart purchased the trees and shrubs for that particular promotion, Burl then continued to sell to Wal-Mart. In an email on March 4, 2014, from Burl to Rob Cowgur, Wal-Mart's head buyer, Burl told Mr. Cowgur: "On other product for the rest of the spring, there are still some items out there that I can tie up for you and bring it into mix with what we have at Parkhill[.] [W]e don't plan on shipping BFN anymore product so we can ship you all of that product as well."[28] Park Hill's sales to Wal-Mart approached $9 million dollars in 2014 and $12 million dollars in 2015. The record is clear that upon Burl's departure from BFN, Park Hill, while still owned by the Berrys, immediately began competing with BFN for Wal-Mart's business.[29]

¶22 After Burl's resignation from BFN, Park Hill also began selling directly to Home Depot, which was BFN's second largest customer. On Burl's last day at BFN, January 31, 2014, Park Hill's sales manager, Brett Jones, emailed Home Depot's buyer, Rick Pappas, attaching a Park Hill Plants quote for Home Depot to the email: "I quoted the items that we discussed and items that I thought you might be interested in. I even put a column in for what I would suggest as the retail and calculated what this would yield for a beginning margin…."[30] Mr. Pappas responded: "Brett, I am good with all of the items listed for the program. We would need to get pricing set up and your PBS vendor number as the next steps."[31] Mr. Pappas testified that the "program" referred to in the email was Home Depot's HGTV program, a program that *BFN* had been selling to Home Depot until Burl's departure.[32] Mr. Pappas also testified that setting up a "PBS vendor number" allowed Park Hill to sell directly to Home Depot.[33]

¶23 In an email from Mr. Jones to Mr. Pappas on May 5, 2014, Mr. Jones specifically proposed to sell Home Depot clematises as part of Home Depot's HGTV program. Home Depot accepted the proposal. At his deposition, Mr. Pappas was asked whether this was yet another example of the Berrys, through Park Hill, seeking business from Home Depot. Mr. Pappas stated: "Yes, it was an e-mail to do business with [us]."[34] Regarding a June 17, 2014, email between Mr. Jones and Mr. Pappas, Mr. Pappas testified:

> Q: And your email to Jones reads, [t]hese are the heavy-hitters to ship this week. You can build larger orders around the top six – six stores listed here. Did I read that correctly?
>
> A: Correct.
>
> Q: Can you tell us what you're referring to?
>
> A: My highest volume stores on this list.
>
> Q: And did BFN sell any of the stores that are listed in your June 17, 2014 e-mail?
>
> A: Yes.
>
> Q: Would it be fair to say that both BFN and Park Hill were selling plants to those same stores?
>
> A: Yes.[35]

Park Hill's sales to Home Depot in 2014 were approximately $1.4 million dollars and $2.5 million in 2015. The record is clear that upon Burl's departure from BFN, Park Hill, while still owned by the Berrys, immediately began competing with BFN for Home Depot's business. The trial court's finding that the Berrys violated the non-compete is supported by competent evidence and is affirmed.

Injunctive Relief

¶24 The trial court issued Findings of Fact and Conclusions of Law on August 19, 2015, wherein the court concluded BFN was entitled to permanent injunctive relief pursuant to 12 O.S. 2011 § 1381.[36] The trial court also concluded BFN was "entitled to an equitable extension of the Covenants *through June 7, 2017*."[37] However, on September 4, 2015, before the Final Journal Entry of Judgment was filed, BFN sought and was granted a Temporary Restraining Order against the Berrys for their continued breach of the covenants after the entry of Findings of Facts and Conclusions of Law. The TRO Application alleged that after the trial court entered its Findings of Facts and Conclusions of Law on August 19, 2015, Park Hill accelerated its sales to certain retailers to sell as many plants as possible before the final judgment was entered and hosted Home Depot's plant buyers at its nursery on August 25, 2015, to garner additional Home Depot business. On October 15, 2015, the Final Journal Entry of Judgment was filed. Because of the Berrys' vio-

lation of the court's Findings of Facts and Conclusions of Law, the court again extended the duration of the covenants and enjoined the Berrys *until August 20, 2017*, from owning a wholesale nursery that sold to or solicited business from any national or regional retailer, including Wal-Mart and Home Depot.[38]

¶25 "Matters involving the grant or denial of injunctive relief are of equitable concern." Dowell v. Pletcher, 2013 OK 50, ¶ 5, 304 P.3d 457, 460. A court sitting in equity "exercise[s] discretionary power," and the granting of an injunction "rests in the sound discretion of the court to be exercised in accordance with equitable principles and in light of all circumstances." Id. ¶ 6, 304 P.3d at 460. However, an "[i]njunction is an extraordinary remedy that should not be lightly granted," id., and "[e]ntitlement to injunctive relief must be established in the trial court by clear and convincing evidence …."[39] In reviewing the matter, we will consider all of the evidence on appeal, but the trial court's decision "issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or its decision is clearly against the weight of the evidence." Scott v. Okla. Secondary Sch. Activities Ass'n, 2013 OK 84, ¶ 16, 313 P.3d 891, 896.

¶26 The trial court found that BFN had proven by clear and convincing evidence that it was entitled to injunctive relief. We have reviewed the entire record in this case, and we find the trial court's determination that BFN was entitled to injunctive relief is supported by the evidence. We affirm this portion of the court's order. However, we find no Oklahoma case, and the parties cite to none, wherein this Court has extended the duration of a restrictive covenant beyond the contractually specified timeframe as a remedy for violation of that covenant.

¶27 In Brown v. Stough, 1956 OK 3, 292 P.2d 176, this Court upheld a provision within a medical clinic partnership agreement that prohibited a partner who voluntarily withdrew from the partnership from practicing medicine for a period of two years within the county in which the medical clinic was located. On appeal, the plaintiffs asked the Court to "fix the time that the injunction is to commence for its duration of two years *as the time the mandate is spread of record*." Id., ¶ 19, 292 P.2d at 181 (emphasis added). The Court specifically declined to extend the injunction beyond the contractually specified time reasoning that the partnership agreement "plainly provide[d] that a member withdrawing shall not practice medicine for a period of *two years from the date of his withdrawal*," and that the plaintiffs sought "injunctive relief in accordance with the provisions of the contract." Id. The Court concluded that the plaintiffs could not "obtain additional or greater relief than that prayed for in their petition or *authorized by the contract sued upon*." Id. (emphasis added).

¶28 In this case, the parties' Agreement plainly relieved the Berrys from the covenants upon the expiration of the five-year term, which all parties agree was December 7, 2015.[40] Although the Agreement specifically allowed for injunctive relief as a remedy for any breach, nothing in the Agreement suggests either party contemplated or agreed to an extension of the covenants beyond December 7, 2015, as part of any injunctive relief that might issue. Thus, we reverse that portion of the trial court's judgment extending the duration of the covenants for an additional twenty months through August 20, 2017.

Damages

¶29 BFN also sought damages for the Berrys' breach of the covenants, specifically for lost profits on the Home Depot and Wal-Mart accounts for the years 2014, 2015, 2016, 2017, and 2018 (2014 – 2018). BFN's expert calculated such lost profits at $8,212,404.00.[41] The Berrys offered no evidence, by way of expert testimony or otherwise, to dispute BFN's calculation of such damages. Rather, the Berrys' sole argument at trial and on appeal is that the Berrys' breach was not the cause of BFN's damages with regard to sales to Wal-Mart and Home Depot. The trial court's *only* finding on damages was: "[B]FN failed to establish it would have continued to sell to Wal-Mart and Home Depot but for the interference of the Berrys or Park Hill. Therefore, no monetary damages are awarded."[42] For the reasons set forth below, we reverse the trial court's finding that BFN was not entitled to monetary damages for the Berrys' breach.

¶30 Much was made at trial about the unique purchasing cycle of the nursery industry. At trial, Burl explained the nursery planting cycle as follows:

> [W]e go through the planting process. We have to plant – we have to plant in the spring of the year our bare root trees. You've got to typically plant the bare root

> trees in January, February, and March for the whole – for your fall business or for the next spring. So, you've got to plan it out….
>
> Then, you go to the line review process…. The line review process is where you go in to basically see a vendor, i.e., be it Wal-Mart or Lowe's…. Typically it happens in July or August…. You go in, and you present your prices. You present the products that you have to sell for the next year. And you basically have an idea of the area that you'd like to ship that's compatible to the products you have. And you usually go over for the day, and you make that presentation. And then typically, sometimes it was as late as December before you would hear back from them…. And that would be the first time that you could take those areas, arrive and write some preliminary orders and know what inventory you're really going to need….
>
> The next step would be the shipments. Send them back to Wal-Mart. Get PO's. Get hard PO's on them. And plan to ship them in the spring or at the next – at the determined proper time, you know, the next spring.[43]

¶31 Wal-Mart's head buyer, Mr. Cowgur, also testified that *particularly* for a company the size of Wal-Mart, horticulture inventory has to be planned out years in advance to ensure supply is available in the large quantities needed.[44] When asked why Wal-Mart continued to do business with BFN after the March 2014 tree and shrub promotion, Mr. Cowgur responded:

> A: We didn't have a choice. We – BFN is a big company, and they were in our top ten as far as volume goes. And when you look at what it takes to plan out the horticulture business specifically in trees and shrubs, *long lead times; three, four, five, six, sometimes seven years on product.* And quite frankly, you know, so many folks have closed up shop. We – we needed product to be able to sell to our customer. So not that we wanted to, but we did…. *I'm just saying there was no other product available anywhere else, so we didn't have a choice. Whether we wanted to or not, that's irrelevant*.[45]

¶32 With regard to the Home Depot account, Burl testified at trial that he and Mr. Pappas had previously discussed an order of more than twenty thousand hydrangeas that were originally supposed to have been shipped to Home Depot in the spring of 2014 *through BFN*. When asked if prior to his departure from BFN, whether he "anticipated that that product would be shipped to Home Depot under BFN[,]" Burl responded, "[p]rior to my leaving, yes, that was our plan."[46] In addition, when asked whether Park Hill anticipated selling inventory already in the ground to BFN for the spring 2014 season so that BFN could then sell it to Wal-Mart, Burl replied, "[n]ot only Wal-Mart. Lowe's … Home Depot, any accounts."[47]

¶33 A claim for lost profits need not be proven with "absolute certainty," and "[i]n essence, what a [party] must show for the recovery of lost profits is *sufficient certainty that reasonable minds might believe from a preponderance of the evidence that such damages were actually suffered*.'"[48] Upon Burl's departure from BFN on January 31, 2014, Park Hill immediately began selling inventory directly to Wal-Mart and Home Depot – inventory that Burl specifically testified was to be sold to BFN for the spring 2014 season so BFN could sell to Wal-Mart and Home Depot. The question then is not whether the Berrys' breach caused BFN damages – it most certainly did – the question, rather, is what are BFN's damages? On remand the trial court shall determine BFN's damages for lost profits on the Home Depot and Wal-Mart accounts. Although a "non-breaching party may not receive more in damages than he might or could have gained from full performance" of the contract, we make no determination whether BFN is entitled to damages beyond December 7, 2015, and leave that question to the trial court to determine on remand.[49]

Tortious Interference

¶34 BFN also alleged that Park Hill tortiously interfered with BFN's Agreement with the Berrys.[50] BFN argues that "[b]ecause the sales to Wal-Mart and Home Depot in violation of the Covenants were all made by Park Hill, the damages from the Berrys' breach of the Covenants *and Park Hill's interference with them* are the same."[51] The trial court found "Park Hill tortiously interfered with the Covenants"[52] because Park Hill "intentionally and knowingly" participated in the violation.[53] However, the trial court found BFN "failed to prove monetary damages."[54] The Berrys made no claim of error on appeal with regard to the court's finding that Park Hill tortiously interfered with the Agreement.[55] Thus, the trial court's finding remains undisturbed in that regard, and the only issue on appeal is whether the trial court

correctly concluded BFN failed to prove monetary damages.

¶35 Because we are remanding the case to the trial court to determine BFN's damages for the Berrys' breach, we also remand the case for the trial court to reconsider damages with regard to BFN's tortious interference claim against Park Hill. Although BFN agrees that damages from the Berrys' breach and Park Hill's interference are the same, BFN is entitled to reassert its claim for punitive damages against Park Hill on remand upon the trial court's determination of BFN's damages for lost profits on the Home Depot and Wal-Mart accounts.[56] In addition, on remand, Park Hill is entitled to a reduction of $439,000.00 on any judgment against it as the trial court correctly concluded BFN owed Park Hill $439,000.00 on an open account.[57]

Attorney's Fees

¶36 The Final Journal Entry of Judgment also concluded that BFN, as the prevailing party, was entitled to reasonable attorney's fees with the "amount [to] be determined by separate application."[58] Although the trial court did not specify whether it was awarding attorney's fees to BFN under Texas or Oklahoma law, BFN sought attorney's fees pursuant to Section 38.001(8) of the Texas Civil Practice & Remedies Code.[59] The Berrys appealed the trial court's finding, asserting that the trial court erred "in ruling BFN is entitled to attorneys fees and costs … under § 38.001(8) of the Texas Civil Practice and Remedies Code" because, among other reasons, the court "erred procedurally in not allowing the issue to be fully briefed by both parties."[60] Because the trial court did not set an amount for attorney's fees in the Final Journal Entry of Judgment, that portion of the judgment is an interlocutory ruling. An order granting attorney's fees, but not determining the amount is not a final judgment, and appeal of this issue is premature. [61] Because the trial court's ruling is not a final order in this regard, either party may ask the trial court to reconsider the ruling. Liberty Bank & Trust Co. of Okla. City, N.A. v. Rogalin, 1996 OK 10, ¶ 14, 912 P.2d 836, 839 (stating that an interlocutory order is "subject to trial court modification"). In that same vein, because the trial court's ruling on the issue remains open to modification, any ruling regarding attorney's fees, is "subject to subsequent examination on timely appeal" by either party. Id.

Conclusion

¶37 The trial court correctly enforced the parties' bargained-for Texas choice-of-law provision, and under Texas law, the non-compete is valid and enforceable. The trial court also correctly concluded that the Berrys breached the non-compete upon Burl's departure from BFN on January 31, 2014. Although the trial court correctly found BFN was entitled to injunctive relief, we reverse that portion of the trial court's judgment extending the duration of the restrictive covenants for an additional twenty months through August 20, 2017. We also reverse that portion of the trial court's judgment finding BFN suffered no damages from the Berrys' breach or from Park Hill's tortious interference. We affirm the trial court's finding that BFN owed Park Hill $439,000.00 on an open account. That portion of the trial court's order awarding attorney's fees to BFN is not a final judgment, and appeal of that issue is premature. The case is remanded to the trial court for further proceedings consistent with this opinion.

TRIAL COURT'S ORDER AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

¶38 Combs, C.J., Gurich, V.C.J., Kauger, Winchester, Reif and Wyrick, JJ., concur;

¶39 Colbert, J., concurs in result;

¶40 Edmondson, J., not participating.

GURICH, V.C.J.

1. BFN Operations was formed to hold the assets of the company. BFN Properties was formed to hold the real property.

2. The record indicates the sale of Park Hill's business and assets would have created a large tax liability for the Berrys, so at the Berrys' urging, the Agreement did not provide for the sale of Park Hill.

3. Record on Appeal, Non-Jury Trial Proceedings, Defs.' Ex. 26, at 56.

4. Pursuant to the terms of the Purchase Option Agreement, the Berrys were free to sell Park Hill upon the expiration of the three-year option, and the purchaser of Park Hill was not prohibited from competing with BFN. Jack Waterstreet, an executive for BFN, testified that initial drafts of the Agreement contained only "a blanket non-competition," but that the Berrys specifically negotiated the non-compete to allow them to continue to own and operate Park Hill, Sanders Nursery, and Rosetree Nursery so long as such entities did not compete with BFN. Record on Appeal, Non-Jury Trial Proceedings at 972.

5. Each Employment Agreement had a choice-of-law provision that provides that the Employment Agreement "is governed by and shall be construed in accordance with the laws of the State of Oklahoma." Record on Appeal, Non-Jury Trial Proceedings, Pls.' Ex. 420, at 4; Ex. 421, at 4.

6. The record indicates Park Hill's sales to BFN increased from about $2.4 million in 2011 to about $8.9 million in 2013. The Berrys' equity in Park Hill more than doubled during that time, increasing from about $3.6 million in 2010 to about $8.9 million in 2013.

7. Record on Appeal, Non-Jury Trial Proceedings, Pls.' Ex. 349.

8. The Findings of Fact and Conclusions of Law are discussed in detail throughout the remainder of this opinion.

9. The Findings of Fact and Conclusions of Law were incorporated into the Journal Entry of Judgment. Record on Appeal at 1066.

10. During the pendency of the appeal, we remanded the case to the trial court to determine whether a bond should be posted as a condition of the stay. The trial court denied BFN's request for bond, and we left that decision undisturbed.

11. On June 23, 2016, BFN filed a suggestion of bankruptcy, notifying this Court that it had filed for bankruptcy. We stayed proceedings in this Court on June 24, 2016. On July 21, 2016, we lifted the stay upon notification from the parties the automatic bankruptcy stay had been modified in part to allow this appeal to proceed. The parties then sought, and were granted, several briefing extensions.

On March 13, 2017, BFN filed a "Notice of Assignment of Judgment," notifying the Court that on January 10, 2017, BFN had assigned all of its rights, title, and interest in and to the Journal Entry of Judgment entered October 15, 2015, to Nursery Solutions, LLC, a Texas company. The Berrys now argue that BFN no longer has standing to pursue the appeal. Upon consideration, we conclude BFN has standing to continue to pursue the appeal. After oral argument, the Berrys filed a Motion to Supplement the Record on Appeal, which BFN opposed. That motion is denied.

12. Williams v. Shearson Lehman Brothers, Inc., 1995 OK CIV APP 154, ¶ 17, 917 P.2d 998, 1002.

13. JPMorgan Chase Bank, N.A. v. Specialty Rests., Inc., 2010 OK 65, ¶ 9, 243 P.3d 8, 13. See also 15 O.S. 2011 § 152 ("A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.").

14. Restatement (Second) of Conflicts of Law § 187 cmt. G.

15. Williams, 1995 OK CIV APP 154, ¶ 14, 917 P.2d at 1002. See also Oliver v. Omnicare, Inc., 2004 OK CIV APP 93, ¶ 4, 103 P.3d 626, 628 ("The general rule [in Oklahoma] is that a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law of the state where enforcement of the contract is sought."); MidAmerican Constr. Mgmt. v. Mastec N. Am., Inc., 436 F.3d 1257, 1260 (10th Cir. 2006) ("Under the law of the forum state in this case, Oklahoma, 'a contract will be governed by the laws of the state where the contract was entered into *unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought*.'"); Eakle v. Grinnell Corp., 272 F.Supp. 1304, 1308 (E.D. Okla. 2003); ("With respect to contract actions, the general rule under Oklahoma law is that 'contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought.").

The Berrys ask us to apply the Restatement's most significant relationship test to determine the choice-of-law issue. However, this Court has not adopted the Restatement's most significant relationship analysis in contract cases, and we need not do so today. See Bernal v. Charter Cty. Mut. Ins. Co., 2009 OK 28, ¶ 12, 209 P.3d 309, 315.

16. Williams, 1995 OK CIV APP 154, ¶ 17, 917 P.2d at 1002 ("Nothing in this record demonstrates that the parties' contractual choice of law should not be given effect as written.").

17. With regard to the non-compete, Texas law allows non-compete agreements to protect business goodwill. The Texas Business and Commerce Code, specifically the Covenants Not to Compete Act, provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful." Tex. Bus. & Com. Code § 15.05(a). Similar to Oklahoma law, which we discuss below, the Act also provides a statutory exception specifically allowing parties to enter into a non-compete agreement to protect the goodwill of a business:

> Notwithstanding Section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary *to protect the goodwill* or other business interest of the promisee.

Id. (emphasis added).

18. "[A] specific Oklahoma court decision, state legislative or constitutional provision, or a provision in the federal constitution that prescribes a norm of conduct for the state can serve as a source of Oklahoma's public policy." Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 13, 176 P.3d 1204, 1212.

19. 15 O.S. 2011 § 217. This Court has said that "'[s]ection 217 prohibits only *unreasonable* constraints on the exercise of a lawful profession, trade or business.'" Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, ¶ 14, 61 P.3d 210, 213 (citing Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, ¶ 11, 780 P.2d 1168, 1172. "To cure an overly broad and thus unreasonable restraint of trade, an Oklahoma court may impose 'reasonable limitations concerning the activities embraced, time, or geographic limitation' but it will refuse to supply material terms of the contract." Id.

20. 15 O.S. 2011 § 218. This Court has defined goodwill as: "[T]he custom or patronage of any established trade or business; the benefit or advantage of having established a business and secured its patronage by the public. The 'good will' value of any business is the value that results from the probability that old customers will continue to trade with an established concern." Freeling v. Wood, 1961 OK 113, ¶ 12, 361 P.2d 1061, 1063 (internal citations omitted).

21. Sections 217 and 218 "were adopted word for word" from the Dakota territories. Key v. Perkins, 1935 OK 142, ¶ 9, 46 P.2d 530, 531.

22. See Farren, 1973 OK 4, 508 P.2d 646 (enforcing covenant not to compete where owner of vending machine operation and food service company agreed not to compete in such business in the same county for one year after the closing of a corporate merger which included the sale of goodwill of the business); Griffin v. Hunt, 1954 OK 87, 268 P.2d 874 (enforcing covenant not to compete where veterinarian who sold his practice, including the goodwill of the business, agreed not to operate a veterinary facility in the same county for a specified time); Clare v. Palmer, 1949 OK 8, 203 P.2d 426 (enforcing covenant not to compete where the seller of a drug store and the goodwill of such business agreed not to compete in the same town as the buyer so long as the buyer continued the operation of a similar business in the town); Hartman v. Everett, 1932 OK 460, 12 P.2d 543 (enforcing covenant not to compete where the seller of stock of a publishing company agreed not to edit, publish, or manage a fox, wolf or hound magazine in the same county as the buyer for a period of five years).

23. 15 O.S. 2011 § 215.

24. Record on Appeal at 770.

25. Nichols v. Nichols, 2009 OK 43, ¶ 10 & n.14, 222 P.3d 1049, 1054 & n.14 ("An appellate court has a common-law duty to affirm a trial judge's decision if it can be supported by any applicable legal theory.").

26. Soldan, 1999 OK 66, ¶ 6, 988 P.2d at 1269. Because BFN sought damages only with regard to the Home Depot and Wal-Mart accounts, we need not address whether the Berrys breached the non-compete with regard to other BFN customers including Lowe's and K-Mart.

27. Record on Appeal at 1426. This much discussed tree and shrub promotion for Wal-Mart was set to take place in March of 2014. The undisputed evidence at trial revealed that BFN had previously been awarded the promotion from Wal-Mart and had planned to supply the promotion with trees and shrubs already in the ground at Park Hill.

28. Record on Appeal, Non-Jury Trial Proceedings, Defs.' Ex. 117.

29. The Berrys spent much of their time at trial presenting witnesses who testified that BFN had discontinued its relationship with Wal-Mart when Park Hill began selling to Wal-Mart in March of 2014. However, the record makes clear that BFN had not ended its relationship with Wal-Mart as evidenced by Wal-Mart's purchase of millions of dollars of inventory from BFN after March of 2014. Mr. Cowgur testified that the dollar amount of plants Wal-Mart purchased from BFN after March of 2014 was "between 10 and 15 million dollars." Record on Appeal at 1446. In addition, the record reflects that BFN executives were in daily communication with Wal-Mart buyers attempting to reach an agreement to negotiate pricing with Wal-Mart after the tree and shrub promotion. Record on Appeal at 1465; Record on Appeal, Non-Jury Trial Proceedings, Defs.' Exs. 124 – 125, 134 – 137. Regardless, such evidence is irrelevant to the determination of whether the Berrys violated the non-compete.

30. Record on Appeal at 1641.

31. Id. at 1639.

32. Id. at 1602.

33. Mr. Pappas testified that Park Hill did not have a vendor number until after Burl left BFN and that under Home Depot's vendor system, Home Depot must assign a vendor a number for the vendor to sell plants to Home Depot. Id. at 1598, 1603.

34. Id. at 1602.

35. Id. at 1604.

36. Although Texas law governs the validity and enforceability of the non-compete in this case, the remedy available to enforce such contractual provision is determined by the law of the forum. Consol. Grain & Barge Co. v. Structural Sys. Inc., 2009 OK 14, n.6, 212 P.3d 1168, 1171 n.6; see also Clark v. First Nat'l Bank of Marseilles, Ill., 1916 OK 404, ¶ 9, 156 P. 96, 98 ("[M]atters respecting the remedy depend upon the law of the place where the remedy is sought to be enforced.").

37. Record on Appeal at 774 (emphasis added).

38. The trial court's judgment with regard to injunctive relief provides:

> Bob Berry and Burl Berry, directly or indirectly, from the date of this Final Journal Entry of Judgment in this action through August 20, 2017, be and hereby are enjoined and restrained from (1) owning or being an equity owner (other than as an equity

holder of less than 2% percent of the issued and outstanding shares of a publicly traded company) within the United States of America, in any business activity or enterprise, including but not limited to, Park Hill, that is a wholesale nursery that sells trees, shrubs, rose bushes, and/or perennials to any national or regional retailer, including, without limitation, Costco, Home Depot, K-Mart, Kroger, Lowe's, Sam's Club, Wal-Mart, Meijer, Shopko, or Rural King, for resale to consumers, and (2) either directly or indirectly, for their own benefit or the benefit of any other person or entity, including, but not limited to, Park Hill, from soliciting, attempting to solicit, calling on, or diverting or attempting to divert from [BFN], the customers identified on Schedule 3.18(a) to the APA, a copy of which is attached hereto as Exhibit A. Bob Berry and Burl Berry are not enjoined from having an ownership in Park Hill, so long as Park Hill refrains from selling trees, shrubs, rose bushes and/or perennials to any national or regional retailer, including, without limitation, Costco, Home Depot, K-Mart, Kroger, Lowe's, Sam's Club, Wal-Mart, Meijer, Shopko, or Rural King, for resale to consumers. The Court shall have continuing jurisdiction to enforce the injunctive relief granted herein.

Id. at 1067.

39. House of Realty, Inc. v. City of Midwest City, 2004 OK 97, ¶ 11, 109 P.3d 314, 318 (internal quotation marks omitted).

40. Record on Appeal at 772.

41. Record on Appeal, Non-Jury Trial Proceedings, Defs.' Ex. 201.

42. Record on Appeal at 773.

43. Record on Appeal, Non-Jury Trial Proceedings at 163 – 166.

44. Record on Appeal at 1355.

45. Id. at 1355 (emphasis added).

46. Record on Appeal, Non-Jury Trial Proceedings at 403.

47. Id. at 384.

48. Florafax Int'l, Inc. v. GTE Market Res. Inc., 1997 OK 7, ¶ 42, 933 P.2d 282, 296 (emphasis added). In Florafax this Court addressed the standard for assessment of damages for lost profits in a breach of contract case, and specifically discussed lost profits from a third-party collateral contract. In that case, Florafax International, Inc. sued GTE Market Resources for breaching a contract that required GTE to provide telecommunication and telemarketing services to Florafax. However, part of the damages sought by Florafax was profits lost under a collateral contract Florafax had with a third party that was canceled because of GTE's breach of its contract with Florafax. The jury determined that GTE breached its contract with Florafax, and in addition to other damages, awarded Florafax damages for lost profits Florafax would have earned under its collateral contract with the third party.

This Court affirmed the jury's award and found that an award in the form of lost profits is "generally considered a common measure of damages for breach of contract, [and] frequently represents fulfillment of the non-breaching party's expectation interest …. [I]t often closely approximates the goal of placing the innocent party in the same position as if the contract had been fully performed." Id., ¶ 26, 933 P.2d at 292. The Court set forth the following standard for assessing damages for lost profits:

> [L]oss of future or anticipated profit – i.e. loss of expected monetary gain – is recoverable in a breach of contract action: 1) if the loss is within the contemplation of the parties at the time the contract was made, 2) if the loss flows directly or proximately from the breach – i.e. if the loss can be said to have been caused by the breach – and 3) if the loss is capable of reasonably accurate measurement or estimate.

Id.

49. Id., ¶¶ 34 – 39, 933 P.2d at 295.

50. "Oklahoma recognizes a tortious interference claim with a contractual or business relationship if the plaintiff can prove (1) the interference was with an existing contractual or business right; (2) such interference was malicious and wrongful; (3) the interference was neither justified, privileged nor excusable; and (4) the interference proximately caused damage." Wilspec Techs., Inc. v. DunAn Holding Grp, Co., 2009 OK 12, ¶ 15, 204 P.3d 69, 74.

51. Combined Answer Brief and Brief-in-Chief of BFN at 38 n.30 (emphasis added).

52. Record on Appeal at 775.

53. Id. at 769 – 70.

54. Id. at 775.

55. In Wilspec, we said that a tortious interference "claim is viable only if the interferor is not a party to the contract or business relationship." 2009 OK 12, ¶ 15, 204 P.3d at 74. The Berrys did not argue at trial or on appeal that Park Hill was a party to the contract.

56. "[P]unitive damages are not recoverable solely for breach of contract obligations [but] when a breach of obligations arises from tortious conduct … punitive damages may be recoverable." Wilspec, 2009 OK 12, ¶ 17, 204 P.3d at 76. "In addition to proving the elements of a tort, the plaintiff seeking punitive damages for tortious interference with a contract obligation must prove that the defendant acted either recklessly, intentionally, or maliciously by clear and convincing evidence." Id., ¶ 18, 204 P.3d at 76.

57. Park Hill alleged in its Petition that BFN owed Park Hill $450,000.00 for failure to pay for products supplied by Park Hill to BFN. BFN asserted setoff as an affirmative defense to Park Hill's open-account claim, alleging that Park Hill owed $48,285.00 to BFN and that any judgment entered in Park Hill's favor should be set off in this amount. On this issue, the trial court found that "BFN owed Park Hill $439,000.00 at the time of trial" and that "BFN had failed to prove its setoff claim." Record on Appeal at 773.

Although exhibit 177 from the non-jury trial indicates BFN may be entitled to setoff in amount of $48,285.00, the exhibit is not dated. Jack Waterstreet, the BFN executive who testified to the authenticity of the document, testified that the document was an excerpt of the accounts receivable ledger, but Mr. Waterstreet likewise did not provide a date for the document, just that it was made at or near the time of the act. Record on Appeal, Non-Jury Trial Proceedings at 1075. The ledger includes invoices for Park Hill Plants and Park Hill Plants & Trees ranging from August 29, 2013, to June 29, 2014. Other exhibits in the record relied on by BFN, including Exhibit 159 at page 18, do not support BFN's claim for setoff. Page 18 of Exhibit 159 is a chart showing "YTD Cost of Sales Update/Inventory Bridge," and does not reflect any amount owed by Park Hill to BFN. Park Hill did not address BFN's setoff claim in its Combined Reply and Answer Brief on appeal. Regardless, the evidence relied on by BFN is incomplete, at best, with regard to its setoff claim. Thus, we defer to the trial court's finding that BFN failed to prove setoff. The court's judgment is affirmed in this regard.

58. Record on Appeal at 1068 – 69.

59. Compare Veiser v. Armstrong, 1984 OK 61, n.6, 688 P.2d 796, 799 n.6 (stating that in a conflict-of-law analysis "matters of procedure are governed by the law of the forum"), with Boyd Rosene and Assocs., Inc. v. Kansas Mun. Gas Agency, 174 F.3d 1115, 1118 – 25 (10th Cir. 1999) (concluding that under Oklahoma law, attorney's fees would be considered substantive in a choice-of-law analysis, and thus, the state's law that governs the substantive issues in the case also applies to decide whether attorney's fees are recoverable).

60. Petition in Error, Ex. C. We note that if Texas law applies, the parties were not given a full opportunity to address whether that state's law allows attorney's fees to employers who seek to enforce restrictive covenants against employees. The issue remains unsettled under Texas law and deserves closer examination by both the trial court and the parties.

61. See Keel v. Wright, 1995 OK 18, 890 P.2d 1351; see also Beavers v. Byers, 2010 OK CIV APP 79, ¶ 8, 239 P.3d 484, 487 ("A trial court order determining only a party's entitlement to attorney fees and costs does not constitute a final order."); City of Norman v. Am. Fed'n of State, Cty. & Mun. Emps., 2006 OK CIV APP 137, ¶ 3, 146 P.3d 872, 872 ("[T]he resolution of the issue of entitlement [to attorney's fees] without a determination as to amount does not constitute a final order, and this appeal must be dismissed as premature.").

April

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

18 **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

19 **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

20 **OBA Board of Governors meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City, Contact John Morris Williams 405-416-7000

21 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212

23 **OBA Estate Planning, Probate and Trust Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Emily E. Crain 918-744-0553

24 **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

25 **OBA Immigration Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melissa R. Lujan 405-600-7272

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

27 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

May

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

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

3 **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

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

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

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

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

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

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE *OKLAHOMA INDIGENT DEFENSE SYSTEM* BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2019 pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2019 (July 1, 2018 through June 30, 2019) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

COMANCHE, COTTON, JEFFERSON, LEFLORE & STEPHENS

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2019 (July 1, 2018 through June 30, 2019). Offers may be submitted for complete coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, April 26, 2018.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2019 OFFER TO CONTRACT **TIME RECEIVED:**
_____ COUNTY / COUNTIES **DATE RECEIVED:**

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2019 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, April 26, 2018 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, April 27, 2018, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, April 27, 2018, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, May 18th, 2018**, at ***OIDS offices, 111 N Peters Ave, Norman, OK 73069.***

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2019 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2014, FY-2015, FY-2016, FY-2017 and FY-2018 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2661.**

* * * * * * * * * * * *

REQUEST FOR OIDS FY-2019 OFFER-TO-CONTRACT PACKET

Name: _____ OBA#: _____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest: _____

_____

_____

Court of Criminal Appeals Opinions

2018 OK CR 7

TERRON A. DAVIS, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-171. March 22, 2018

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Terron A. Davis, was tried by a jury and convicted in Cleveland County District Court, Case No. CF-2013-1293, of Count 1: Attempted Robbery with a Weapon, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 801; Count 2: Assault and Battery with a Deadly Weapon, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 652; and Count 3: Burglary in the First Degree, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 1431.[1] The jury recommended as punishment twenty-five (25) years imprisonment on each of Counts 1 and 3, and life imprisonment on Count 2. On March 9, 2016, the Honorable Tracy Schumacher, District Judge, sentenced Davis in accordance with the jury's verdicts.[2] Judge Schumacher further ordered the sentences for all three counts to run concurrently and ordered credit for time served.

¶2 Davis now appeals, raising ten (10) propositions of error before this Court:

I. CONVICTIONS AND SENTENCES FOR ATTEMPTED ROBBERY WITH A WEAPON, ASSAULT AND BATTERY WITH A DEADLY WEAPON, AND BURGLARY IN THE FIRST DEGREE, VIOLATED APPELLANT'S RIGHT TO BE FREE FROM MULTIPLE PUNISHMENT UNDER 21 O.S.2011, § 11;

II. BECAUSE THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY ALLOWED A CONVICTION FOR ASSAULT AND BATTERY WITH A DEADLY WEAPON WITHOUT REQUIRING PROOF OF AN INTENT TO KILL, THE JUDGMENT AGAINST APPELLANT MUST BE MODIFIED;

III. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ASSAULT AND BATTERY WITH A DANGEROUS WEAPON AS A LESSER RELATED OFFENSE TO THE CHARGED COUNT OF ASSAULT AND BATTERY WITH A DEADLY WEAPON, IN VIOLATION OF APPELLANT'S FUNDAMENTAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

IV. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO SEVER THE TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION AND 22 O.S.2011, § 439;

V. APPELLANT WAS DENIED HIS RIGHT TO FIVE SEPARATE PEREMPTORY CHALLENGES EVEN THOUGH HE AND HIS CODEFENDANTS HAD INCONSISTENT DEFENSES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, 22 O.S.2011, § 655, AND ARTICLE II, §§ 7, 19, AND 20 OF THE OKLAHOMA CONSTITUTION;

VI. THE ADMISSION OF THE EXTRAJUDICIAL IDENTIFICATIONS OF APPELLANT VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

VII. THE TRIAL COURT ERRED BY FAILING TO GIVE A CAUTIONARY JURY INSTRUCTION ON EYEWITNESS IDENTIFICATION IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

VIII. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

IX. UNDER ALL OF THE FACTS AND CIRCUMSTANCES OF THIS CASE, A LIFE SENTENCE FOR ASSAULT AND BATTERY WITH A DEADLY WEAPON IS SHOCKINGLY EXCESSIVE;

X. THE ACCUMULATION OF ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND RELIABLE VERDICT.

¶3 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's Judgment and Sentence is therefore **AFFIRMED**.

I

¶4 Appellant concedes that his multiple punishment claim was not raised at trial and thus may be reviewed on appeal only for plain error. *Rousch v. State*, 2017 OK CR 7, ¶ 3, 394 P.3d 1281, 1282. To be entitled to relief under the plain error doctrine, Appellant must show an actual error, that is plain or obvious, and that affects his substantial rights. *Baird v. State,* 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d 887, 896-97; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. 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. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883; *Ashton,* 2017 OK CR 15, ¶ 34, 400 P.3d at 896-97; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701). Appellant fails to show an actual or obvious error.

¶5 Here, the charged burglary was completed when Appellant and his accomplices opened the front door and entered the occupied duplex with intent to commit assault and battery of the victim inside. The commission of the assault and battery with a deadly weapon was completed when Appellant stabbed the victim in the chest during the fight. It was only after David Morgan was stabbed and the fighting had stopped that the attempted robbery commenced. The record shows a clear separation or break between the stabbing of the victim in the chest, the completion of the fighting and the subsequent robbery attempt. The record thus shows separate and distinct offenses committed in rapid succession and requiring different proof. There is no actual or obvious double punishment error from Appellant's convictions on Counts 1-3. *State v. Kistler*, 2017 OK CR 24, ¶¶ 2-8, __P.3d__; *Davis v. State*, 1999 OK CR 48, ¶¶ 10-13, 993 P.2d 124, 126-27; *Gregg v. State,* 1992 OK CR 82, ¶ 27, 844 P.2d 867, 878; *Ziegler v. State,* 1980 OK CR 23, ¶¶ 9-10, 610 P.2d 251, 253-54. Proposition I is denied.

II

¶6 The trial court appropriately used the uniform Oklahoma jury instructions defining the crime of assault and battery with a deadly weapon in the written charge. We recently reaffirmed that "[i]ntent to kill is not an element of assault and battery with a deadly weapon. It would be error to instruct jurors otherwise." *Tucker v. State*, 2016 OK CR 29, ¶ 25, 395 P.3d 1, 8-9 (citing *Goree v. State*, 2007 OK CR 21, ¶¶ 3, 5, 163 P.3d 583, 584-85) (internal citations omitted). We also unanimously declined in *Tucker* to reconsider our previous holding from *Goree* on this issue. *Tucker,* 2016 OK CR 29, ¶ 25, 395 P.3d at 9. Thus, there is no plain error from the instructions. *Id.* Proposition II is denied.

III

¶7 This Court reviews a trial court's decision on which instructions are given to a jury, including lesser related instructions, for an abuse of discretion. *Simpson v. State*, 2010 OK CR 6, ¶ 16, 230 P.3d 888, 897. We require *prima facie* evidence of the lesser offense to support giving a lesser included instruction. *Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 116. "*Prima facie* evidence of a lesser included offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Id.* Here, *prima facie* evidence of the lesser related offense of assault and battery with a dangerous weapon was not presented at trial.

¶8 After reviewing the evidence, we do not believe that a rational jury could find that the manner in which Appellant stabbed the victim was with the intent merely to harm or injure.

21 O.S.2011, § 645; *Eizember v. State*, 2007 OK CR 29, ¶ 118, 164 P.3d 208, 238. The nature and severity of the victim's injury alone shows Appellant wielded the knife in a life-threatening manner. Notably, Appellant did not defend the case by arguing that he stabbed the victim but merely with an intent to injure. There is no affirmative evidence of mere intent to injure from the potentially lethal stab wound Appellant inflicted to the victim's chest. Under these circumstances, the evidence did not support instruction on the lesser related offense of assault and battery with a dangerous weapon. A rational jury could not convict Appellant of assault and battery with a dangerous weapon, and acquit on assault and battery with a deadly weapon, based on this evidence. Proposition III is denied.

IV

¶9 The record shows that the defenses presented by Appellant and his codefendants were not mutually antagonistic. *Ochoa v. State*, 1998 OK CR 41, ¶ 29, 963 P.2d 583, 595-96 ("Where two defendants have 'mutually antagonistic defenses,' separate trials ought to be held and compelling joinder of trials may result in reversible error."). All three defendants argued they were not guilty of the charged offenses and focused their attack on undermining the credibility of the State's witnesses. The defendants did not engage in any sort of finger-pointing or blame. "The issue is neither whether defendants disagree about facts nor whether one defendant claims the other should bear greater responsibility. Conflicting defenses or cases in which both defendants admit to presence and some participation in the crimes do not require severance[.]" *Fowler v. State*, 1994 OK CR 27, ¶ 4 n.2, 873 P.2d 1053, 1055 n.2.

¶10 The jury's sentencing recommendation for Quantez Cotton during the first stage of trial also did not warrant severance. Appellant's jury was instructed that the issue of punishment was not before them when guilt was determined either for Appellant or Draquan Cotton. Further, the jury was instructed to consider each defendant's case separately and to consider only the evidence and law applicable to each defendant. "A jury is presumed to follow its instructions." *Blueford v. Arkansas*, 566 U.S. 599, 606, 132 S. Ct. 2044, 2051, 182 L. Ed. 2d 937 (2012) (quoting *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)). Further, as discussed below, Appellant was not deprived of the statutory complement of peremptory challenges because the defenses presented at trial by Appellant and his codefendants were not inconsistent. Under the total circumstances presented here, the trial court did not abuse its discretion in denying Appellant's motion to sever. *Spears v. State*, 1995 OK CR 36, ¶ 47, 900 P.2d 431, 443-44 (reviewing decision on motion to sever for abuse of discretion). Proposition IV is denied.

V

¶11 Appellant did not assert below that inconsistent defenses required that he be given five peremptory challenges separate from his codefendants. He also did not renew his objection to the trial court's ruling when it came time to exercise jointly the five peremptory challenges authorized by 22 O.S.2011, § 655. Instead, Appellant's counsel spoke for all three codefendants and exercised peremptory challenges to remove five prospective jurors and two alternates. Appellant did not, at that time, request additional peremptory challenges. Under these circumstances, Appellant has waived review of this claim for all but plain error.

¶12 Appellant also fails to show actual or obvious error based on the trial court's ruling. Prior to the trial court's ruling, neither Appellant nor his codefendants alleged inconsistent defenses. At best, Appellant offered mere speculation that mutually antagonistic defenses would emerge at trial. The record does not show either that Appellant disagreed with the exercise of peremptory challenges against the five prospective jurors removed by all three defendants jointly or that Appellant would have removed other jurors had he been granted separate peremptory challenges. "It is the burden of the party urging error to present to this Court a sufficient record upon which this Court may determine the issue raised." *Boyd v. State*, 1987 OK CR 211, ¶ 11, 743 P.2d 674, 676.

¶13 As discussed in Proposition IV, this is not a case where Appellant and his codefendants attempted to exonerate themselves by inculpating each other in the crimes. At most they forced the State to prove its case against all three defendants by challenging the credibility of the state's witnesses and overall theory of the case in light of the evidence. This does not amount to inconsistent defenses warranting separate peremptory challenges under Section 655. *See Nickell v. State*, 1994 OK CR 73, ¶ 21, 885 P.2d 670, 676; *Carter v. State*, 1994 OK CR 49, ¶ 16, 879 P.2d 1234, 1243; *Fox v. State*, 1989 OK

CR 51, ¶¶ 20-21, 779 P.2d 562, 568. Based on this record, there was no actual or obvious error with the Court's ruling and, thus, no plain error. Proposition V is denied.

VI

¶14 Appellant argues that testimony from both Dejia Rogers and Officer McGuire concerning Rogers's extrajudicial identification of Appellant at the police department was inadmissible. Appellant did not object to this identification testimony at trial, thus waiving review of all but plain error on appeal. *Ochoa,* 1998 OK CR 41, ¶ 34, 963 P.2d at 596. Appellant fails to show actual or obvious error.

¶15 What has emerged from our cases over the years is a confusing patchwork of rules and restrictions governing the use of extrajudicial identification evidence. The general rule we have adopted is simple enough: "Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity." *Young v. State*, 1975 OK CR 25, ¶ 10, 531 P.2d 1403, 1406. We adopted this rule in *Hill v. State,* 1972 OK CR 209, 500 P.2d 1075 which overruled previous decisions from this Court rejecting such evidence outright as self-serving, immaterial or hearsay. *See id.*, 1972 OK CR 209, ¶¶ 4-7, 500 P.2d at 1077-78 (Simms, J., special concurring opinion). *Cf. Cothrum v. State,* 1963 OK CR 29, ¶¶ 11-30, 379 P.2d 860, 863-65; *Gillespie v. State*, 355 P.2d 451, 453-55, 1960 OK CR 67, ¶¶ 4, 6-12 (extrajudicial identification testimony from an identifying witness or third party is inadmissible). The rationale in *Hill* was that "prior identification of an accused is more reliable than a later courtroom identification for the reason that it is closer to the crime in point of time, thus affording less opportunity for fading or deterioration of the victim's memory or changes in the accused's appearance." *Id.*, 1972 OK CR 209, ¶ 6, 500 P.2d at 1078.

¶16 In adopting this position, we followed the lead of California in *People v. Gould*, 354 P.2d 865 (Cal. 1960). That case held that extrajudicial identification testimony is available as substantive evidence, regardless of whether the testimonial identification is impeached, because of its greater probative value over in-court identifications; because the witness's failure to repeat the extrajudicial identification does not destroy its value as such may be explained by loss of memory or other circumstances; because of the tendency of extrajudicial identification evidence to connect the defendant with the crime; and because the principal danger of admitting hearsay is eliminated as the identifying witness is available at trial for cross-examination. *Hill*, 1972 OK CR 209, ¶ 10, 500 P.2d at 1078 (discussing *Gould, supra*). *See Conley v. State*, 1983 OK CR 133, ¶¶ 6-7, 669 P.2d 304, 306-07 (victim's testimony concerning her extrajudicial identification of appellant was not hearsay).

¶17 Although *Hill* represented on the one hand a watershed moment in our jurisprudence for its recognition of the admissibility of extrajudicial identification evidence, we nonetheless restricted the force of this ruling. Specifically, we held that statements of prior identification are admissible only through the testimony of the identifier – and at that only *after* a correct in-court identification by the identifier – which included testimony regarding the particular day, place and time of the prior identification. We further relegated testimony from third-parties concerning the out-of-court identification "to rebuttal and evidentiary hearing status." *Id.*, 1972 OK CR 209, ¶¶ 8-9, 500 P.2d at 1078 (Simms, J., special concurring opinion).

¶18 We have generally adhered to these limits although with some exceptions pertinent to Appellant's appeal. In *Jones v. State*, 1985 OK CR 14, 695 P.2d 13 we held that "where a witness incorrectly identifies defendant, evidence of an extra-judicial identification is inadmissible." *Id.*, 1985 OK CR 14, ¶ 16, 695 P.2d at 16. Appellant cites *Jones* as a basis for relief in this case in light of Rogers's misidentification of Appellant at trial. In *Jones* however there was no evidence showing the photograph used in the extrajudicial identification was that of the defendant, and thus testimony about the witness's prior identification could not be admitted as independent evidence of identification. *Id.*, 1985 OK CR 25, ¶ 15, 695 P.2d at 16.

¶19 Nine months later, in *Elvaker v. State,* 1985 OK CR 128, ¶¶ 8-10, 707 P.2d 1205, 1206-07, this Court found no error in a two-step process whereby a witness who could not identify the defendant at trial identified a photograph she had earlier picked from a photographic line-up. A police detective then identified that photograph as the defendant. *Id.*

¶20 In *Scales v. State*, 1987 OK CR 100, ¶¶ 6-8, 737 P.2d 950, 952-53, this Court attempted to reconcile *Jones* and *Elvaker*. In *Scales*, two witnesses testified that they had identified the

defendant before trial and they then identified him in court. The Court ruled in *Scales* that evidence of the extrajudicial identification could not be admitted as independent evidence because the witnesses were able to make specific in-court identifications. It also ruled that evidence of the extrajudicial identification could not be admitted as corroborative evidence because neither witness had made an in-court identification at the time evidence of the extrajudicial identification was received. *Id.*

¶21 What has emerged from our cases is a rule allowing evidence of an extrajudicial identification where the witness fails to make a positive in-court identification, but strictly barring such evidence when the witness incorrectly identifies another as the defendant. Although the probative value of evidence concerning the extrajudicial identification may certainly be tainted or diminished by the in-court identification of a different person, we see no statutory or constitutional reason prohibiting it. Indeed, the continuing vitality of this prohibition is undermined by the Legislature's amendment of Title 12 O.S.2011, § 2801 to state the following:

> B. A statement is not hearsay if:
>
> 1. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> * * * *
>
> c. one of identification of a person made after perceiving the person[.]

This provision was enacted in 1991 and remains in force today. In the present case, Rogers testified that she identified three of the intruders at the police station and was able to describe their roles inside the victim's duplex. Under the express terms of Section 2801(B)(1)(c), Rogers's testimony concerning her previous identification at the police department was admissible as substantive evidence. Section 2801(B)(1)(c) does not as a precondition to admissibility require that the witness first correctly identify the defendant at trial. Rather, it requires simply that the identifier testify at the trial or hearing and be subject to cross examination concerning his or her prior statement of identification. In the present case, these preconditions were satisfied.

¶22 We therefore hold that the *Elvaker* procedure may be used to present evidence of an extrajudicial identification where the witness has made no in-court identification, or where the prosecution seeks to impeach the in-court identification with a prior, inconsistent extrajudicial identification. The holding in *Jones* is limited to its facts – i.e., where there is no evidence introduced tending to show the photograph which the witness identified out of court is one and the same person as the defendant. *Jones* is overruled to the extent it is inconsistent with today's decision.

¶23 We therefore find no actual or obvious error with respect to Rogers's testimony concerning her out-of-court identification. Appellant's challenge to Officer McGuire's testimony requires additional analysis. We have repeatedly held – consistent with *Hill* – that testimony from third parties concerning a witness's extrajudicial identification is inadmissible except as rebuttal or at an evidentiary hearing. *E.g., Kamees v. State*, 1991 OK CR 91, ¶ 13, 815 P.2d 1204, 1207-08; *Maple v. State*, 1983 OK CR 52, ¶ 2, 662 P.2d 315, 316. We now find that prohibition too is undermined by Section 2801(B)(1)(c). Officer McGuire's challenged testimony relates Rogers's statement of identification of Appellant made after she perceived Appellant. Additionally, Rogers testified at trial and was subject to cross-examination concerning this statement of identification. Thus, under the express terms of Section 2801(B)(1)(c), Officer McGuire's testimony concerning Rogers's identification of Appellant was also admissible as substantive evidence.

¶24 Section 2801(B)(1)(c) eliminates what historically has been the major concern – i.e., hearsay – relating to admission of extrajudicial identification evidence presented through a third party. *See Washington v. State,* 1977 OK CR 240, ¶ 41, 568 P.2d 301, 311; *Cothrum*, 1963 OK CR 29, ¶ 21, 379 P.2d at 865; *Gillespie,* 1960 OK CR 67, ¶ 6, 355 P.2d at 453. Having previously recognized in *Hill* that extrajudicial identification testimony is competent and material, it is unclear what if any purpose is served from the continued application of our prohibition against third party testimony relating out-of-court identifications. Section 2801(B)(1)(c) does not require the out-of-court identification to be denied or affirmed by the declarant at trial. Rather, all that is contemplated by this provision is an out-of-court statement of identification and that the declarant be subject to cross-examination concerning the statement. As discussed above, these requirements were satisfied here as Rogers testified at trial and was subject to cross-examination concerning her prior identification of Appellant.

See United States v. Owens, 484 U.S. 554, 561-64, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).

¶25 Additionally, in 2002, the Legislature amended Title 12 O.S. § 2802 to state: "[H]earsay is not admissible except as otherwise *provided by an act of the Legislature*." (emphasis added). Previously, Section 2802 read that "Hearsay is not admissible *except as provided by law*." (emphasis added). Professor Whinery opined in his commentaries on Oklahoma evidence that the Legislature's amendment of Section 2801 was expected to supersede *Hill* and its progeny but that the Legislature's adoption of the original version of Section 2802 stating that hearsay is not admissible "except as provided by law" allowed our decisional authority to coexist with the statutory revision to Section 2801 relating to identification testimony. 2 Leo Whinery, *Oklahoma Evidence, Commentary on the Law of Evidence*, § 29.11 (2d. ed. 2000).

¶26 The combined effect of the statutory amendments to Sections 2801 and 2802 is to undermine the limits placed on the admission of extrajudicial identification testimony by this Court in *Hill* and subsequent decisions. Section 2801(B)(1)(c) makes extrajudicial identification testimony admissible as substantive evidence – both by the identifier and third parties present at the prior identification – so long as the declarant testifies at trial and is subject to cross-examination concerning the statement. Moreover, Section 2802's express command that the Legislature alone defines what is and is not hearsay effectively supersedes this Court's decisions disallowing the admissibility of extrajudicial identification testimony from third parties except upon certain conditions as set forth in our decisional law. In so doing, the Legislature has removed the remaining limits to extrajudicial identification testimony embodied in our case law. To the extent that our previous decisions are inconsistent with today's ruling, they are expressly overruled.[3] Thus, under these circumstances, we find no actual or obvious error from the admission of Officer McGuire's testimony.

¶27 To summarize, extrajudicial identification evidence remains competent and material in the trial of a criminal case for the reasons discussed in *Hill* and the cases applying it. Title 12 O.S.2011, §§ 2801 and 2802 authorizes the admission of extrajudicial identification testimony from both an identifying witness and third parties as substantive evidence where the identifying witness testifies at trial and is subject to cross-examination concerning the statement of identification. This is so regardless of whether the identifying witness correctly identifies, misidentifies or fails to identify the defendant at trial or whether the identifying witness denies or affirms her out-of-court identification. So long as the requirements of Section 2801 are met, a police officer (or some other third party) may testify about a prior statement of identification made by a witness identifying the defendant and the trier of fact may consider that testimony as substantive evidence of identity. Sections 2801 and 2802 supersede the restrictions placed on the admission of out-of-court statements of identification by *Hill* and its progeny.

¶28 Finally, we reject Appellant's related claim on appeal that the show-up procedure used by Norman Police in this case was both suggestive and unnecessary. We have approved of show-up procedures similar to that used in the present case. *Harrolle v. State,* 1988 OK CR 223, ¶ 7, 763 P.2d 126, 128. Accordingly, the admission of the extrajudicial identification testimony in this case was not actual or obvious error. There is no plain error. Proposition VI is denied.

VII

¶29 "Instructions are sufficient where they state the applicable law." *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. In the present case, Appellant's failure to request an instruction on the hazards of eyewitness testimony or object to the instructions given waives review on appeal for all but plain error. *Id.* No actual or obvious error occurred here. *Waller v. State,* 1986 OK CR 83, ¶ 3, 720 P.2d 338, 339 (cautionary instruction on eyewitness identification is not required in the absence of a defense request); *Dyke v. State*, 1986 OK CR 44, ¶ 19, 716 P.2d 693, 698-99 (same). Further, the jury was instructed, *inter alia*, that they were to assess the credibility of witnesses in light of the witnesses' ability to remember and relate past occurrences and the witnesses' means of observation and opportunity of knowing the matter to which they testified. This was sufficient to cover the eyewitness testimony under the facts of this case and the record presented to us. *Ashinsky v. State*, 1989 OK CR 59, ¶ 17, 780 P.2d 201, 206; *Leigh v. State,* 1985 OK CR 41, ¶ 11, 698 P.2d 936, 938. Thus, there is no actual or obvious error arising from the omission of this instruction and no plain error. Proposition VII is denied.

VIII

¶30 To prevail on an ineffective assistance of counsel claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 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). Appellant fails to show prejudice with any of his ineffectiveness claims which are based on trial counsel's failure to preserve various errors now raised on appeal.

¶31 In Proposition I, we found that Appellant's convictions on Counts 1, 2 and 3 did not arise from a single act made criminal in different ways and thus there is no double punishment violation. In Proposition II, we applied our prior decisions and reaffirmed that assault and battery with a deadly weapon does not have an intent-to-kill element. In Proposition V, we held that Appellant was not entitled under 22 O.S.2011, § 655 to separate peremptory challenges. In Proposition VI, we rejected Appellant's challenge to the admission of testimony concerning Dejia Rogers's extrajudicial identification testimony. Based upon our rejection of the underlying claims of error for each instance of ineffectiveness now alleged, Proposition VIII lacks merit and is denied.

IX

¶32 Under the total circumstances, Appellant's sentence is not so excessive as to shock the conscience of the Court. *Duclos v. State*, 2017 OK CR 8, ¶ 19, 400 P.3d 781, 786. To the extent Appellant attempts to raise a freestanding Eighth Amendment claim with his citation to *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637 (1983) and his passing statement that "[t]he Eighth Amendment prohibits not only barbaric punishment but also disproportionate punishments[,]" Aplt. Br. at. 49, this claim is so inadequately developed on appeal as to be waived from our review. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) (requiring argument in support of a proposition of error supported by citations to the authorities, statutes and parts of the record). Proposition IX is denied.

X

¶33 We deny relief for Appellant's claim of cumulative error. *Mitchell v. State*, 2016 OK CR 21, ¶ 32, 387 P.3d 934, 946. Proposition X is denied.

DECISION

¶34 The Judgment and Sentence of the District Court is **AFFIRMED**. 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 CLEVELAND COUNTY
THE HONORABLE TRACY SCHUMACHER,
DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
KUEHN, J.: CONCUR
ROWLAND, J.: CONCUR

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

¶1 I commend my colleague on his well-written opinion, particularly his scholarly review of Proposition VI on the issue of extrajudicial identification. *Stare decisis* requires that I join the opinion. However, as I expressed in my dissent in *Goree v. State*, 2007 OK CR 21, 163 P.3d 583, the Court's decision that there is no intent element required for the charge of assault and battery with a deadly weapon is fundamentally flawed. I continue to adhere to that view.

1. Davis was tried jointly with codefendants Draquan Cotton and Quantez Cotton. Draquan Cotton was convicted of Count 1: Attempted Robbery with a Weapon, After Two Prior Felony Convictions, and was sentenced to twenty-five (25) years imprisonment. Quantez Cotton was convicted of Count 1: Attempted Robbery with a Weapon; Count 2: Assault and Battery with a Deadly Weapon; and Count 3: Burglary in the First Degree. He was sentenced to five (5) years imprisonment on Count 1; seven (7) years imprisonment on Count 2; and seven (7) years imprisonment on Count 3. We affirmed Draquan's

judgment and sentence on direct appeal. *See Cotton v. State*, No. F-2016-193, slip op. (Okl.Cr. Jan. 18, 2018) (unpublished). At Quantez's request, we dismissed his direct appeal. *Cotton v. State*, No. F-2016-601, Order Dismissing Appeal (Okl.Cr. Mar. 3, 2017) (unpublished).

2. Davis must serve 85% of the sentences imposed for Counts 2 and 3 before he is eligible for parole. 21 O.S.2011, § 13.1.

3. *See Myers v. State*, 2006 OK CR 12, ¶ 28, 133 P.3d 312, 324; *Ochoa v. State*, 1998 OK CR 41, ¶ 34, 963 P.2d 583, 596-97; *Kamees v. State*, 1991 OK CR 91, ¶ 13, 815 P.2d 1204, 1207; *Trim v. State*, 1991 OK CR 37, ¶ 7, 808 P.2d 697, 698-99; *Allen v. State*, 1989 OK CR 79, ¶ 14, 783 P.2d 494, 498; *Maxwell v. State*, 1989 OK CR 22, ¶¶ 5-6, 775 P.2d 818, 819-20; *J.A.M. v. State*, 1988 OK CR 10, ¶ 9, 749 P.2d 116, 119; *Elix v. State*, 1987 OK CR 204, ¶ 12, 743 P.2d 669, 672; *Lahey v. State*, 1987 OK CR 188, ¶¶ 24-26, 742 P.2d 581, 584-85; *Miles v. State*, 1987 OK CR 169, ¶ 12, 741 P.2d 877, 879; *Scales v. State*, 1987 OK CR 100, ¶¶ 7-8, 737 P.2d 950, 952-53; *Ross v. State*, 1987 OK CR 48, ¶ 8, 734 P.2d 321, 323; *Coulter v. State*, 1987 OK CR 37, ¶ 7, 734 P.2d 295, 298; *Bradley v. State*, 1985 OK CR 149, ¶ 7, 715 P.2d 78, 80; *Christian v. State*, 1985 OK CR 137, ¶ 5, 708 P.2d 1133, 1133-34; *Elvaker v. State*, 1985 OK CR 128, ¶ 10, 707 P.2d 1205, 1207; *Aycox v. State*, 1985 OK CR 83, ¶ 5, 702 P.2d 1057, 1058; *Jones v. State*, 1985 OK CR 14, ¶ 16, 695 P.2d 13, 16; *Brownfield v. State*, 1983 OK CR 125, ¶ 11, 668 P.2d 1165, 1168; *Maple v. State*, 1983 OK CR 52, ¶ 2, 662 P.2d 315, 316; *Godwin v. State*, 1981 OK CR 23, ¶¶ 7-9, 625 P.2d 1262, 1264-65; *Mintz v. State*, 1979 OK CR 32, ¶¶ 6-8, 593 P.2d 1093, 1095; *Martinez v. State*, 1977 OK CR 291, ¶ 16, 569 P.2d 497, 500; *Washington v. State*, 1977 OK CR 240, ¶¶ 39, 41, 568 P.2d 301, 311; *Towning v. State*, 1974 OK CR 67, ¶¶ 6-7, 521 P.2d 415, 417.

2018 OK CR 8

REUBEN JUAN LAMAR, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-240. March 22, 2018

OPINION

HUDSON, JUDGE:

¶1 Appellant, Reuben Juan Lamar, was tried and convicted by a jury of Count 2: Robbery with a Dangerous Weapon, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 801; Count 5: Conspiracy to Commit a Felony, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 421; and Count 6: Burglary in the First Degree, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 1431, in the District Court of Oklahoma County, Case No. CF-2012-7029.[1] The jury recommended a sentence of twenty (20) years imprisonment on Count 2, four (4) years imprisonment on Count 5, and twenty (20) years imprisonment on Count 6.[2]

¶2 At formal sentencing, the Honorable Ray C. Elliott, District Judge, sentenced Appellant in accordance with the jury's verdicts and ordered the sentences for Counts 2 and 5 to run concurrently and the sentence for Count 6 to run consecutively to the sentences on Counts 2 and 5 and consecutive to Appellant's sentences in Case Nos. CF-2009-7147, CF-2010-4451 and CF-2012-7211. Judge Elliott ordered credit for time served and also ordered post-imprisonment supervision of not less than nine (9) months, nor more than one (1) year. Lamar now appeals, raising nine propositions of error. We affirm.

BACKGROUND

¶3 On October 24, 2012, Appellant, Britnie Wiggins and Donnie Parton[3] were driving around south Oklahoma City looking for a way to come up with some fast cash. Wiggins was particularly desperate for cash. Her rent was due and, by her own admission, she "was tired and . . . didn't want to go work." Wiggins and the others were also high on methamphetamine. To score some cash, Wiggins suggested the trio "hit a lick" meaning they "go rob somebody". After some deliberation, Parton suggested they rob his grandmother, Debbie Parton. Within five minutes, Appellant drove the trio to Debbie's[4] south Oklahoma City residence where they parked and kicked in the front door.

¶4 Debbie lived in her home with Chase Parton, her son, and Chase's girlfriend, Chelsea Alexander. Around 11 p.m. on October 24th, Debbie was falling asleep on the couch in the den when she heard three loud bangs followed by the appearance in her home of a man wearing sunglasses and several bandanas covering his neck and face. This man walked to the back of the house towards Chase's bedroom. When Debbie got up to investigate, she found her front door kicked in. She also discovered two other intruders – Appellant and Wiggins – standing inside her home. Appellant had a handgun with a red laser sight and was smoking a Black and Mild cigar.

¶5 Chase was walking towards the front door when the intruders kicked it open and came inside. Wiggins forced Chase into the bathroom and unsuccessfully attempted to handcuff him. In the back bedroom, Donnie Parton told Chelsea Alexander – Chase's girlfriend – to get down on the ground. A few minutes later, Debbie, Chase and Chelsea were seated around the dining room table by their attackers and held at gunpoint by Appellant. Parton and Wiggins ransacked the entire house and stole the victims' valuables. This included two televisions, Debbie and Chelsea's purses, Debbie's jewelry, the house phone, food from the kitchen and Chase's game console.

¶6 Appellant chatted with his hostages as their home was ransacked. Appellant sarcastically asked the victims how their day was going and mentioned he was a gang member. At one point, Appellant pointed the gun at Chase and forced him to help move a television. Appellant also

forced Debbie to hand over the keys to her '93 Ford Mustang which was parked in the garage. When Debbie tried to remove her house key from the key ring, Wiggins slapped her in the ear causing it to bleed. Appellant told his captives that he wanted drugs and money; Debbie replied that they did not have any drugs or money.

¶7 After searching the house, Appellant told the victims not to call the police or he would come back and "get us". Appellant and his two accomplices then left not only with the victims' property from inside the house but also Debbie's Ford Mustang. Despite Appellant's threat, Debbie walked across the street to a neighbor's house and called 911. The police arrived soon thereafter and Debbie, Chase and Chelsea gave statements about what happened. A crime scene investigator recovered a partially smoked cigar tip found near the front door and submitted it for forensic examination. Police also found a pair of handcuffs on the dining room table. Several days later, police showed the victims a photo lineup during which Chase and Chelsea identified Appellant, who was pictured in one of the photographs, as the black robber with the gun.

¶8 On November 1, 2012, Wiggins gave a statement to police in which she implicated herself, Appellant and Donnie Parton in the robbery at Debbie Parton's house. That same day, police executed a search warrant at a south Oklahoma City apartment Wiggins shared with Appellant. The police found inside the apartment, *inter alia*, a Discover credit card in Chelsea Alexander's name. Chelsea's credit card was inside the purse stolen from her during the October 24th robbery.

¶9 Detective Eddie Dyer later obtained a search warrant authorizing the collection of Appellant's DNA using buccal swabs of the inside of Appellant's cheek. Campbell Ruddick, the DNA manager for the OCPD Forensic Laboratory, conducted DNA testing of both the cigar tip recovered from the crime scene and Appellant's known biological sample on the buccal swabs. Ruddick developed DNA profiles from both items. Ruddick's comparison of these profiles revealed that the DNA found on the cigar tip matched Appellant's known DNA profile. The probability of selecting an unrelated person at random from the population having this same genetic profile was one in 67.16 quintillion Caucasians, one in 13.9 quintillion African Americans and one in 2.3286 sextillion Southwest Hispanics. A quintillion has 21 zeroes behind it.

I

¶10 In his first proposition of error, Appellant complains that he was denied the right to represent himself at trial. The record shows that on March 19, 2014, Appellant filed with the trial court a one-page handwritten motion requesting to proceed *pro se* in the case. Appellant requested six (6) months in which to prepare for trial along with production of full discovery for his case. Appellant acknowledged he would be held to the same responsibilities as counsel but believed this was the only way to "assure that there is not a miscarriage of justice of [sic] this matter." Appellant concluded his motion with a request for a hearing.

¶11 Judge Donald L. Deason was originally assigned to this case and held three separate pre-trial hearings on Appellant's motion. At the first hearing, Appellant stated that he wanted to go *pro se* because the appointed public defender was ineffective, "not doing his job" and "not really trying to help me, I feel." Appellant explained that defense counsel waited eighteen (18) or twenty (20) months before talking to him about the case. Appellant stated that he believed he could do a better job than counsel in handling the case. Judge Deason denied Appellant's motion after asking Appellant basic questions about trial procedure which Appellant could not answer. Appellant offered, however, that his ignorance of the law was the reason he asked for six months in which to prepare for trial. Judge Deason found that Appellant "[did not] have even the most basic knowledge to represent [himself]" and that Appellant was "in way over your head on this." A trial date was set for August 25, 2014.

¶12 On August 22, 2014, a call docket was held during which the prosecutor expressed his understanding that Appellant was withdrawing his previous request to go *pro se* and instead wished to proceed to trial with his appointed counsel. When Judge Deason asked Appellant if this was correct, Appellant stated that he previously raised the issue and it had been ruled on by the Court. When asked by Judge Deason whether Appellant wished to proceed to trial with his attorney, Appellant responded "Yeah. Due to the fact that I was denied, yes."

¶13 The prosecutor expressed his view that additional questioning was necessary to ad-

dress this issue and "if he wants to proceed with his appointed attorney . . . he needs to make that without any conditions of any previous ruling." The following exchange occurred:

> DEFENDANT LAMAR: I did that earlier, the first time.
>
> THE COURT: I've addressed that earlier, and I found that though he, like anybody else, has a right to represent himself, Mr. Lamar does not have even the most basic legal knowledge that would help him get through a jury trial. He doesn't even know how to start it, what to do during a trial. With what he's looking at on these charges, I, in good conscience – And I've made my ruling on that.
>
> So, Mr. Lamar, just a straight-up question: Do you desire to proceed with your counsel at this time.
>
> DEFENDANT LAMAR: (No answer).
>
> THE COURT: Yes or no?
>
> DEFENDANT LAMAR: (No answer).
>
> THE COURT: It's not a trick question.
>
> DEFENDANT LAMAR: Well, I think your ruling that I was denied, and you're standing by that, then I guess I'll proceed.
>
> THE COURT: I'd like for you to answer my question. Do you desire to proceed with your counsel, yes or no?
>
> DEFENDANT LAMAR: I'm not going to answer that question.
>
> THE COURT: I can't hear you.
>
> DEFENDANT LAMAR: I'm not going to answer that question.

(8/22/2014 Tr. 5-6).

¶14 Appellant persisted in this manner despite Judge Deason urging him to reconsider and answer the question. Defense counsel stated, in response to the court's subsequent questions, that Appellant had been cooperative with him and had been participating in preparing a defense. Judge Deason stated that Appellant's refusal to answer the court's questions was yet another reason, in addition to his lack of legal knowledge, why Appellant should not be representing himself at trial. The prosecutor asked for leave to present additional research on the issue which the trial court agreed to hear and then moved on to other matters.

¶15 The prosecutor and defense counsel also engaged Appellant and attempted to get a straight answer concerning his wishes to proceed to trial *pro se* but to no avail; Appellant would not answer the question. Defense counsel inquired of Judge Deason whether the court would grant a continuance should Appellant choose to represent himself. This prompted the following exchange:

> THE COURT: If Mr. Lamar told me clearly and unequivocally that he wants to represent himself, if I give him the appropriate warnings as to what the pit falls of that are and knowing those pitfalls and understanding that he still wished to represent himself, I would certainly entertain a motion for continuance to prepare.
>
> DEFENDANT LAMAR: I'm pretty sure you would, now. Since this situation came up, I'm pretty sure I can. I'm pretty sure that wouldn't be a problem as of now.
>
> [DEFENSE COUNSEL]: I don't understand your response, Mr. Lamar. Are you saying you do want to represent yourself, with that in mind, or what are you saying?
>
> DEFENDANT LAMAR: I'm saying that if you're ready to go to trial, I'm ready to go to trial. Trial's set for Monday. There's nothing else. Your clarification is not going to be granted on my end, if that's what you're asking. Not now, not tomorrow, not ever. So whatever you guys are going to do go ahead.

(8/22/2014 Tr. 14-15).

¶16 Judge Deason stated that he would not proceed to trial with the case as scheduled unless Appellant "affirmatively state[d] on the record that he's willing to accept the assistance of counsel" and that if Appellant kept giving equivocal answers, the case would not go to trial on Monday. Appellant again refused to answer. Instead, Appellant said he was "ready for trial Monday, sir" and he "can't answer that question."

¶17 On September 5, 2014, another hearing was held on the matter. Judge Deason began the hearing by noting he had signed an order vacating his previous order denying Appellant's motion to proceed *pro se*. Judge Deason told Appellant he "now . . . can represent yourself if you want, or if you're willing to accept, of your own free will, appointed counsel, then we'll be ready to proceed." When Judge Deason asked what Appellant's decision was, Appellant

stated he "[s]till haven't [sic] changed. I'm not speaking."

¶18 Judge Deason clarified for defense counsel that he considered Appellant's original motion to go *pro se* "to still be pending" in light of the court's latest order. Appellant refused to answer the trial court's questions, instead falling back to his familiar refrain that the motion had already been denied and he, Appellant, wasn't saying anymore. At one point, Appellant stated that the trial court's handling of the matter "**will just have to be in one of my propositions, wouldn't it**?" (emphasis added). Appellant then stated he was not going to say anything more. Judge Deason, in turn, granted Appellant's motion to proceed *pro se*. Judge Deason at that time also appointed the assigned public defender as standby counsel to "provide assistance to [Appellant] if he needs it, if he needs legal research done, and to just be in the courtroom." Judge Deason clarified that the public defender was to sit at counsel table with Appellant during the trial.

¶19 On October 3, 2014, Appellant's case was reassigned to Judge Ray Elliott after Judge Deason signed a transfer order. During an October 15, 2014, pre-trial conference, defense counsel stated that Judge Deason had recused from the case based on a motion filed by Appellant claiming Judge Deason "forced" Appellant to proceed *pro se*. During that hearing, Appellant told Judge Elliott that he "wished to proceed with counsel" and requested a continuance of the trial setting so he and defense counsel could "get to being on the same page." Judge Elliott granted the continuance after confirming a second time that Appellant wanted to proceed with counsel.

¶20 Judge Elliott granted defense counsel's request to set the case for pre-trial conference so counsel and Appellant "had time to discuss his cases" and to thereafter set a trial date. Judge Elliott stated he would probably end up setting the case for trial sometime in January or February 2015. Over the next seventeen (17) months, Appellant's case remained in pre-trial status. During this period, defense counsel signed and filed various pre-trial motions and pleadings on Appellant's behalf.

¶21 On March 18, 2016, Appellant's case was called for jury trial. According to the docket entry for this hearing (there is no transcript), Appellant appeared with defense counsel and announced ready for trial. The State also announced ready for trial. Judge Elliott ordered both parties to return on March 21st at 9 a.m. to commence jury selection.

¶22 The parties returned as ordered to commence trial with both defense counsel and the prosecutor announcing ready for trial. Appellant, however, took a different approach, immediately asking to represent himself at trial under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Appellant explained that he decided the night before to go *pro se* and that he wanted a continuance – "a brief time" as he put it – in order "to get all of my motions and hire my private investigator." Judge Elliott responded this was the sixth jury trial setting in the case. Judge Elliott observed too that it was "a little interesting" that Appellant, "literally the evening before the matter is set for trial in which both sides were notified that they were first up in this courtroom, that [Appellant] now has made this request of the Court."

¶23 Judge Elliot asked Appellant why he decided the night before to proceed *pro se*. Appellant stated the following:

> THE DEFNDANT: Well, your Honor, it's been a couple of, I think, errors that have been made that haven't been addressed appropriately. And throughout the three years, this is the first time that I had a confident decisions [sic] that my attorney has been making. And at the last, I think it was in your courtroom where we addressed it, and I thought that me and [defense counsel] was on the same page, but apparently it seems otherwise.
>
> THE COURT: All right. Anything else?
>
> THE DEFENDANT: Not that I can think of at the time.

(Tr. I 4-5). The prosecutor told Judge Elliott that Appellant was serving a 30 year sentence in one case and a 10 year sentence in another. Defense counsel declined to add anything to the conversation. Judge Elliott then made the following ruling:

> THE COURT: * * * * We can't continue matters forever because of the multiple cases that Mr. Lamar has pending and apparently is continuing to pick up new cases in the county jail during his time that he's waiting in the county jail to dispose of these matters.

> And in light of the fact that he is a Department of Corrections inmate, and in light of the fact that he's waited until literally the evening before by his own statements, that being March the 20th, to decide to make this decision, it appears to the Court this is a maneuver done to delay the process.
>
> These matters need to be resolved. [Defense counsel] is a very good lawyer, very knowledgeable lawyer. He's appeared in front of this Court numerous times through the years. I have found him continually to be prepared and have the ability to present the relevant issues that need to be presented to the Court each and every time.
>
> So in light of the fact that this decision was made last evening and just conveyed to this Court, literally at 9:30 on the morning of trial – the matter is set for trial, coupled with the fact that [defense counsel] has announced ready for trial, the defendant's request will be denied.
>
> I have a jury out in the hallway ready to proceed. And at some point these decisions, I believe, have to be made before 9:30 on trial morning. Otherwise, it certainly ap-pears to be nothing more than a delaying tactic, which this Court will make the decision to move forward.

(Tr. I 6-7).

¶24 After hearing two pre-trial motions filed by defense counsel, Judge Elliott briefly returned to the issue of Appellant's request to proceed *pro se*. Judge Elliott asked whether Appellant was ready for trial if the motion to proceed *pro se* was granted. Appellant responded that he was not ready for trial and would be asking for a continuance due to his unpreparedness. In response, Judge Elliott announced that he had reconsidered his initial ruling and would allow Appellant to proceed *pro se*. However, there would be no continuances and "[i]f you're not ready to go today and you don't want to go *pro se* today, then [defense counsel] is your lawyer." Appellant then resorted to a familiar refrain, one he used previously with Judge Deason, namely, to challenge Judge Elliott's authority to reconsider his previous ruling. Judge Elliott explained that he was reconsidering his previous ruling and would grant the motion to go *pro se* so long as Appellant understood that "the trial is today."

¶25 Judge Elliott pressed Appellant numerous times to answer whether he wanted to proceed *pro se* or proceed with counsel for trial that day. Appellant responded simply that he had nothing else to say, that he "already answered that question" and that Judge Elliott had already denied the motion. Judge Elliott repeatedly instructed Appellant to stand when he addressed the Court but Appellant persisted in refusing to comply even with this request. Judge Elliott told Appellant that the trial was proceeding and that if he, Appellant, did not answer the court's question, it would be the functional equivalent of withdrawing his motion to proceed *pro se*. Judge Elliott then asked Appellant if he wanted to be tried in absentia in light of his failure to cooperate with the court. When Appellant refused to answer, Judge Elliott gave defense counsel an opportunity to consult with his client.

¶26 After a pause in the proceedings, defense counsel reported to Judge Elliott that he advised Appellant it was not in his best interest to be tried in abstentia and that Appellant should do his best to answer the court's questions. Defense counsel also stated that Appellant had expressed his desire to return upstairs to the lockup. The prosecutor confirmed that he also heard Appellant say "I'm ready to go upstairs." Judge Elliott stressed again that the trial was going to proceed as scheduled, that Appellant could proceed *pro se* or with defense counsel who was fully prepared and ready for trial. Judge Elliott again asked Appellant what he wanted to do and gave Appellant a moment to think about it.

¶27 After a nine-and-a-half (9.5) minute pause in the proceedings, the following record ensued:

> [DEFENSE COUNSEL]: Since you asked Mr. Lamar the question and I have tried to speak to Mr. Lamar and again advised him, that it's not in his best interest to have this case tried in absentia.
>
> I tried to explain what was going on today, that you have reconsidered your motion. That at least in our legal opinion, that any error that might have been created has been corrected and that Mr. Lamar has been given the opportunity to represent himself today.
>
> After speaking with Mr. Lamar, he's told us that he is done with the conversation. He no longer wishes to speak to us.

> THE COURT: No longer wishes to speak to you, too?
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: Okay. All right. Mr. Lamar, it's now been 12 minutes. I will ask you one last time, do you wish to proceed at this time *pro se* or proceed at this time with an attorney?
>
> All right. He's refusing again to answer. He'll proceed with an attorney. Bring the jury in. We're going to proceed right now.

(Tr. I 20-21). At this point, the prospective jurors were summoned to the courtroom and *voir dire* commenced.

¶28 On appeal, Appellant complains that he had a right to proceed *pro se* and, in representing himself, had "the right to be prepared." Aplt. Br. at 16. Citing *Coleman v. State*, 1980 OK CR 75, 617 P.2d 243, Appellant says his request to proceed *pro se* was not untimely and thus he was entitled to a continuance to facilitate his preparation for trial. Appellant argues Judge Elliott's ruling that he would grant the motion to proceed *pro se*, but not grant a continuance, created a "Hobson's Choice" for him. Appellant tells us he had no real alternative but to proceed to trial with unwanted counsel. Aplt. Br. at 16-17.

¶29 A criminal defendant has an absolute constitutional right to represent himself at trial, guaranteed by the Sixth Amendment to the United States Constitution, if he elects to so do. *Faretta v. California*, 422 U.S. 806, 818-21, 95 S. Ct. 2525, 2532-34, 45 L. Ed. 2d 562 (1975). Because the right to the assistance of counsel is a fundamental right, a waiver of the benefits of counsel must be knowingly and intelligently made after being informed of "the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541. To validly waive the assistance of counsel, "a defendant must be competent to make this decision and must be clear and unequivocal in his desire to proceed *pro se*." *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 72. We review the totality of the circumstances in each case to determine whether such a waiver is valid. *Id.*

¶30 We have reviewed the trial court's denial of a motion to proceed *pro se* for abuse of discretion. *See, e.g., Mathis*, 2012 OK CR 1, ¶ 18, 271 P.3d at 75; *Halbert v. State*, 1987 OK CR 57, ¶ 4, 735 P.2d 565, 566. However, it must be observed that, under *Faretta,* a trial judge has no discretion to deny a valid request for self-representation. *See Parker v. State,* 1976 OK CR 293, ¶ 5, 556 P.2d 1298, 1300-01. Violation of the right to self-representation recognized under *Faretta* is structural error which can never be harmless. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 950 n.8, 79 L. Ed. 2d 122 (1984).

¶31 The first issue here is whether Appellant made a sufficient demand to represent himself. *Coleman*, 1980 OK CR 75, ¶ 7, 617 P.2d at 245-46. The record shows Appellant made a clear and unequivocal request to proceed *pro se* on the first day of trial which Judge Elliott said he would grant. Appellant was warned of the dangers and disadvantages of self-representation, based on all the circumstances of the case. Appellant was fully aware of what he was giving up by waiving counsel, most notably, the fact that he would be proceeding to trial unprepared. Judge Elliott made the dangers of self-representation in this case abundantly clear for Appellant. Before this, Judge Deason repeatedly cautioned Appellant against the folly of self-representation. Appellant knowingly and intelligently waived counsel and elected to conduct his own defense. *Mathis,* 2012 OK CR 1, ¶ 15, 271 P.3d at 74.

¶32 However, Appellant's request to represent himself at trial was connected with the additional demand that Judge Elliott grant yet another continuance so Appellant could be prepared. Was Appellant entitled to another continuance in order to facilitate his last-minute election of self-representation at trial? Appellant correctly points out that in *Coleman* we found a request for self-representation made before the selection of a jury to be valid and timely. *Coleman,* 1980 OK CR 75, ¶ 3, 617 P.2d at 245 (denial of request made just before jury selection violated the Sixth Amendment). Further, we held that "a defendant who elects to proceed *pro se* after dismissing his counsel, whom he considers to be ineffective, should also be provided time for preparation." *Id.*, 1980 OK CR 75, ¶ 6, 617 P.2d at 245. However, we stressed there was nothing in *Coleman* to suggest the motion "was a tactic to secure delay[.]" *Id.* The same cannot be said for Appellant's case.

¶33 Here, the record is replete with instances demonstrating Appellant's intent to sabotage the jury trial setting with delay tactics and disruptive behavior. The mere fact Appellant announced his intention to proceed *pro se* on the morning of trial, after remaining silent

through five previous continuances of the jury trial over a period of seventeen (17) months and a sounding docket the Friday before trial speaks volumes to the dilatory nature of Appellant's request. Appellant too provided no legitimate excuse for discharging counsel on the first day of trial beyond citing "a couple of" unspecified errors committed by counsel in the handling of the case. All this after Appellant withdrew, months earlier, his initial demand for self-representation when Judge Deason recused from the case. Appellant's on-again, off-again approach to self-representation in this case reeks of dilatory tactics designed to thwart a final resolution of this matter.

¶34 We have long held that the decision to grant or deny a motion for continuance is left to the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *E.g., Marshall v. State*, 2010 OK CR 8, ¶ 44, 232 P.3d 467, 478. An abuse of discretion is defined as "a conclusion or judgment that is clearly against the logic and effect of the facts presented." *Pullen v. State*, 2016 OK CR 18, ¶ 4, 387 P.3d 922, 925. When a motion for continuance on the eve of trial is grounded on a desire to change counsel, a defendant must show valid reasons for discharge of his attorney. Otherwise, the demand for new counsel will be viewed as "an impermissible delaying tactic." *Henegar v. State*, 1985 OK CR 56, ¶ 3, 700 P.2d 659, 660 (quoting *Boone v. State,* 1982 OK CR 34, ¶ 3, 642 P.2d 270, 272), *overruled on other grounds, Robinson v. State,* 1987 OK CR 195, ¶¶ 6-7, 743 P.2d 1088, 1090. *See Dixon v. Owens,* 1993 OK CR 55, ¶¶ 10-11, 865 P.2d 1250, 1252 (a non-indigent defendant should be allowed to discharge counsel "absent a showing of undue delay, disruption of the orderly process of justice, or prejudice to himself or opposing counsel" and the court may deny the request if it is simply a delaying tactic or is untimely made).

¶35 The same principle should apply here. Appellant has shown no valid reasons for discharge of court-appointed counsel which would necessitate self-representation. "Valid reasons include demonstrable prejudice against defendant by counsel, incompetence of counsel, and conflict of interest." *Henegar*, 1985 OK CR 56, ¶ 3, 700 P.2d at 660. The record shows defense counsel was assigned as lead counsel on the case for at least two years and was prepared for trial. Appellant, by contrast, offered vague references to unspecified errors trial counsel supposedly made in his handling of the case and was *not* prepared for trial. Worse yet, Appellant offered those vague reasons just before commencement of *voir dire*, on the first day of trial, without any rational explanation for his delay in seeking once again to represent himself at trial. This is wholly insufficient to warrant a continuance in light of the protracted nature of the proceedings leading up to the trial, a substantial portion of which was attributable to Appellant's earlier request to proceed *pro se*.

¶36 To exercise his Sixth Amendment right to conduct his own defense, Appellant was required to "knowingly and intelligently forego[ ] his right to counsel *and . . . [be] able and willing to abide by rules of procedure and courtroom protocol." McKaskle*, 465 U.S. at 173, 104 S. Ct. at 948 (emphasis added). That is not what happened here. Appellant became uncooperative and nonresponsive when Judge Elliott inquired whether Appellant would either engage in self-representation at trial without benefit of a continuance or proceed to trial with appointed counsel. The State correctly argues that Judge Elliott, faced with Appellant's obstinate behavior, did not abuse his discretion in effectively terminating, or foreclosing, Appellant's self-representation at that point. *Johnson v. State,* 1976 OK CR 292, ¶ 42, 556 P.2d 1285, 1297 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct[.]") (quoting *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46). *See United States v. Garey,* 540 F.3d 1253, 1263 (11th Cir. 2008) (en banc) ("It is important to remember that *Faretta's* discussion of the right to self-representation presupposed a cooperative defendant willing to engage in reciprocal dialogue with the court.").

¶37 In *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), the Supreme Court held that a "defendant can lose his right to be present at trial if, after he has been warned by the judge . . . he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.*, 397 U.S. at 343, 90 S. Ct. at 1060-61. The *Allen* court further concluded that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.*, 397 U.S. at 343, 90 S. Ct. at 1061. The same rationale can be extended to self-representation.

¶38 Appellant demonstrated throughout the proceedings that he was less interested in representing himself at trial and more interested in delaying the trial setting while also preserving a *Faretta* claim for purposes of appeal. In so doing, Appellant engaged in the same obstructionist behavior he exhibited earlier in the case despite repeated warnings from Judge Elliott. There was good cause to believe Appellant would continue to disrupt the trial proceedings in this manner if the court permitted Appellant to represent himself. The trial court did not abuse its discretion in terminating Appellant's right to self-representation based on Appellant's pre-trial conduct. *See Martinez v. Court of Appeal of California, Fourth Dist.*, 528 U.S. 152, 162, 120 S. Ct. 684, 691, 145 L. Ed. 2d 597 (2000) ("Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta,* 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46. All things considered, relief is denied for Proposition I.

II

¶39 In his second proposition of error, Appellant complains that the police photo lineup shown to the victims a week after the robbery was suggestive and gave rise to a substantial likelihood of misidentification. Appellant tells us the suggestiveness of the photo line-up procedure made the in-court identification unreliable, thus violating his due process rights.

¶40 Appellant concedes that he did not raise his Proposition II claim below, thus waiving review on appeal for all but plain error. *Mitchell v. State,* 1983 OK CR 25, ¶ 3, 659 P.2d 366, 368. To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State,* 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d 887, 896; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. 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. *Baird,* 2017 OK CR 16, ¶ 25, 400 P.3d at 883; *Ashton*, 2017 OK CR 15, ¶ 34, 400 P.3d at 896-97; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701).

¶41 Appellant fails to show actual or obvious error. "[D]ue process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire,* 565 U.S. 228, 238-39, 132 S. Ct. 716, 724, 181 L. Ed. 2d 694 (2012). The record does not show, nor does Appellant explain, how the police photo lineup was suggestive. Appellant's only argument is to repeat, in conclusory fashion, that the photo lineup was suggestive. Appellant's failure to allege how the photo lineup was suggestive, let alone unnecessarily suggestive, is fatal to the present claim. *Stewart v. State*, 2016 OK CR 9, ¶ 27, 372 P.3d 508, 514 (appellant has "the heavy burden of demonstrating plain error" on appeal).

¶42 Appellant further complains that the officers did not follow the police department's revised written procedures for conducting photo lineups. Nothing in the trial record, however, supports this claim. Instead, Appellant has submitted a document he says is the pertinent portion of the police operations manual supporting his argument.[5] He asks us to expand the record with this document and to consider its contents in adjudicating this claim. Appellant cites Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016) as authority for this request. Appellant's request is **DENIED**. Supplementation of the record under Rule 3.11(A) is not appropriate merely to cure a defendant's failure to preserve an issue below. *Day v. State*, 2013 OK CR 8, ¶ 10, 303 P.3d 291, 297. Proposition II is denied.

III

¶43 In his third proposition of error, Appellant complains that Inspector Guthrie improperly bolstered the identification testimony of Chase Parton and Chelsea Alexander by confirming their respective identifications of Appellant at the photo lineup. Appellant concedes that he did not raise this objection below, thus waiving all but plain error. Appellant fails to show an actual or obvious error. The record shows Inspector Guthrie indeed did confirm Chase and Chelsea's respective identifications of Appellant at the photo lineup. Inspector Guthrie's testimony concerning their extrajudicial identification of Appellant was permissible, however, because Chase and Chelsea testified at trial and were each subject to cross-examination concerning their respective out-of-court identifi-

cations. 12 O.S.2011, §§ 2801(B)(1)(c) & 2802; *Davis v. State*, 2018 OK CR 7, ¶¶ 26-27, ___P.3d___ (overruling prior decisions that disallow third party testimony concerning extrajudicial identifications when the requirements of § 2801(B)(1)(c) are satisfied). Proposition III is therefore denied.

IV

¶44 In his fourth proposition of error, Appellant contends the buccal swabs taken of his inner cheek were obtained in violation of his constitutional rights under the Fourth and Fourteenth Amendments. Appellant asserts the affidavit for the search warrant to obtain the buccal swabs contained material omissions and was deficient to establish probable cause.

¶45 Appellant did not challenge the validity of the search warrant below. Nor did he challenge the admissibility of testimony concerning the buccal swab or the DNA evidence. Appellant has thus waived all but plain error review on appeal. *Marshall v. State*, 2010 OK CR 8, ¶ 47, 232 P.3d 467, 478. Appellant fails to show error. The record does not contain the search warrant or the affidavit for the search warrant cited by Appellant to support this Fourth Amendment challenge. However, Detective Eddie Dyer testified that he collected the buccal swabs pursuant to a search warrant. Based on this record, Appellant fails to demonstrate any error surrounding the search warrant process, let alone an actual or obvious error affecting his substantial rights as required to show plain error. *See Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916-17 (holding that an appellant must prove plain error); *England v. State*, 1972 OK CR 75, ¶ 9, 496 P.2d 382, 385 (finding that where a defendant contends a search warrant was invalid, the burden is on him to establish the facts which render it invalid; the claim is waived where the record does not reflect either the affidavit for search warrant or the search warrant itself).

¶46 Appellant asks this Court to grant his motion to supplement the record under Rule 3.11(A) with the search warrant application presented to a Comanche County judge used to obtain the search warrant authorizing collection of the buccal swabs along with other documents Appellant believes will bolster his claim of a Fourth Amendment violation. *See* Rule 3.11 Appl., Attachments B, E.[6] In essence, Appellant asks this Court to allow him to create the record on appeal to support this claim which he wholly failed to make below. As discussed previously, this is not the purpose of direct supplementation of the record under Rule 3.11(A). *Day*, 2013 OK CR 8, ¶ 10, 303 P.3d at 297. Appellant's motion to supplement with these documents under Rule 3.11(A) is **DENIED**. Proposition IV is denied.

V

¶47 In his fifth proposition of error, Appellant claims the trial court erred when it prevented him from impeaching: 1) Britnie Wiggins using a prior inconsistent statement she made prior to trial in an affidavit concerning Appellant's involvement in the crime; and 2) Inspector Guthrie concerning OCPD policies and procedures relating to the administration of police photo lineups. Appellant argues these errors violated his right to due process, to confrontation, and to present a defense.

¶48 The district court struck Wiggins's testimony on cross-examination concerning her purported prior inconsistent statement in the writing she referred to in her testimony because defense counsel was unable to produce the writing as required by 12 O.S.2011, § 2613.[7] This was not an abuse of discretion. *Oman v. State*, 1988 OK CR 66, ¶ 10, 753 P.2d 374, 377 (standard of review). Section 2613(A) commands disclosure of the contents of the witness's prior statement to opposing counsel no later than "just prior to the cross-examination of the witness." *Id.*

¶49 It is true, as Appellant asserts, that evidence rules may not be mechanistically applied to defeat the ends of justice. *Coddington v. State*, 2006 OK CR 34, ¶ 82, 142 P.3d 437, 458. We have acknowledged too that "a defendant has a right to present competent evidence in his own defense, and . . . rules of evidence may not arbitrarily impinge on that right." *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. Appellant nonetheless "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973).

¶50 In the present case, the trial court did not apply an arbitrary state procedural rule that was disproportionate to the purposes it was designed to serve. Appellant wholly fails to show that he had an overriding interest in impeaching Wiggins using an unverifiable prior statement from a witness's purported writing which counsel had never seen, which could not be produced and was first disclosed

by Appellant while the witness was on the stand. We observe too that the trial court allowed defense counsel to elicit from Wiggins that she had previously written or said something inconsistent compared to her testimony at trial. Under these circumstances, Appellant was not deprived of his right to present a defense, nor was he deprived of his due process rights or his right to confrontation of witnesses, by the trial court's application of § 2613(A). *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006).

¶51 We also find no constitutional error arising from the trial court sustaining an objection when defense counsel asked Inspector Guthrie whether it was still standard procedure to show the lineup photographs to each witness collectively in a group of six. The trial court's ruling was well within the court's broad discretion to place reasonable limits on cross-examination in light of defense counsel's thorough and adequate cross-examination of Inspector Guthrie about the photo lineup. *See Thrasher v. State,* 2006 OK CR 15, ¶¶ 7-10, 134 P.3d 846, 849. Proposition V is denied.

VI

¶52 In his sixth proposition of error, Appellant complains that his Count 2 and Count 6 convictions violate the double jeopardy clause and the statutory proscription against multiple punishments contained in 21 O.S.2011, § 11. Appellant tells us his robbery and burglary convictions are part of a single transaction which should result in only one count.

¶53 Appellant's convictions in this case for First Degree Burglary and Robbery with a Dangerous Weapon do not violate the double jeopardy clause or the statutory proscription against multiple punishments contained in 21 O.S.2011, § 11. These crimes are two separate and distinct offenses requiring different proof. Each crime requires proof of a fact which the other does not. There is no error, let alone, plain error. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 2d 306 (1932); *State v. Kistler,* 2017 OK CR 24, ¶¶ 3-10, __P.3d__; *Sanders v. State,* 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State*, 1999 OK CR 48, ¶¶ 10-13, 993 P.2d 124, 126-27; *Taylor v. State,* 1995 OK CR 10, ¶ 45, 889 P.2d 319, 339; *Williams v. State*, 1991 OK CR 28, ¶ 6, 807 P.2d 271, 273; *Ziegler v. State,* 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254. Proposition VI is denied.

VII

¶54 In his seventh proposition of error, Appellant alleges various instances of prosecutorial misconduct which he says deprived him of a fair trial. Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Bosse v. State*, 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863. Appellant timely objected to only one instance of prosecutorial misconduct now alleged, thus preserving it for appellate review. The other instances of alleged prosecutorial misconduct, however, drew no objection from Appellant thus waiving on appeal all but plain error review. *Id.*

¶55 Appellant was not deprived of a fundamentally fair sentencing proceeding from either challenged comment during the prosecutor's closing argument. There is also no error arising from Appellant's claim that the prosecutor elicited improper testimony concerning the police photo lineup. This claim – which Appellant also categorizes as prosecutorial misconduct – relies upon the same non-record evidence discussed in Proposition II which we decline to consider for the same reasons here, i.e., it may not be used to supplement the record here under Rule 3.11(A). Proposition VII is denied.

VIII

¶56 In his eighth proposition of error, Appellant alleges various instances of ineffective assistance of counsel. Specifically, Appellant argues trial counsel was ineffective for failing to: 1) challenge in a pre-trial motion the police photo lineup procedures used in this case as being "unduly suggestive," *see* Proposition II; 2) object to Inspector Guthrie's testimony concerning the victims' identification of Appellant during the police photo lineup, *see* Proposition III; 3) move to suppress the DNA evidence based on the alleged Fourth Amendment violation associated with collection of the buccal swabs, *see* Proposition IV; and 4) object to the prosecutorial misconduct during the prosecutor's sentencing phase closing argument, *see* Proposition VII.

¶57 To prevail on an ineffective assistance of counsel claim, the defendant must show both

that counsel's performance was deficient and that the deficient performance prejudiced his defense. *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) (summarizing *Strickland* two-part standard). Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) allows an appellant 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 course of trial. *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.*

¶58 In the present case, Appellant is not entitled to an evidentiary hearing for his ineffective assistance counsel claims which are based on non-record evidence because he fails to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2016). Appellant's application for evidentiary hearing on his ineffectiveness claims is **DENIED**. Appellant's remaining ineffectiveness claims, which are based on the existing record, also lack merit. Proposition VIII is denied.

IX

¶59 Finally, relief is denied for cumulative error. *Mitchell v. State,* 2016 OK CR 21, ¶ 32, 387 P.3d 934, 946 ("Where there is no error, there is no cumulative error."). Proposition IX is denied.

DECISION

¶60 The Judgment and Sentence of the district court is **AFFIRMED**. Appellant's *Motion to Supplement Direct Appeal Record With Attached Exhibits and/or for an Evidentiary Hearing Pursuant to Rule 3.11(A) and/or Rule 3.11(B)(3)(B)* 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 OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Mark McCormick, Assistant Public Defender, 320 Robert S. Kerr, Ste. 611, Oklahoma City, OK 73102, Counsel for Defendant

Dan Gridley, Josh Young, Assistant District Attorneys, 320 Robert S. Kerr, Ste. 505, Oklahoma City, OK 73102, Counsel for the State

APPEARANCES ON APPEAL

Gina K. Walker, Assitant Public Defender, 320 Robert S. Kerr, Ste. 611, Oklahoma City, OK 73102, Counsel for Appellant

E. Scott Pruitt, Oklahoma Attorney General, Theodore M. Peeper, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.:SPECIALLY CONCUR
KUEHN, J.:CONCUR
ROWLAND, J.:RECUSE

LEWIS, V.P.J., SPECIALLY CONCURRING:

¶1 Trial judges must be careful in wielding this sword of terminating a defendant's request to go *pro se*. I agree with the majority opinion in this case, but grave caution should be exercised when making this decision.

1. The Third Amended Information, filed on the eve of trial, alleged five separate counts against Lamar, i.e., Counts 2, 5, 6, 7 and 8. However, the State dismissed Counts 7 and 8 – alleging separate counts of Kidnapping – on the first day of trial, prior to the commencement of *voir dire*.

2. Appellant must serve 85% of his sentences on Counts 2 and 6 before becoming eligible for parole. 21 O.S.2011, § 13.1.

3. Donnie Parton is occasionally referenced in the record by his nickname, "DJ" (Tr. II 35, 72).

4. Normally, we refer to witnesses and other relevant persons in a case by their last names. Because Debbie and her son share the same last name as one of the defendants, however, we will refer to all three victims by their first names.

5. Appellant has submitted this document as Attachment A to his *Motion to Supplement Direct Appeal Record With Attached Exhibits and/or for an Evidentiary Hearing Pursuant to Rule 3.11(A) and/or Rule 3.11(B)(3)(B)*, tendered for filing on September 29, 2016.

6. Attachment C to Appellant's motion to supplement is the information and supporting probable cause affidavits filed in the present case. These documents are contained within the existing trial record. So too is Attachment D, the signed dismissal order filed in this case which dismissed out Counts 1 and 3. To the extent Appellant is attempting to supplement the record with these documents, his motion is **DENIED** as they are already part of the existing trial record.

7. There is no proof in this regard, by testimony or otherwise, that whatever writing was being referred to was actually an affidavit. At most, there appears to be some type of a statement previously written by the witness.

OBA Real Property Section - 2018 Cleverdon Real Property Roundtable Seminar

The materials for this course have been submitted to the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for approval of 4 hours of CLE credit.

Roundtable Topics	Speakers
"Oil & Wind: Harmony in Energy"	**Chris Tytanic,** OU College of Law
"Update on Oklahoma Real Property Title Authority: Revisions for 2016-2017"	**Kraettli Q. Epperson,** Mee Mee Hoge & Epperson
"This Land is My Land, That Land is Your Land . . . The Roles of the Attorney and the Surveyor in Resolving Boundary Disputes in Oklahoma."	**Bruce Pitts,** Oklahoma Board of Licensure for Professional Engineers and Land Surveyors **Monica Wittrock,** First American Title Insurance Company
"Indian Title: Don't Panic!"	**Stephanie Moser-Goins,** Ball Morse Lowe PLLC
"Water Rights - Real Property, or Not?"	**Dean A. Couch,** GableGotwals
"A Short Survey of Oklahoma History"	**John A. Mackechnie,** Gum, Puckett & Mackechnie LLP

The seminar is limited to sixty (60) participants per location in order to encourage discussion. At the event, participants will choose three (3) of the roundtable sessions to attend but will receive the materials*** for all of the presentations. Following the roundtable sessions, lunch will be provided during the final CLE topic, "A Short Survey of Oklahoma History." Registration and Check-in begins at 8:30 A.M. The first session begins at 9:00 A.M.

This seminar is free for members of the Real Property Section and $25.00 for non-members.

To register, complete form below and email to brandon@nwoklaw.com by May 11, 2018.

NOTE: MATERIALS ARE ONLY AVAILABLE VIA EMAIL

In order to lower costs and protect the environment, materials will be provided to registered attendees for free via email.

___ Oklahoma City - **May 17, 2018** - 8:30 AM - 1:00 PM — Oklahoma City University School of Law, 800 N. Harvey, Oklahoma City, OK

___ Tulsa - **May 18, 2018** - 8:30 AM - 1:00 PM — University of Tulsa School of Law, 3120 E. 4th Pl., Tulsa, OK

NAME:_____ TELEPHONE:_____

FIRM NAME:_____ BAR NUMBER:_____

ADDRESS:_____

EMAIL:_____

2018 OK CIV APP 18

GERON R. TAYLOR, Plaintiff/Appellant, vs. THE CITY OF BIXBY, OKLAHOMA, a municipal corporation, Defendant/Appellee.

Case No. 114,686. May 1, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANA L. KUEHN, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS

Steven R. Hickman, FRASIER, FRASIER & HICKMAN, LLP, Tulsa, Oklahoma, for Plaintiff/Appellant

Thomas A. LeBlanc, Matthew B. Free, BEST & SHARP, Tulsa, Oklahoma, for Defendant/Appellee

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Geron Taylor appeals the district court's judgment in favor of the City of Bixby in this civil rights action. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. The City is entitled to judgment with respect to Taylor's tort claims and his State and federal constitutional claims except in one respect. It cannot be determined from the summary judgment record whether Taylor has a claim based on the ten days he served in the City's jail after his arrest for speeding and driving without a license. In all other respects, the district court's judgment is affirmed. This case is remanded for a determination of whether Taylor has a claim based on his ten-day incarceration.

BACKGROUND

¶2 On September 8, 2011, Taylor was stopped by a Bixby police officer for driving 49 miles per hour in a 40-mile per hour speed zone. During the interrogation that followed, Taylor failed to produce a driver's license, admitted that he did not have a driver's license and admitted that he had never possessed a valid driver's license. Taylor was arrested and charged with speeding and driving without a license. It was subsequently determined that Taylor had been convicted of driving without a valid driver's license on nine previous occasions. On October 4, 2011, Taylor appeared in the Bixby Municipal Court pro se and entered a plea of guilty to both the speeding and driver's license charges. He was fined $703 and sentenced to ten days in the City jail. Taylor served the jail time but did not pay the fine.

¶3 Represented by counsel, Taylor filed this case on January 20, 2012, after his release from jail, asserting violations of his Oklahoma and federal constitutional rights as well as Oklahoma tort law claims. In support of these claims, Taylor alleged facts concerning his arrest, conviction and the conditions of his confinement and treatment while incarcerated. The City was named as the only defendant and removed the case to the United States District Court for the Northern District of Oklahoma. The City filed a motion for summary judgment to which Taylor responded. By order dated December 12, 2012, the federal court granted the City's motion, in part, denied it in part, and remanded the case to the state district court for further proceedings. With respect to some of the issues, the federal court determined that Taylor had failed to exhaust available state remedies. The following day, Taylor filed a pro se application for post-conviction relief in Bixby Municipal Court.

¶4 In his post-conviction application, Taylor argued that prior to pleading guilty, he was not advised of his right to counsel, right to a jury trial, right to appeal, right to bond pending appeal and that he was fined in excess of the maximum permitted by law. On May 3, 2013, the Bixby Municipal Court allowed Taylor to withdraw his original guilty plea, vacated the October 4, 2011 judgment and granted Taylor a new trial. The court's order states Taylor "was not advised of his right to appeal the decision of the Court or the right to withdraw his plea …" The City appointed counsel to represent Taylor and his case was tried to a jury on August 1, 2013. The jury found Taylor guilty of driving without a valid driver's license.[1] The Judgment and Sentence was entered on February 6, 2014. This time Taylor was fined $300, the maximum fine allowed for driving without

a license, and ordered to pay court costs in the amount of $51, both of which he paid. The Judgment and Sentence does not impose or refer to any jail time.

¶5 The City then filed a motion for summary judgment in this case and Taylor filed a response. Taylor appeals the district court's January 8, 2016 Final Order and Journal Entry of Judgment granting the City's motion for summary judgment, and finding that Taylor had not and would not be able to state a claim for relief based on the circumstances of his arrest, conviction and incarceration.

STANDARD OF REVIEW

¶6 Title 12 O.S.2011 § 2056 governs the procedure for summary judgment in this case. A motion for summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* If the moving party has not addressed all material facts, or if one or more of such facts is not supported by acceptable evidentiary material, summary judgment is not proper. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682 (approved for publication by the Oklahoma Supreme Court). The de novo standard controls an appellate court's review of a district court order granting summary judgment. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051. De novo review involves a plenary, independent, and non-deferential examination of the trial court's rulings of law. *In re Estate of Bell-Levine*, 2012 OK 112, ¶ 5, 293 P.3d 964.

ANALYSIS

¶7 Taylor's petition, as clarified by his summary judgment submissions, asserts five theories of liability against the City: (1) unreasonable seizure in violation of Article 2 § 30 of the Oklahoma Constitution based on the allegation that he was stopped and arrested because he was black, (2) violation of the Eighth Amendment to the United States Constitution and Article 2 § 9 of the Oklahoma Constitution prohibiting excessive fines and cruel and unusual punishment based on his alleged treatment and the conditions during his ten-day incarceration and the allegation that he was fined in excess of the maximum permitted by City ordinance, (3) violation of Article 2 § 19 of the Oklahoma Constitution guaranteeing a jury trial in criminal proceedings based on the allegation that he was not advised of his constitutional rights before he pled guilty, (4) violation of the Sixth Amendment to the United States Constitution and Article 2 § 20 of the Oklahoma Constitution providing a right to counsel in criminal proceedings based on the same allegation, and (5) violation of Oklahoma tort law – assault and battery and the tort of outrage – based on the allegations regarding his treatment while imprisoned, including the allegation that he was assaulted when jailors pointed their weapons at him, denied adequate food and water and subjected to racial slurs. First, we review Taylor's petition and the federal court's judgment to determine what claims survived the federal court proceeding.

I. Taylor's State Constitutional Claims

¶8 In his summary judgment briefing, Taylor cites seven Oklahoma constitutional rights he claims were violated by the City. In addition to the Oklahoma constitutional provisions cited in the previous paragraph, Taylor relies on Article 2 § 2 guaranteeing the right to life, liberty and the pursuit of happiness, and Article 2 § 6 guaranteeing a speedy and certain remedy for every wrong in the courts of this State. Taylor claims he has a private right of action to pursue violations of each of these constitutional rights, citing *Bosh v. Cherokee County Governmental Building Authority,* 2013 OK 9, 305 P.3d 994.

¶9 In *Bosh*, a pretrial detainee alleged that he was subjected to excessive force by law enforcement officials during the booking process at a county detention facility. The Court held that *Bosh* had a private right of action to enforce a claim of excessive force pursuant to Article 2 § 30 of the Oklahoma Constitution even though the county was exempt from tort liability pursuant to the Governmental Tort Claims Act, 51 O.S.2011 §§ 1 to 172. *Id.* ¶ 23. Whether the holding in Bosh establishes a private right of action pursuant to other provisions of the Oklahoma Constitution has not been entirely settled. "There has been disagreement among Oklahoma's lower federal and state courts regarding the scope of *Bosh's* holding." *Daffern v. Rhodes,* No. CIV-16-1025-C, 2016 WL 7429454 at *3 (W.D. Okla. Dec. 23, 2016). We examine the holding in *Bosh* to determine the extent to which Taylor may maintain his asserted State constitutional claims.

A. Article 2 § 30

¶10 Article 2 § 30 protects the "right of the people to be secure in their persons . . . against unreasonable searches or seizures . . . ." The federal court declined to exercise its supplemental jurisdiction, remanding this claim for determination by the state district court. Certainly, *Bosh* establishes a private right of action available to pretrial detainees subjected to excessive and unreasonable force, in certain circumstances, after an arrest. It would "defy reason" to refuse to extend the holding in Bosh to pretrial detainees who claim they were unlawfully arrested merely because of their race. *Bosh,* 2013 OK 9, ¶ 22. Article 2 § 30 "applies to citizens who are seized . . . ." *Id.* Taylor has a private right of action to pursue his false arrest claim but only if a cause of action pursuant to the Governmental Tort Claims Act is not available. *Perry v. City of Norman*, 2014 OK 119, ¶ 1, 341 P.3d 689. We need not address that issue.

¶11 The City's motion for summary judgment asserts as undisputed material facts that Taylor was stopped for speeding, during the stop Taylor admitted that he did not have a valid driver's license and he had never possessed a valid driver's license, and Taylor was arrested for driving without a license. Taylor's response to the City's motion admits each of these facts. Consequently, Taylor admits, for summary judgment purposes, that he was not arrested because he was black and that there was probable cause for his arrest. The district court's judgment in favor of the City with respect to Taylor's Article 2 § 30 claim based on the circumstances of his arrest is affirmed.

¶12 But Taylor's summary judgment briefing also argues that he has an Article 2 § 30 claim that applies to the conditions of his ten-day incarceration after the Bixby Municipal Court vacated his October 4, 2011 conviction. According to Taylor's theory, his Article 2 § 30 claim based on his treatment during incarceration in October 2011 did not arise until May 3, 2013, after his original conviction was vacated and he was released from jail. Taylor's theory of recovery is novel, and unsupported by any authority. At the time the treatment occurred about which Taylor complains, he had been convicted. And, he was subsequently convicted again after his original conviction was vacated. To follow Taylor's theory to its logical conclusion, his Article 2 § 30 claim arose on May 3, 2013, when his original conviction was vacated. Therefore, the claim would have been extinguished on August 1, 2013, when he was convicted a second time for the same offense. We find instructive the United States Supreme Court's holding in *Heck v. Humphrey,* 512 U.S. 477, 114 S. Ct. 2364 (1994). Taylor "has no cause of action under § 1983 unless and until [his] conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Id.* at 489. For the reasons discussed in Part I (B) of this Opinion, Taylor's Article 2 § 30 claim is limited to the allegations concerning his arrest and the City is entitled to judgment regarding that claim.

B. Article 2 § 9

¶13 Because his conviction was not vacated until after his incarceration, an Article 2 § 30 claim is not available to Taylor with respect to his complaints regarding the conditions of his confinement. *See Bryson v. Oklahoma County,* 2011 OK CIV APP 98, ¶¶ 14, 28, 261 P.3d 627 (noting that only pretrial detainees have a claim for relief pursuant to Article 2 § 30 concerning their conditions of confinement)(cited with approval in *Bosh*, 2013 OK 9, ¶ 24). However, because Taylor was incarcerated as a result of his conviction, his claim arising from the conditions of his confinement is based on Article 2 § 9. *See Washington v. Barry,* 2002 OK 45, 55 P.3d 1036. That constitutional provision also authorizes Taylor's claim that his original fine was excessive. Neither aspect of this claim is precluded by the holding in *Perry v. City of Norman*, 2014 OK 119, 341 P.3d 689. The City is immune from prosecution pursuant to the Governmental Tort Claims Act regarding the operation of its jail. See 51 O.S.2011 § 155(25). Therefore, Taylor has stated a potential claim for violation of Article 2 § 9.

C. Article 2 § 7, Due Process of Law

¶14 The basis of Taylor's due process claim is not clear but seems to concern the fact that he entered a guilty plea without being advised of his right to counsel and a jury trial. This Court extended the holding in *Bosh* to provide a private right of action for due process violations pursuant to Article 2 § 7 by or on behalf of children in State custody. *See GJA v. Okla. Dep't of Human Servs*., 2015 OK CIV APP 32, 347 P.3d 310; *Deal v. Brooks*, 2016 OK CIV APP 81, ___ P.3d ___ (approved for publication by the Oklahoma Supreme Court). We find nothing in the analysis or authority relied on in *Deal* to suggest that its holding must be limited to children in State custody. In fact, *Deal* merely extended

to children the jurisprudence previously recognizing the due process rights of mentally retarded adults in state custody. *Youngberg v. Romeo,* 457 U.S. 307, 102 S. Ct. 2452 (1982).

¶15 In *Howard v. Grady County Criminal Justice Authority*, 2017 OK CIV APP 7, __ P.3d __, a divided panel of this Court assumed without deciding that a prisoner had a private right of action for due process violations pursuant to Article 2 § 7. Today, we decide that the protections of Article 2 § 7 extend to prisoners, like Taylor, in State custody because of incarceration. Taylor has a private right of action for any due process violation pursuant to Article 2 § 7 of the Oklahoma Constitution subject to the limitations imposed by the Supreme Court in *Perry v. City of Norman,* 2014 OK 119, 341 P.3d 689.

D. Article 2 §§ 19 and 20

¶16 The right to counsel and a trial by jury in criminal proceedings is firmly established in this State. "[A] municipality's power to imprison an indigent person must be exercised in the context of providing that person counsel for the process which results in his or her imprisonment . . . ." *Dutton v. City of Midwest City,* 2015 OK 51, ¶ 22, 353 P.3d 532. *See A.E. v. State,* 1987 OK 76, ¶ 22, 743 P.2d 1041 ("Insofar as the constitutional right to jury trial exists, it cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action."). No Oklahoma case has addressed whether a private right of action exists pursuant to Article 2 § 19 or § 20 to a person denied the right to counsel or a jury trial in an Oklahoma criminal proceeding. For the following reasons, we hold that there is no private right of action.

¶17 The federal district court dismissed Taylor's Sixth Amendment claim without prejudice, finding that he had yet to pursue available State post-conviction relief so it could not be determined whether Taylor had a cause of action for violation of his right to counsel. Subsequently, Taylor sought State post-conviction relief and was successful in having the conviction based on his guilty plea vacated. At his second trial, Taylor was provided court-appointed counsel and a jury trial. The jury convicted Taylor of driving without a license and he has not appealed that conviction.

¶18 There is a material difference between Taylor's Sixth Amendment claim and his Article 2 § 20 claim. Each claim provides a basis for overturning a conviction when the accused has been denied counsel. *See Fraizer v. City of Tulsa*, 1973 OK CR 131, 507 P.2d 940. But only the federal claim provides an additional damage remedy through 42 U.S.C. § 1983. This Court has concurrent jurisdiction of section 1983 claims. *Howlett v. Rose*, 496 U.S. 356, 358, 380-81, 110 S. Ct. 2430, 2433, 2445-46 (1990). But that remedy is limited to violations of federal constitutional rights and Taylor did not refile his Sixth Amendment claim after it was dismissed without prejudice by the federal court. In contrast to section 1983, no Oklahoma statute provides a civil remedy in damages for a violation of Article 2 § 20. The statute permitting those wrongfully convicted to recover damages, 51 O.S.2011 § 154, is unavailable to Taylor. He was not convicted of a felony, he pled guilty, and he has not been pardoned or judicially absolved of guilt after a finding of innocence. *See* 51 O.S.2011 § 154(B).[2] Just the opposite, Taylor was convicted after his second trial and did not appeal.

¶19 For the same reasons, we find that Taylor does not have a civil remedy in damages for a violation of Article 2 § 19, noting that he was provided a jury trial prior to his second conviction. The district court correctly granted the City's motion for summary judgment regarding these alleged constitutional violations and that aspect of the district court's judgment is affirmed.

E. Article 2 §§ 2 and 6

¶20 Article 2 § 2 provides: "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." Section 6 provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Other than to claim that the City violated Article 2 § 2 on October 4, 2011, when he "appeared in court," Taylor does not support these alleged constitutional violations with any specific factual contentions. We are unable to find anything more than a generalized relationship between those provisions and the harm Taylor claims in this case. For example, the courts of justice were open when Taylor obtained his post-conviction relief and they were open when Taylor filed this suit. The district court determined that Taylor had "not sufficiently stated claims for violation of his constitutional rights." With respect to Article 2 §§ 2 and 6, we agree. That aspect of the district court's judgment is affirmed.

II. The Surviving Claims

¶21 Consequently, we hold that Taylor has potentially stated a claim for violation of two provisions of Article 2 of the Oklahoma Constitution: section 9 concerning cruel and unusual punishment and excessive fines, and section 7 concerning due process. Taylor has also stated State tort law claims for assault and battery and the tort of outrage.

A. Article 2 § 9, Cruel and Unusual Punishment

¶22 Taylor's petition alleges that he was subjected to cruel and unusual punishment while he was incarcerated because he was denied toilet paper, an adequate shower, a warm blanket, adequate food and water and subjected to excessive force and racial slurs. He claims this was a violation of his rights protected by the Eighth Amendment to the United States Constitution and Article 2 § 9 of the Oklahoma Constitution.

¶23 In its analysis of this claim, the federal district court applied the two-step analysis established in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994), for violations of the United States Constitution and found that Taylor failed both prongs of the *Farmer* test. First, the court determined that the conditions about which Taylor complained were not "sufficiently serious" to constitute a constitutional violation. *Id.* at 834. Second, the court found that Taylor had failed to show "deliberate indifference" by jail officials to a substantial risk of serious harm posed by the conditions about which Taylor complained. *Id.* The federal court granted the City judgment as to Taylor's Eighth Amendment claim based on the conditions of his confinement. Taylor did not appeal and that judgment is now final. As the City correctly argues, that judgment precludes Taylor from relitigating the same issue in State court. Once a court has decided an issue necessary to its judgment, the same parties may not relitigate that issue. *Okla. Dep't of Pub. Safety v. McCrady*, 2007 OK 39, ¶ 7, 176 P.3d 1194.

¶24 However, the federal court declined to exercise its supplemental jurisdiction regarding Taylor's state law constitutional claims, remanding those claims for resolution by the state district court. Further, the federal court's resolution of Taylor's Eighth Amendment claim does not necessarily resolve Taylor's state law claim based on Article 2 § 9 of the Oklahoma Constitution. "The state of Oklahoma in the exercise of its sovereign power may provide more expansive individual liberties than those conferred by the United States Constitution . . . ." *Bosh v. Cherokee Cty. Governmental Bldg. Auth.*, 2013 OK 9, n.42, 305 P.3d 994.

¶25 No Oklahoma Supreme Court decision has expressly adopted the *Farmer* two-prong test for determining when a violation of Article 2 § 9 has occurred. *Farmer,* 511 U.S. at 834. However, in *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, the Oklahoma Supreme Court recognized that State prisoners have a private right of action pursuant to Article 2 § 9 for claims of cruel and unusual punishment during incarceration. The *Washington* Court then applied the federal test for determining violations of the Eighth Amendment established in *Whitley v. Albers,* 475 U.S. 312, 106 S. Ct. 1078 (1986), concerning claims of excessive force by prison officials when security measures are taken in response to prisoner disturbances. *Washington*, 2002 OK 45, ¶ 13. *Whitley* and *Washington* are, therefore, factually distinguishable from Taylor's claim. However, the Supreme Court's reliance on federal law in *Washington* suggests it would follow *Farmer* as well.

¶26 Further, in *Estate of Crowell v. Board of County Commissioners,* 2010 OK 5, 237 P.3d 134, the Oklahoma Supreme Court applied the Farmer test to an Eighth Amendment claim filed on behalf of a prisoner who died while incarcerated in a county jail. Although the facts would have supported a violation of Article 2 § 9 as well, the plaintiff did not assert that claim, relying solely on the federal constitution.[3] We conclude the Supreme Court would adopt the *Farmer* test, and it is the proper standard for evaluating Taylor's Article 2 § 9 claim. Therefore, Taylor's Article 2 § 9 claim of cruel and unusual punishment is precluded by the federal court's previous determination that the conduct about which Taylor complained lacked severity and the necessary indifference.

¶27 The district court correctly granted the City's motion for summary judgment regarding Taylor's Article 2 § 9 claim of cruel and unusual punishment during incarceration. That aspect of the district court's judgment is affirmed.

1. Excessive Fines

¶28 However, Taylor's claim that he was subjected to an excessive fine in violation of the Eighth Amendment and Article 2 § 9 of the Oklahoma Constitution is not precluded by the

federal court's judgment. "Issue preclusion prevents relitigation of facts and issues actually litigated and necessarily determined in an earlier proceeding . . . ." *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438. The federal court did not address Taylor's excessive fine issue. Consequently, pursuant to our concurrent jurisdiction to decide federal section 1983 claims and our inherent jurisdiction to decide State constitutional matters, we review Taylor's State and federal constitutional claims regarding the imposition of excessive fines.

¶29 In *Heck v. Humphrey,* the United States Supreme Court addressed this issue.

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 25 U.S.C. § 2254.

512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372 (1994). This Taylor cannot prove. Although it appears undisputed that the $700 fine originally imposed exceeded the City's maximum for driving without a license, because of post-conviction relief Taylor did not pay the fine. Taylor paid the $300 fine imposed after his second conviction and does not challenge the imposition of that fine in this case. Consequently, Taylor "has no cause of action under § 1983 unless and until [his] …sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Id.* at 489. And, Taylor has cited no authority to suggest that the result would be different with respect to his Article 2 § 9 claim.

¶30 The district court correctly granted the City's motion for summary judgment regarding Taylor's excessive fine claim asserting violations of the Eighth Amendment and Article 2 § 9. That aspect of the district court's judgment is affirmed.

B. Article 2 § 7, Due Process

¶31 "A two-step inquiry is necessary to determine whether a plaintiff was denied procedural due process: (1) did the individual possess a protected interest to which due process protection was applicable? and (2) was the individual given an appropriate level of process?" *Barnthouse v. City of Edmond*, 2003 OK 42, ¶ 11, 73 P.3d 840. It is hard to imagine what more process Taylor was due than that which he was provided after his original conviction. Taylor's original conviction and sentence were vacated. Taylor was then provided court-appointed legal counsel who represented him during his jury trial on the charge of driving without a license. When Taylor was found guilty by the jury, his fine was $300 and did not exceed the maximum allowed. Taylor has not challenged his fine or conviction after the jury trial. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S. Ct. 2963, 2976 (1974). Taylor has failed to show the "abuse of power" with which the Due Process Clause of the Fourteenth Amendment to the United States Constitution is concerned. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S. Ct. 662, 665 (1986). He also has failed to show that Article 2 § 7 requires more.

¶32 The district court correctly granted the City's motion for summary judgment regarding Taylor's due process claim asserting a violation of Article 2 § 7. That aspect of the district court's judgment is affirmed.

C. State Tort Claims

¶33 Taylor asserts two theories of tort liability, assault and battery and the tort of outrage. The predicate facts supporting these claims concern Taylor's treatment during and the conditions of his ten-day incarceration. As the City correctly argues: "The state or a political subdivision shall not be liable if a loss or claim results from: Provision, equipping, operation or maintenance of any prison, jail or correctional facility . . . ." 51 O.S.2011 § 155(25). The district court correctly granted the City's motion for summary judgment regarding Taylor's tort claims. That aspect of the district court's judgment is affirmed.

D. Ten-Day Incarceration

¶34 There is one aspect of Taylor's claim that cannot be resolved on summary judgment. After his guilty plea, Taylor was sentenced to and served ten days in the City jail. That sentence was vacated by the municipal court. But, the Judgment and Sentence subsequently imposed after his second conviction does not address jail time. Wrongful incarceration may support a claim for violation of constitutional rights. *See Manuel v. City of Joliet,* 580 U.S. ___,

137 S. Ct. 911 (2017); *Stein v. Ryan,* 662 F.3d 1114 (9th Cir. 2011). Therefore, it cannot be determined from the summary judgment record whether this resulted from a clerical omission, a finding that no additional jail time beyond the time served was warranted or a finding that the crime did not warrant the imposition of jail time. Further, because Taylor's original sentence was vacated after the federal court's judgment, any potential claim he has is not precluded by that ruling. *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438. Nonetheless, the City has failed to show that all facts material to its motion are supported by acceptable evidentiary material in this regard. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶ 10, 743 P.2d 682 (approved for publication by the Oklahoma Supreme Court). Consequently, summary judgment is not proper. *Id.*

CONCLUSION

¶35 The district court's judgment in favor of the City regarding a claim based on Taylor's ten-day incarceration in the City jail prior to the vacation of the conviction resulting in that incarceration is reversed, and this case is remanded for a determination of that issue consistent with this Opinion. In all other respects, the district court's judgment in favor of the City is affirmed.

¶37 **AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.**

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

JOHN F. FISCHER, PRESIDING JUDGE:

1. The speeding charge was bifurcated and remained untried during the proceedings in district court.

2. "[C]laims shall be allowed for wrongful criminal felony conviction resulting in imprisonment if the claimant has received a full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced or has been granted judicial relief absolving the claimant of guilt on the basis of actual innocence of the crime for which the claimant was sentenced."

3. This Court also used the *Farmer* test to evaluate an Eighth Amendment claim in *Howard v. Grady County Criminal Justice Authority,* 2017 OK CIV APP 7, ¶ 14, ___ P.3d ___.

2018 OK CIV APP 19

CANDACE JOAN BROWN, Plaintiff/Appellee, vs. MARY C. THOMPSON, an Individual, Defendant/Appellant, and Scott Douglas Thompson and Gary S. Thompson, as Individuals, and Drakestone Farms, LLC, Edmond Farms, LLC, and Westminster Farms, LLC, as Oklahoma Limited Liability Companies, Defendants.

Case No. 114,822; Comp. w/115,801
November 7, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA G. SWINTON, JUDGE

AFFIRMED

David L. Thomas, THOMAS & TERRELL, PLLC, Oklahoma City, Oklahoma, and Noble McIntyre, McINTYRE LAW, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee,

H. Craig Pitts, Larry E. Finn, RUBENSTEIN & PITTS, P.L.L.C., Edmond, Oklahoma, for Defendant/Appellant.

ROBERT D. BELL, JUDGE:

¶1 Defendant/Appellant, Mary C. Thompson, appeals from the trial court's judgment dissolving the partnership of Plaintiff/Appellee, Candace Joan Brown, and Defendant Scott Douglas Thompson, and dividing the partnership assets. In essence, Appellant contends (1) there was insufficient evidence to support a finding that Plaintiff and Scott were partners and (2) the trial judge erred by allegedly denying Appellant's request to present evidence regarding her supposed interest in the subject assets during the second stage bench proceeding. For the reasons set forth below, we affirm.

¶2 Plaintiff and Scott Thompson met and began dating in 2001. At that time, Scott lived in Oklahoma City with his parents, Gary S. Thompson (Defendant) and Mary C. Thompson (Appellant), and he owned a lawn mowing service. Plaintiff lived in a mobile home she owned in Yukon and she worked at a hotel. Soon thereafter, the two began living together. Plaintiff testified the couple then began formulating a plan to acquire real estate, primarily in the area around Jones and Luther in Northeast Oklahoma County. Plaintiff explained that they wanted to acquire rental property to generate income when they retired. In 2003, the couple purchased their first piece of property and a mobile home together, where they began living. Plaintiff testified proceeds from the sale of her mobile home were used to help with the land and new mobile home purchases.

¶3 Over the course of the next decade, the parties acquired numerous rent houses and

parcels of raw land. During that period, Plaintiff testified she was responsible for locating many of the properties and she worked alongside Scott in preparing the properties for use by tenants and in property upkeep. Plaintiff also worked at Scott's mowing service and his funeral home display business. Rather than pay Plaintiff for all of the work she performed, the couple agreed Plaintiff's income would be combined with rental income to acquire additional properties. Plaintiff also testified she contributed to the joint venture substantial sums of her own money, including $35,000.00 from an automobile accident settlement, $29,000.00 in back child support payments from her former husband and a $9,500.00 Social Security disability lump sum payment. Scott handled all of the couple's finances. The majority of rental income was paid in cash, which Scott conceded was kept in a large home safe or in a bank safety deposit box. Plaintiff had access to neither.

¶4 On January 1, 2013, Scott told Plaintiff their relationship was over and he demanded she move out of their house. Plaintiff initially brought an action for divorce, alleging the parties had a common law marriage and seeking an equitable division of the marital estate. After Scott denied the existence of a marriage and denied Plaintiff was entitled to any of the real estate holdings, Plaintiff dismissed the divorce action.

¶5 Plaintiff filed the present action alleging she and Scott were partners in a real estate venture, and she was entitled to her share of those properties. The petition named as defendants Scott and his mother (Appellant). Appellant was named as a defendant because Plaintiff learned that title to several of the partnership properties had been transferred to Appellant. Plaintiff maintained Appellant was not involved with, nor had contributed to, the joint venture. Plaintiff subsequently amended her petition to add as defendants Scott's father, Gary S. Thompson, as well as three limited liability companies, after discovering Scott had transferred title to several other partnership properties to his father or those companies. As with the putative transfers to Appellant, Plaintiff alleged the transfers to Gary and the limited liability companies were undertaken by Scott in an effort to shield those properties from Plaintiff's claims.

¶6 The combined Answer of the defendants simply denied the existence of a partnership between Plaintiff and Scott. The Answer contained no affirmative defenses and no counterclaims.[1] Appellant never pled that she had any interest in the subject properties. Similarly, none of the defendants, including Appellant, asserted during the pretrial conference that Appellant had any interest in those properties. The Court bifurcated the proceedings for trial. The issue of the existence of a partnership/joint venture was tried to a jury in January 2016.

¶7 In addition to the facts set forth above, Plaintiff presented *inter alia* documentary evidence and the testimony of both an appraiser and an expert economist. The appraiser valued the couple's twenty-eight (28) properties at between two and two and one-half million dollars ($2,000,000.00 to $2,500,000.00). The appraiser noted the majority of the properties were not financed, but were purchased with cash. The appraiser also estimated the properties were capable of producing, as of January 1, 2013, between $22,700.00 and $25,650.00 in rental income per month. Plaintiff's economist determined her contributions to the joint venture, either in cash or as in-kind contributions, totaled $528,000.00.

¶8 Scott denied the existence of any joint venture agreement with Plaintiff and claimed she was not entitled to any of the subject properties. Appellant and her now former husband, Gary, testified, albeit unconvincingly, they were Scott's partners in a real estate business. The jury returned a unanimous verdict in favor of Plaintiff and against the defendants.

¶9 On February 17, 2016, the parties appeared for a non-jury trial. At that time, Scott's attorney sought to introduce evidence regarding ownership of the 28 properties identified in the jury trial portion of the proceedings. The trial court first questioned the timeliness of the documentary evidence sought to be introduced by Scott's attorney and noted Scott's failure to comply with a previous discovery order concerning tax returns. The court then reiterated that the non-jury proceeding was for determining damages and dividing partnership property. The judge specifically noted that during the jury trial, all parties considered the 28 properties listed on Plaintiff's Exhibit 8 were the partnership assets. Because the jury had already determined Plaintiff and Scott were in a partnership with respect to those properties, the court ruled there was no need for further evidence in this regard. Appellant was represented by her own counsel, who did not object to the trial court's declaration regarding proceeding

with damages and property division. The court then tentatively ruled the property should be divided equally between Scott and Plaintiff, and suggested the parties undertake settlement discussions regarding property distribution.

¶10 Following a conference, the attorneys for all parties returned to court with an agreement, announced on the record, to award specific properties to each party to approximate a 50/50 split of the total value of the 28 subject properties. The trial court's Journal Entry specifically states, "The Plaintiff and all named Defendants reached a settlement on the issue of damages and division of properties, which was place of record in open court, . . ." The order then identified each individual property to be awarded to Scott and Plaintiff, respectively. From said judgment, Appellant lodges this appeal.

¶11 This partnership dissolution is an equitable proceeding. *Butcher v. McGinn*, 1985 OK 58, 706 P.2d 878. "In actions of equitable cognizance, the judgment made by the trial court will be reversed if it is clearly contrary to the weight of the evidence or contrary to accepted principles of equity or rules of law." *Oklahoma Dep't of Sec. Ex rel. Faught v. Seabrooke Investments, LLC*, 2017 OK CIV APP 42, ¶14, ___ P.3d ___. *Accord In re Estate of Eversole*, 1994 OK 114, ¶7, 885 P.2d 657. "Absent the standard's breach, the appellate court must indulge in the presumption that the decree is correct." *Merrill v. Oklahoma Tax Comm'n*, 1992 OK 53, ¶7, 831 P.2d 634.

¶12 "The essential criteria for ascertaining the existence of a joint venture relationship are: (1) joint interest in property, (2) an express or implied agreement to share profits and losses of the venture and (3) action or conduct showing cooperation in the project." *Martin v. Chapel, Wilkinson, Riggs, and Abney*, 1981 OK 134, ¶11, 637 P.2d 81. Title 54 O.S. 2011 §1-202(a) contains a similar requirement: "the association of two or more persons to carry on as co-owners of a business for profit forms a partnership." In her first and second propositions of error, Appellant asserts insufficient evidence was presented to prove Plaintiff and Scott were partners in a real estate venture. Specifically, Appellant claims there is a complete absence of proof that Scott and Plaintiff agreed to share profits and losses of their venture, or that they carried on the partnership as co-owners for profit. In large part, Appellant bases her arguments on the fact that Plaintiff admitted she never received a profit from her partnership with Scott. We are unconvinced.

¶13 As set forth above, Plaintiff testified she and Scott agreed to pool their resources to purchase properties for future income. Profits from existing properties were used to buy additional properties. It is immaterial that Plaintiff had yet to realize any profits from the joint venture as of January 1, 2013. The law of joint venture requires an agreement to share in profits and losses; it does not require an actual profit (or loss).

¶14 The *Martin* Court further explained joint ventures:

> The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each co-adventurer of something promotive of the enterprise. Each member of a joint venture acts for himself as principal and as agent for the other members within the general scope of the enterprise. The law of partnership and of principal and agent underlies the conduct of a co-adventurer and governs the rights and liabilities of co-adventurers and third parties as well. The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details.

Martin, 1981 OK 134 at ¶11 (citations omitted).

¶15 "In the absence of an express agreement setting forth the relationship, the status may be inferred from the conduct of the parties in relation to themselves and to third parties." *Id.* at ¶12. "[N]o one factor is determinative [in proving a joint venture]; the facts must be examined as a whole." *Id.* at 13. "[J]oint venture property may be held in the name of one member in a fiduciary capacity for the others." *Id.* Finally, the "loss" element of a joint venture agreement is satisfied where a party is "in a position to sustain an actual loss by the failure of the enterprise." *Boren v. Scott*, 1996 OK CIV APP 115, ¶5, 928 P.2d 327, quoting *Crest Const. Co. v. Insurance Co. of N. Am.*, 417 F.Supp. 564, 570 (W.D. Okla. 1976) (applying Oklahoma law).

¶16 In the present case, Plaintiff's evidence established she and Scott had a joint interest in 28 properties, they agreed to share profits and losses of the venture and their conduct showed cooperation in the venture. Although the defense presented evidence to the contrary, we find the trial court's decision was not clearly

contrary to the weight of the evidence. Therefore, the trial court's judgment finding a partnership existed between Plaintiff and Scott is affirmed.

¶17 As her final proposition of error, Appellant asserts the trial court erred by preventing her from submitting evidence during the second stage of trial regarding her supposed interest in the subject properties. The record belies Appellant's argument. As previously stated, the trial court rejected an attempt by Scott's counsel to introduce, during the second stage, evidence regarding ownership of the 28 properties identified as partnership assets in the first stage. The court ruled such evidence was irrelevant during the second stage and intimated the documentary evidence was inadmissible because it was not timely produced prior to trial. The trial judge then made what was clearly announced as a tentative ruling regarding how she believed the property should be divided. Appellant's counsel did not specifically seek to introduce similar evidence, nor did he object to the trial court's ruling regarding Scott's evidentiary offer. Rather, Appellant and her attorney thereafter participated in a settlement conference where the parties agreed to a division of partnership assets, and thereafter announced the same in open court and signed a minute order to that effect. We also reiterate Appellant did not file a counterclaim or otherwise plead that she had any interest in the subject properties.

¶18 "Parties on appeal are limited to the issues presented at the trial level." J*ones v. Alpine Investments, Inc.*, 1987 OK 113, ¶11, 764 P.2d 513. Because Appellant did not seek to introduce the now complained of evidence at trial - nor object to the trial court's ruling regarding Scott's attempted introduction of ownership evidence, she waived this proposition of error on appeal. The trial court was not given the opportunity to specifically rule for or against Appellant in this regard. "An appellate court will not make first-instance determinations of disputed law or fact issues." *Bivens v. State ex rel. Okla. Mem. Hosp.*, 1996 OK 5, ¶19, 917 P.2d 456 (emphasis omitted). The judgment of the trial court is affirmed.

¶19 Along with a motion to dismiss, Plaintiff has filed a motion for appeal-related attorney fees and sanctions pursuant to 20 O.S. 2011 §15.1 and 12 O.S. 2011 §995. Section 15.1 provides for an award of attorney fees in meritless appeals; §995 provides for sanctions, including attorney fees, for filing a frivolous appeal. Division II of this Court reiterated the standard for determining frivolous appeals as follows:

> "Stated in its basic form a frivolous appeal is one having no reasonable or legitimate legal or factual basis to support it. It is an appeal where the result is obvious or appellant's arguments are wholly without merit." *TRW/Reda Pump v. Brewington* [1992 OK 31] at ¶ 14, 829 P.2d [15] at 22 (citations omitted). However, an appeal is not frivolous merely because the lower court's decision is sustained, and all doubts as to whether an appeal is frivolous should be resolved in favor of the appellant. *Id.* at [¶14]. "Only if there are no debatable issues upon which reasonable minds might differ and the appeal is so totally devoid of merit that there is no reasonable possibility of reversal will an appeal be deemed frivolous." *Id.*

Shaw Group, Inc. v. Greer, 2012 OK CIV APP 24, ¶12, 273 P.3d 895.

¶20 Upon review of the instant record and applicable law, we cannot find this appeal is "so totally devoid of merit" as to constitute a frivolous appeal. Plaintiff's motion for attorney fees and sanctions is denied, as is Plaintiff's motion to dismiss this appeal.

¶21 AFFIRMED.

GOREE, P.J., and JOPLIN, J., concur.

ROBERT D. BELL, JUDGE:

1. Appellant's response to the original petition contained a counterclaim for forcible entry and detainer by which she sought to evict Plaintiff from the property Plaintiff shared with Scott. However, that counterclaim and counterclaims originally asserted by Scott were subsequently abandoned, not mentioned in the pretrial order and never tried.

2018 OK CIV APP 20

CECILIA W. GOODWIN, et al., Plaintiffs/Appellees, vs. PATRICK H. BLAKE and JOAN E. BLAKE, Defendants/Appellants.

Case No. 114,884. October 30, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA SWINTON, TRIAL JUDGE

AFFIRMED

John W. Gile, Matthew R. Gile, HALL, ESTILL, HARDWICK, PC, GABLE, GOLDEN & NEL-

SON, Oklahoma City, Oklahoma, for Plaintiffs/Appellees

W. Dan Nelson, Oklahoma City, Oklahoma and MaryGaye LeBoeuf, Oklahoma City, Oklahoma, for Defendants/Appellants

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

¶1 Patrick H. Blake and Joan E. Blake (the Blakes) appeal a decision of the district court holding that they acted unreasonably in destroying some 940 feet of fence belonging to Cecilia Goodwin and others, and awarding damages. On review, we affirm the decision of the district court.

BACKGROUND

¶2 This case begins in November 2005, when Cecelia Goodwin filed a petition to quiet title and an application for injunction, alleging that she owned certain property in the N/2 of the SE/4 of Section 34, Township 14, Oklahoma County, and that her adjoining neighbors, the Blakes, had entered a strip at one edge of the property and destroyed her fence. The fence was allegedly located on a section line. The same month, the Blakes filed suit alleging that the Goodwin family (the Goodwins) had refused them rightful access to the same strip of property. The record shows that the Blakes were attempting to establish an access road to their property along the section line without a prior judicial declaration of their right to do so. The two cases were consolidated.

¶3 On September 19, 2011, the district court held a bench trial and issued a journal entry holding that the Blakes had no authority to open the section line, and, as a result, had no right to remove the Goodwins' fence. We vacated this decision in June 2014 in Case No. 111,172, because neither the common law of easements nor 69 O.S.2011 § 1201(A) require that a landowner seeking to use a section line for access to their own property "open" the section line to do so. We remanded the matter to the district court to inquire into the reasonableness of the Blakes' actions in attempting to create access along the section line, and to decide whether the Blakes had a right to destroy the Goodwins' fence based upon a grant of "reasonable access and use" of the section line. The district court held trial on this question in 2015, and allowed the Blakes' road to stay, but awarded damages for the destruction of the Goodwins' fence. The Blakes now appeal for a second time.

STANDARD OF REVIEW

¶4 "The denial or award of an easement is an exercise of the trial court's equitable cognizance, and its order will be affirmed on appeal unless it is found to be against the clear weight of the evidence or contrary to law or established principles of equity." *Mainka v. Mitchusson*, 2006 OK CIV APP 51, ¶ 11, 135 P.3d 842; *see also Barrett v. Humphrey,* 2012 OK CIV APP 28, 275 P.3d 959. This case also requires the interpretation of 69 O.S.2011 § 1201(A). Legal questions involving statutory interpretation are subject to *de novo* review. *Heffron v. Dist. Court of Okla. Cnty.*, 2003 OK 75, ¶ 15, 77 P.3d 1069. *De novo* review is non-deferential, plenary and independent. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶5 Preliminarily, we must correct certain statements made in the Blakes' petition/briefing regarding the earlier appeal: the Blakes state that "On appeal, COCA vacated the judgment *holding that Goodwins had no right to erect a fence* . . . ." The Blakes' reply brief goes further, stating that we "held in the first appeal that *Blake had had an inviolable constitutional right*" to use the section line for access. This Court made no such statements in its prior opinion. Nor do we believe that our decision could be reasonably (mis)interpreted as making such statements. Our prior Opinion clearly stated:

> Given that the right to use the section line for access is clearly conditioned on equitable principles, we find that the district court was required to inquire into the reasonableness of the Blakes' actions in **attempting** to create access along the section line, and decide whether the Blakes had any **right to remove the Goodwins'** fence based upon a grant of "reasonable access and use." (Emphasis added).

¶6 Consistent with that prior order quoted above, two issues were therefore presented for decision by the district court: (1) did the Blakes demonstrate that their use of the section line for access was reasonable pursuant to the criteria set out by *Burkhart v. Jacob*, 1999 OK 11, 976 P.2d 1046,[1] and similar cases; and (2) if so, did the Blakes have a right to destroy some 940 feet of the Goodwins' fence as part of this "reasonable access?"

I. The Need For Access

¶7 The district court's order appears to find that the Blakes did demonstrate the necessity to make reasonable use of the section line in order to access their property. The need for such access does not have to be absolute, i.e., the proposed road need not be the *only possible* means of accessing adjoining land. *Burkhart* at ¶ 15. Here, although the Blakes had an alternate route of access, that route was also subject to dispute with another neighbor. The court observed after closing argument that "the roadway is there," and there would be little point in closing it only to leave the Blakes' property without effective access and thereby begin another easement argument. Pursuant to the standard of review, we find no error in the decision that the Blakes met the requirements to demonstrate their entitlement to an easement by necessity, and the road already constructed on the section line provided this access.

¶8 The argument of consequence in this case concerns whether the Blakes should pay compensation for destroying the Goodwins' fence while constructing their road. The Blakes contend they had a right to remove "obstructions or nuisances" from an "easement," and that the Goodwins' fence constituted such an obstruction because it veered onto the section line easement at a certain point.[2]

II. Use of the Section Line

¶9 The core of the Blakes' argument is that they had an immediate right to begin constructing an access road down the unopened section line because they *already possessed* an easement across the Goodwins' property running along the section line at the time they began to construct the road, which gave them the right to construct the road and "remove obstructions" from their "easement." We find no record of such an easement. The Blakes argue that their alleged easement was created by the Legislature in the 1975 amendments to § 1201(A). We find nothing in the language of the statute itself, or in the case law before or since 1975, declaring an absolute, or automatic, right of a landowner to place an access road across a neighbor's property, regardless of whether the road is to be located on a section line. In fact, although the original 1909 statutory language that "all section lines in the State are hereby declared public highways" could be interpreted as creating a public highway on all section lines (and hence a general right of access), case law has persistently described the statute as having created only an easement along section lines for the benefit of the ***state.*** *See, e.g., Franks v. Tyler,* 1974 OK CIV APP 55, ¶ 3, 531 P.2d 1067 (citing *Salyer v. Jackson*, 1924 OK 1173, 232 P. 412)(Franks overruled on other grounds in *Childress v. Jordan*, 1980 OK CIV APP 35, 620 P.2d 470). Nonetheless, the Blakes rely on an interpretation of *Burkhart v. Jacob* to reach an opposite conclusion.

A. *Burkhart* Distinguished

¶10 The question in *Burkhart* was whether the Burkharts could **substantially change** the use of an **existing easement** without the permission of the Jacobs, the servient estate owners. The common law in prior cases such as *Hudson v. Lee,* 1964 OK 134, ¶ 13, 393 P.2d 515, protected a servient estate from the use of an easement that went beyond the *intent or reasonable expectations* of the parties at the time of its creation. The Burkharts argued that the 1975 amendment to § 1201(A), which provides that "No fee owner shall be denied the right of ingress and egress to his land by virtue of this Act," had overruled this common law and prohibited the courts from restricting new or different uses of an appurtenant easement.

¶11 *Burkhart* held that the revised § 1201(A) did not overrule this common law of "reasonably contemplated use." As a part of that analysis, ¶ 10 of *Burkhart* stated that "By the use of the term 'ingress and egress' [in § 1201(A)] the Legislature has created an easement in general terms without specifics." The Blakes rely upon this paragraph for their argument that the 1975 amendment to § 1201(A) created new "general easement" rights along section lines.

¶12 The paragraph must be read in the context of the rest of the case, however. The Burkharts *already had an appurtenant easement,* and the *Burkhart* court was referring only to the fact that an existing "ingress and egress" right was a "general" easement, and hence was subject to the common law "reasonable use" restrictions. We reject the argument that *Burkhart* changed the state's highway easements to "general easements" over thousands of miles of section lines, and thereby substantially changed the statutory and common law scheme in effect till that time.[3]

B. Other Case Law

¶13 We find it clear that *Burkhart* did not recognize a new general right to an easement

along a section line. We further find no other evidence that such a right was created in 1975 or existed prior to that time. Title 69 O.S.2011 § 1201(A) was derived from the previous 69 O.S.1961 § 1, which had existed in some form since 1909. Prior to 1968, the rule regarding section lines was found at 69 O.S.1961 § 1. It had not changed substantially since 1909. That statute simply stated that "all section lines in the State are hereby declared public highways." The statute was recodified, with essentially the same provisions, in 1968 as 69 O.S. § 1201. It is currently located within the "right of way" provisions of the state's county road improvement statutes. In 1975, the Legislature added additional provisions to § 1201. The 1975 amendment changed the 1968 version of the statute in two ways. First, it changed the declaration that section lines were "declared public highways" to one that "all section lines in the state which are opened and maintained by the board of county commissioners or the Department of Public Highways for public use are hereby declared public highways." Second, it allowed an *unopened* section line to be designated a "reserved section line" that was "in the *full and complete control* of the owner or owners of the abutting land." It was at this point that the Legislature also added the caveat that "no fee owner shall be denied the right of ingress and egress to his land by virtue of this act." We find it clear that this caveat was not meant to create any *new* right, but was simply intended to limit the effect of the 1975 amendments on *existing rights*. **Hence the statute created no new "right of access,"** but merely confirmed that existing statutory or common law rights were not affected by placing a section line in reserve status, or by virtue of a section line being deemed "unopened."

III. Removal of the Fence

¶14 As discussed above, we find no legal principle that a landowner has an automatic easement to place an access road across a neighbor's property if a section line was used. As an alternative basis for decision, however, the Blakes propose a statutory or common law right of an individual to destroy a neighbor's property on the grounds that it encroaches on a *state or county owned* easement. We reject this argument. The Blakes cite *White v. Dowell*, 1915 OK 1090, 153 P. 1140, as supporting this principle, but *White* makes no mention of any private right to remove obstacles from a state easement. We find no authority that any law reserving section lines for public highway purposes granted any private right of enforcement against obstructions where no county road was present.

¶15 The Blakes further argue that the Goodwins' fence constituted a "private nuisance" that they had a right to remove. The Blakes trace this right from 50 O.S.2011 § 1 (blocking a "highway" is a nuisance) in combination with 50 O.S.2011 § 13 ("the remedies against a private nuisance are: 1. A civil action; or, 2. Abatement."). Section 14 of the same statute states that "A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury." Case law on this provision is very limited.[4] The only major cases dealing with this remedy of self-abatement of a nuisance are *Hummel v. State*, 1940 OK CR 27, 99 P.2d 913 and *Holleman v. City of Tulsa*, 1945 OK CR 7, 155 P.2d 254.

¶16 *Hummel* involved neighbors allegedly seizing a roaming red bull of dubious pedigree that was attempting to mate with the defendant's "nice, fine herd of white-faced cattle." *Id.* When the bull was returned, it had, in the interim, become a steer. This action fell under a direct and specific statute, Section 9044, Okla. Stats. 1931, which made it an offence for:

> . . . any owner of livestock in this state, to permit any male swine over the age of four (4) months, or any bull over the age of nine (9) months to run at large within any portion of this state where cattle and swine are permitted by law to run at large, unless the animals or animal be pure or standard bred.

¶17 The *Hummel* Court found that the owner was unwilling to confine the non-pure bred bull, and that its free-roaming procreation would damage the bloodline of the neighbors' stock. The bull was therefore a private nuisance, and returning it sans testicles was a reasonable form of abatement.

¶18 Five years later, however, *Holleman* distinguished *Hummel* and limited this common law doctrine noting that:

> The right of an individual to abate a nuisance is recognized, but a careful reading of the entire text reveals that distinctions are made even by a court of equity, and that such courts will take into consideration the nature of the nuisance to be abat-

ed, its direct or harmful results to the party, and whether the nuisance may be abated without a trespass upon the land or premises of another.

This distinction was clearly drawn in the case of *Hummel v. State, supra*. There an injury was being inflicted that was irreparable, and demanded immediate action, and did not necessitate the entering upon the premises of another. It was recognized as a damage to the property, as distinguished from a damage to the person.

¶19 Even assuming, without agreeing, that the Goodwins' fence could qualify as a "private nuisance," *Holleman* is quite clear that "self-help" in the form of abatement is allowed only when the injury being inflicted is an *irreparable damage demanding immediate action*. We find no facts indicating that the Blakes faced such an immediate and irreparable harm to their property or rights that the normal and accepted procedure of a judicial determination of rights or injunctive relief could not be followed. The trial court's judgment on this issue is supported by the evidence, and will not be overturned.

IV. The Fee Issue

¶20 One final issue is presented. In their petition in error, the Blakes attempt to raise the issue of "whether Goodwin is entitled to recover attorney fees for Blake's removal of a fence …." However, the docket sheet and record are clear that the district court had *made no fee award* at the time this petition was filed on March 8, 2016. The district did not enter a journal entry on fees until a year later, on March 8, 2017. The record was completed on October 28, 2016, before this journal entry was made. We find no record that the Blakes either attempted to amend their petition to add the fee issue, or to amend the record to include this later journal entry. Nor do we find any substantive argument in the briefs regarding the fee issue. Therefore, we regard it as not having been properly raised in the appeal and decline to address it.

CONCLUSION

¶21 We reject the Blakes' contention that the 1975 amendment to 69 O.S. § 1201 created an automatic right for any private landowner to use a section line to construct an access road on a neighbor's property without first seeking an easement. Though the district court eventually recognized that the Blakes had a right to an easement by necessity along the section line, we find no resulting legal right or privilege for the Blakes to destroy the Goodwins' fence. Accordingly, we affirm the judgment of the district court.

¶22 **AFFIRMED**.

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

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

1. We will discuss other implications of the *Burkhart* case later in this opinion.

2. There were various disputed surveys regarding the position of the easement relative to the fence.

3. If *Burkhart* did so, this would constitute one of the most far-reaching and radical changes in property law since statehood.

4. We would live in little more than a state of anarchy if the combination of 50 O.S. 2011 § 1 and § 14 grants every citizen license to *destroy another's property* if that citizen believes that the property "endangers the comfort, repose, health, or safety of others," or "offends decency," or "in any way renders other persons insecure in life" without any judicial inquiry as to whether the property does, in fact, constitute a "nuisance."

2018 OK CIV APP 21

JOE SALINAS and PAULINE TAYLOR, Plaintiffs/Appellees, vs. TODD ALAN SHEETS, Defendant/Appellant.[1]

Case No. 115,158. October 25, 2017

APPEAL FROM THE DISTRICT COURT OF McCURTAIN COUNTY, OKLAHOMA

HONORABLE GARY BROCK, JUDGE

AFFIRMED

Thomas H. Ellis, Idabel, Oklahoma, for Plaintiff/Appellant,

Jon Ed Brown, Hugo, Oklahoma, for Defendants/Appellees.

Bay Mitchell, Presiding Judge:

¶1 Defendant/Appellant Todd Alan Sheets (East Landowner) appeals from a partial journal entry of judgment in which the trial court found that Plaintiffs/Appellees Joe Salinas and Pauline Taylor (Salinas, Taylor or, collectively, West Landowners) owned all right, title and interest to a disputed piece of real property adjoining the parties' properties. We find the trial court's finding that the boundary line had been established by acquiescence for the statutory period is not against the clear weight of the evidence. We also find East Landowner failed to prove the trial court imposed an improper burden of proof. We affirm the judgment.

PROCEDURAL HISTORY

¶2 The parties are adjacent landowners in McCurtain County. A dispute developed between the parties in 2010 about the use and ownership of about eight acres (the Disputed Property) located, depending on which party is asked, on either side of two different boundary lines adjoining the parties' properties. East Landowner sought to quiet title to the Disputed Property, claiming that the property was encompassed within the west boundary line established by survey. West Landowners sought to quiet title to the Disputed Property under the doctrines of adverse possession and/or boundary by acquiescence, claiming that an older fence to the east of the survey line had historically served as the boundary between the two properties. After a non-jury trial, the trial court found that West Landowners owned all right, title and interest to the property under both the doctrines of adverse possession and boundary by acquiescence.[2] East Landowner appeals.[3]

STANDARD OF REVIEW

¶3 An action to quiet title is an action of equitable cognizance, and the judgment of the trial court will be affirmed unless found to be against the clear the weight of the evidence. *Krosmico v. Pettit*, 1998 OK 90, ¶23, 968 P.2d 345, 351. Questions of law are reviewed by a *de novo* standard. *See Hogg v. Oklahoma Cnty. Juvenile Bureau*, 2012 OK 107, ¶5, 292 P.3d 29, 33. The credibility of witnesses and the effect and weight to be given to their testimony are questions of fact to be determined by the trier of fact and are not questions of law for the appellate court on appeal. *Hagen v. Indep. School Dist. No. I-004*, 2007 OK 19, ¶8, 157 P.3d 738, 740.

TRIAL EVIDENCE

¶4 Bonnie French originally owned all the land involved in this case. Bonnie built a fence (the older fence), running from the north to the south, on the east side of her property. Bonnie conveyed the northwest and southwest tracts to her nephew, Willie French, at some point in the 1960s. Willie sold the southwest tract to Clyde Neill in the early 1970s. Neill owned the property for approximately one year be-fore selling it to Jimmy Hughitt. Hughitt also bought the northwest tract from Willie French in approximately 1978. Hughitt leased both western tracts to West Landowners beginning in 2004, and then sold both tracts to West Landowners in 2010.

¶5 Bonnie retained ownership of the eastern property until she died in approximately 1994; Joe French, Sr. inherited the property after her death. When he died in 1999, his son, Joe French, Jr., acquired the property. Joe French, Jr. sold the property to East Landowner and his father, Alan Sheets, in 2004. East Landowner became the sole owner of the property when Alan died in 2010. In 2010, East Landowner built a fence running north/south on the survey boundary line on the western side of the Disputed Property. He also erected a gate blocking West Landowners' access to a road which passed through the Disputed Property and which served as West Landowners' only access to their property. The present lawsuit ensued.

¶6 None of the parties disputed that the older north/south fence existed on the eastern side of the Disputed Property, and none of the parties disputed the location of the survey boundary line to the west. However, the parties disputed whether a second fence had existed at the survey boundary line. The parties also disputed who had historically used the Disputed Property and for what purpose.

¶7 West Landowner Taylor testified that she had been familiar with the area since 1956. She stated that she had hunted "all over" the western property and that she had never seen a fence or remnants of a fence on the western survey line. West Landowners also presented aerial photographs of the Disputed Property from 1967, 1979, and 1988, none of which appeared to show a fence at the survey boundary line. West Landowner Salinas testified that he had bailed hay, brush hogged, cleaned, and tended pecan trees on the Disputed Property. He also testified he had maintained the road running through the Disputed Property and had put "tin horns" under the road where it crossed a creek that bisected the property. West Landowners claimed that Jimmy Hughitt had used the Disputed Property to bail hay since at least 1988. West Landowners also claimed Hughitt had shown them the east fence as the boundary line before they purchased the property from him.

¶8 Joe French, Jr. testified that he had been familiar with these properties his entire life and that at no time during the previous fifty years had any of the former landowners treated the survey boundary line as a boundary. He also stated that the historical fence on the east side of the Disputed Property had served as the

boundary line for "75, 100 years." He further testified that he had walked the property with Alan Sheets before Sheets purchased it and that he told Sheets that the old fence line was the boundary line. French stated that neither he nor his father had ever used the Disputed Property during their periods of ownership.

¶9 East Landowner testified that he had met with the previous west tract owner Jimmy Hughitt before purchasing the eastern property and that they had agreed that the survey boundary on the western side was the boundary between their respective properties. He also stated that his father did *not*, as Joe French claimed, agree that the eastern fence was the property line. He claimed that he and his father had looked at the survey markers to confirm the boundary several times before purchasing the property.

¶10 East Landowner also presented the deposition testimony of Clyde Neill.[4] Neill testified that he had helped construct a second fence on the western boundary of the Disputed Property in the 1970s and that the fence had served as a boundary between the east and west properties. He also testified, however, that there was only one fence that served as a common property line. He stated that Willie French never claimed ownership to the Disputed Property but that Willie did run cattle and horses over the property.

ANALYSIS

¶11 After reviewing the record and applicable law, we find the clear weight of the evidence established that West Landowners owned the Disputed Property pursuant to the doctrine of boundary by acquiescence. In *Lewis v. Smith,* 1940 OK 276, 103 P.2d 512, the Oklahoma Supreme Court explained the doctrine as follows:

> [Where] adjoining landowners occupy their respective premises up to a certain fence line which they mutually recognize and acquiesce in for a long period of time, usually the time prescribed by the statute of limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one.

Id., 1940 OK 276, ¶9, 103 P.2d at 514. In *Lewis,* the Court considered four factors for establishing boundary by acquiescence: (1) the division of a unit of land; (2) a fence or other boundary between the two portions which deviates from the true line established by government survey; (3) continued maintenance of the fence for the statutory period; and (4) the parties' use of the land lying on their respective sides of the fence only. *Id.*, ¶8, 103 P.2d at 514. Fifteen years is the statutory period required to establish title by acquiescence. *See* 12 O.S. 2011 §93(4).

¶12 East Landowner claims the trial court misapplied the doctrine. East Landowner argues boundary by acquiescence cannot apply where no dispute, uncertainty, or ignorance arose regarding the true boundary's location. East Landowner relies on *McGlothlin v. Livingston,* 2012 OK CIV APP 48, 276 P.3d 1042, for this proposition. There, another division of this Court did, indeed, find that "A careful reading of [Oklahoma case law] reveals the doctrine of boundary by acquiescence applies only where there is uncertainty or doubt as to the true boundary line, or where no surveyed or recognized boundary line existed when the fence was erected." *Id.*, ¶21, 276 P.3d 1047.

¶13 The cases cited by *McGlothlin,* however, do not support this statement. To the contrary, *Lewis,* one of the cases cited by *McGlothlin,* states "Some of the authorities only permit the establishment of boundaries by recognition and acquiescence where the conduct of the parties arises out of and follows uncertainty or dispute over the true line, *but the majority of the cases establish the better reasoned rule that dispute or uncertainty is not a prerequisite*." *Lewis*, ¶16, 103 P.2d at 515 (emphasis added). *See also Eubanks v. Anderson,* 2008 OK CIV APP 13, 178 P.3d 872 ("Dispute or uncertainty regarding the true boundary is not a prerequisite in establishing a boundary by acquiescence."); *Oaks Country Club v. First Presbyterian Church*, 2002 OK CIV APP 112, ¶11, 60 P.3d 506, 508 ("The Supreme Court held [in *Lewis*] that whether there is a dispute or uncertainty regarding the true boundary is not a prerequisite in establishing a boundary by acquiescence.").

¶14 East Landowner also argues that, because Bonnie French built the fence as a cross fence, and not to settle a boundary dispute, the fence could not become a boundary. This proposition fails for several reasons. First, the intention of the parties in establishing the boundary is not the determining factor. *Berry v. Mendenhall,* 1998 OK CIV APP 134, ¶12, 964 P.2d 974, 977 (citations omitted). Second, the record does not conclusively establish for what purpose Bonnie constructed the fence. Finally, even if Bonnie did not intend for the fence to initially serve as

a boundary line, the clear weight of the evidence shows that future landowners recognized and treated the fence as a boundary line. *See Holt v. Hutcheson*, 1958 OK 299, ¶3, 333 P.2d 530, 533 ("The adoption of a division line between the owners of adjoining lands may be implied from their acts and declarations and by acquiescence in respect thereto, and after the recognition of such division line as the true boundary for the statutory period of limitation, the parties and their privies are estopped from asserting that it is not the true line.").

¶15 We disagree with East Landowner's claim that West Landowners failed to prove sufficient use for the statutory period. As noted above, Joe French, Jr. testified that neither he nor his father had ever used the Disputed Property during their periods of ownership and that the fence had served as the historical boundary line for as long as he could remember. West Landowners testified that Jimmy Hughitt used the Disputed Property as early as 1988 and that he showed them the fence as the boundary line. West Landowners testified that they had bailed hay, brush hogged, cleaned, tended to pecan trees and maintained the road on the Disputed Property. East Landowner presented no evidence to rebut West Landowners' evidence of use, nor did he present any evidence showing that his predecessors had used the Disputed Property.

¶16 We also reject East Landowner's claim that West Landowners' use of the Disputed Property was permissive. At trial, West Landowners admitted that Alan Sheets opened a gate to the Disputed Property for them. East Landowner argues this admission proves their use was permissive. This argument, however, is misleading. West Landowners must travel down a road that passes through another tract owned by East Landowner in order to access their property; a gate stands where this road connects to the Disputed Property. The trial court determined that West Landowners have a valid easement along East Landowner's property, and that finding is not challenged on appeal. Whether Alan Sheets opened the gate at the end of the easement does not conclusively determine that West Landowners' use of the Disputed Property was permissive.

¶17 Finally, we address East Landowner's argument that the trial court imposed an improper burden of proof. East Landowner focuses on the court's statement in its August 20, 2014 decision that "The court finds insufficient credible evidence that any owners ever treated the boundary line as ever being any place other than the fence line" and argues that this statement implies the court improperly put the burden of proof on East Landowner. We disagree. The court also noted that it found credible evidence establishing that the fence line had served as the accepted boundary for at least fifty years. Following that finding with a note that the evidence was unrefuted does not prove that the court improperly shifted the burden of proof.

¶18 The clear weight of the evidence shows that the fifteen year statutory period required to establish boundary by acquiescence was met before East Landowner and West Landowners purchased their respective properties. East Landowner was therefore precluded from asserting that the fence was not the true property line. *See Lewis*, 1940 OK 276, ¶9, 103 P.2d at 514; *Holt*, 1958 OK 299, ¶3, 333 P.2d at 533.

¶19 AFFIRMED.

BUETTNER, C.J., and SWINTON, J., concur.

1. Joe Salinas and Pauline Taylor sued Todd Alan Sheets in McCurtain County case no. CV-2010-80, seeking a writ of assistance, a restraining order, temporary and permanent injunctions, and damages stemming from Sheets' alleged blocking of an easement the parties had allegedly agreed to in the past. Sheets sued Salinas and Taylor in McCurtain County case no. CV-2011-24, seeking to quiet title to the property at issue in this case, as well as a restraining order, temporary and permanent injunctions, and damages.

Because the issues in both cases were related, the trial court consolidated the two actions. The court, however, did not choose a surviving case number. Instead, all pleadings and orders going forward included both case styles and case numbers. Appellant Sheets designated items of the record from both proceedings. For simplicity, we refer to Salinas and Taylor as "Salinas, Taylor, or collectively, West Landowners" and to Sheets as "East Landowner."

2. The court reserved any claims related to trespass and damages and ruled that those claims could be pursued, if at all, in a separate proceeding. The court, however, found there was "no just reason for delay," thus certifying the judgment for immediate appeal. *See* 12 O.S. 2011 §994.

3. The court also found that West Landowners had a valid easement across East Landowner's property and enjoined East Landowner from preventing West Landowners' use of the easement. The court denied West Landowners' applications for a protective order. These findings are not challenged on appeal.

4. The parties stipulated that Neill was mentally incompetent due to dementia and unable to testify at the time of trial on July 18, 2014. The court admitted his deposition, taken on April 20, 2012, into evidence in place of his in-court testimony. At trial, West Landowners challenged Neill's competency at time of the deposition.

2018 OK CIV APP 22

BANK OF AMERICA, N.A., Successor by Merger to BA MORTGAGE, LLC, Successor in Interest by Merger of NATIONSBANC MORTGAGE CORPORATION, Successor in Interest by Merger to BOATMAN'S NATIONAL MORTGAGE, INC. f/k/a BANK IV OKLAHOMA, N.A., Plaintiff/Appellant, vs. W. JEFFREY DASOVICH a/k/a WILLIAM

JEREMY DASOVICH and SALLY W. DASOVICH a/k/a SALLY WITNEY DASOVICH, Husband and Wife, Defendants/Appellees, and OCCUPANTS OF THE PREMISES, STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, UNITED STATES OF AMERICA ex rel. INTERNAL REVENUE SERVICE and JEFF BEELER, Defendants.

Case No. 115,574. July 18, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Jon H. Patterson, BRADLEY ARANT BOULT CUMMINGS, LLP, Birmingham, Alabama, for Plaintiff/Appellant

F. Smith Barnes, F. SMITH BARNES, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma and

C. Austin Reams, REAMS LAW, Oklahoma City, Oklahoma, for Defendants/Appellees

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Bank of America, N.A. (BANA) appeals from the district court's dismissal of its action to enforce a federal foreclosure judgment it obtained against W. Jeffrey Dasovich and Sally W. Dasovich. Based on our review of the law and the record presented, we reverse and remand for further proceedings.

BACKGROUND

¶2 In 2007, BANA filed a foreclosure action against the Dasoviches in Oklahoma County District Court. The Dasoviches were served and filed an answer. However, prior to filing their answer, the case was removed, on diversity grounds, to the United States District Court for the Western District of Oklahoma. Thereafter, BANA filed a motion for summary judgment in the federal case, to which the Dasoviches filed an objection and response. In August 2008, the federal court granted BANA's motion as to its right to foreclose, but denied the motion as to the amount of damages. On February 13, 2009, BANA filed another motion for summary judgment as to the amount of damages. The federal court sustained that motion by separate order and on March 19, 2009, the federal court entered its foreclosure judgment awarding judgment to BANA in rem and in personam against the Dasoviches in the amount of $201,597.82 with interest on that amount from November 2006 at the rate of 6.875% per annum, and a reasonable attorney's fee and costs.

¶3 In the foreclosure judgment, the federal court stated:

> [T]his case [is] remanded to the District Court of Oklahoma County, Oklahoma[,] and a Special Execution and Order of Sale issue out of the office of said District Court Clerk, directed to the Sheriff to levy upon, advertise and sell, after due and legal appraisement, the [subject] real estate and premises . . . , subject to unpaid real estate ad valorem taxes and/or special assessments, if any, and pay the proceeds of said sale to the Clerk of the District Court of Oklahoma County, as provided by law, for application as follows: [to payment for the costs of the sale, to BANA for payment of its foreclosure judgment, and to payment of the junior lien holders.]
>
> Said order reserving the right of [BANA] to recall said execution by oral announcement and/or further order of the District Court of Oklahoma County prior to the sale.

The foreclosure judgment stated "[i]ncluded in the remand are all matters pertaining to the enforcement of this judgment, including but not limited to confirmation of the sale."

¶4 On June 23, 2010, the federal court clerk for the western district sent a letter to the Oklahoma County Court Clerk that was filed in the Oklahoma County court case on July 6, 2010. The letter stated that pursuant to the March 2009 foreclosure judgment, "this case was remanded to your court for all matters pertaining to the enforcement of [the foreclosure] judgment, including but not limited to confirmation of the sale." It also stated that "enclosed" was a certified copy of the remand order and a certified copy of the docket sheet in the foreclosure action.

¶5 On July 30, 2010, BANA issued a Special Execution and Order of Sale out of the office of the Oklahoma County Court Clerk and Sheriff's Sale was set for September 16, 2010, but was later recalled. An alias special execution and order of sale was issued in October 2010, and Sheriff's Sale was set for December 2010.

On November 24, 2010, the Dasoviches filed an application for temporary restraining order in which they admitted they were made aware of the foreclosure judgment in mid-August 2010 when they received notice of the Sheriff's Sale. Among other matters, they claimed they had no notice of the filing of the motion for summary judgment in the federal case, had made attempts to get certain financial information from BANA in November 2010 via subpoena duces tecum but had received no documentation from BANA's attorneys, and were "desirous of resolving their continuing dispute with [BANA]."

¶6 On May 25, 2016, the Dasoviches filed a motion to dismiss BANA's action for lack of jurisdiction and failure to properly register the foreclosure judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, 12 O.S. 2011 §§ 719-726. Between November 2010 and May 2016, BANA had issued two other alias special executions and order of sale, the Dasoviches filed three other applications for temporary injunction, the court entered an order sustaining the Dasoviches' fourth application for temporary restraining order, and the court granted BANA's motion to vacate the temporary restraining order and set an evidentiary hearing for March 2016 to determine the amount needed to satisfy the debt obligation, but that hearing was postponed until August 2016.

¶7 The hearing apparently did not occur; however, on August 18, 2016, having previously received the briefs and arguments of the parties, the trial court heard arguments on the Dasoviches' motion to dismiss. On November 2, 2016, the Oklahoma district court entered its order sustaining the Dasoviches' motion finding that the "certified copy" of the foreclosure judgment filed by the federal court clerk did not satisfy the requirements of the UEFJA "of filing an 'authenticated' copy of the judgment. Accordingly, this Court lacks jurisdiction over any further post-judgment execution proceedings in this matter."

¶8 BANA appeals.

STANDARD OF REVIEW

¶9 The trial court dismissed BANA's action because it determined it lacked jurisdiction to proceed in the matter. "The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo." *Dilliner v. Seneca-Cayuga Tribe of Okla.*, 2011 OK 61, ¶ 12, 258 P.3d 516 (citation omitted). Similarly, this Court subjects a trial court's order granting a motion to dismiss to de novo review. *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155. Motions to dismiss are generally disfavored. *Id.*[1]

ANALYSIS

I. Nature of Foreclosure Judgment: Foreign Judgment

¶10 In its statement of the issues to be adjudicated on appeal, BANA asserts, "Whether the docket of the federal action is automatically incorporated into the state court docket is a matter of first impression for the Oklahoma Supreme Court and is likely the determinative issue in this appeal."[2] In its supplemental briefing in opposition to the Dasoviches' motion to dismiss, BANA cites a number of cases from other jurisdictions in which those state appellate courts gave effect upon remand to pleadings and motions filed in federal cases prior to remand. As BANA states, the reason many of these courts do so is because "interests of efficiency and judicial economy favor a policy of giving continued effect to pleadings and motions filed in federal court prior to remand. This rule mirrors the federal post-removal procedure of picking the case up where it left off and avoids the necessity of duplicative filings." *Crumpton v. Perryman*, 956 P.2d 670, 675 (Colo. App. 1998) (citations omitted).

¶11 In all of the cases cited by BANA, however, the cases were remanded because the federal court determined it did not have subject matter jurisdiction, either because it lacked diversity of citizenship or a federal question,[3] or because the federal court exercised its discretion to remand state claims properly removed with the federal jurisdiction claim after the federal claim was resolved.[4] In none of those cases did the federal court render final judgment on the claim and remand for *enforcement* of its judgment in the state court and no pendant state claim remained.[5] BANA has not cited, nor have we found, statutory or decisional authority that gives a federal court the discretion, under the circumstances presented here, to remand a case over which the federal court properly exercised jurisdiction.[6]

¶12 We, therefore, conclude the foreclosure judgment in this case is a foreign judgment that BANA may seek to enforce in Oklahoma.

II. District Court's Jurisdiction

¶13 As BANA concedes, it may seek enforcement of a foreign judgment in Oklahoma courts either through filing a lawsuit to enforce that judgment or through the provisions of the Uniform Enforcement of Foreign Judgments Act, 12 O.S. 2011 §§ 719-726.[7] It asserts it "substantially complied with the spirit of the UEFJA" and, thus, the trial court erred in dismissing the case because the court determined it lacked jurisdiction. BANA claims it substantially complied because the clerk of the court from which the foreclosure judgment was entered filed a certified copy of that judgment along with a certified copy of the docket sheet from the federal action on July 6, 2010.

¶14 The motion and arguments made by the Dasoviches in support of their motion call for dismissal "with prejudice" of BANA's "action" because, they claim, it did not comply with the mandatory requirements of the UEFJA. They argue the foreclosure judgment was not "properly registered" because it was not properly authenticated; it was not separately filed or file-stamped; the court clerk did not file proof of mailing of notice of the filing of the foreign judgment to them; BANA did not file proof of mailing of notice of the filing of the foreign judgment to them; BANA did not make or file an affidavit setting forth the name and last-known post office address of the judgment debtor and of the judgment creditor; and BANA did not pay the required filing fees to register a foreign judgment. The Dasoviches argue the trial court lacked jurisdiction to domesticate the foreclosure judgment because the UEFJA requirements are mandatory.

¶15 While the trial court sustained the Dasoviches' motion, the trial court did not expressly dismiss BANA's claim "with prejudice." The court determined an "authenticated" copy of the foreclosure judgment had not been filed; thus, it lacked jurisdiction "over any further post-judgment execution proceedings in this matter." The trial court did not grant BANA leave to amend or otherwise cure the defective registration as provided in 12 O.S. 2011 § 2012 (G).[8] As explained by this Court in *Pellebon*:

> The [Oklahoma] Supreme Court has interpreted this obligation in § 2012(G) to grant leave to amend "as a mandatory duty placed on trial courts, as long as the defect can be remedied." [*Fanning v. Brown*, 2004 OK 7, ¶ 23, 85 P.3d 841]. The trial court must as a general rule specify the deficiencies as to each claim which subject that claim to dismissal and either state that no amendment of the claim could cure the stated defect(s) or set a reasonable time for Plaintiff to amend in accordance with 12 O.S. 2011 § 2012(G).

2015 OK CIV APP 70, ¶ 16.

¶16 The question presented for our review is whether the trial court correctly determined as a matter of law that the authentication requirement is jurisdictional and whether the defect was curable.

¶17 The Dasoviches argue the defect is jurisdictional and cannot be cured relying on *Vaughan v. Graves,* 2012 OK 113, 291 P.3d 623, in which the Oklahoma Supreme Court stated:

> A court may enforce a foreign judgment as if it had rendered it but only after the statutory registration requirements have been satisfied. This is true whether the attempt at enforcement of the foreign judgment is in the nature of execution or contempt. Until such time, the trial court lacks the authority to act. The fact that this matter was brought pursuant to the [Uniform Fraudulent Transfer Act] does not change the registration requirements. The foreign judgment must be filed in the county of the court from which remedies in the nature of execution will issue before that court can acquire jurisdiction.

Id. ¶ 16. The Dasoviches argue the trial court lacked the power to enforce the foreclosure judgment and BANA cannot "attempt to rescue an unregistered foreign judgment by belated registration," citing *Vaughan*, ¶ 17.

¶18 At issue in *Vaughan* was "the jurisdiction of the trial court to enforce orders in aid of execution of a foreign judgment or judgment collection remedies before a creditor has registered the foreign judgment in the county of the court from which execution issues." *Id.* ¶ 10.[9] In discussing the UEFJA, the Oklahoma Supreme Court explained that pursuant to 12 O.S. 2011 § 721, "the mere act of filing [the foreign judgment], in substance, transfers the properly authenticated foreign judgment into an Oklahoma judgment. The judgment may be enforced against the judgment debtor "in the same manner as any intra-state judgment." *Vaughan*, ¶ 12 (internal quotation marks omitted) (quoting *Producers Grain Corp. v. Carroll,* 1976 OK CIV

APP 3, ¶ 8, 546 P.2d 285). The Supreme Court further explained, however, that 12 O.S. § 706 (A) "applies to all judgments of courts of record of this state, and judgments of courts of the United States . . . which award the payment of money, regardless of whether such judgments also include other orders or relief"; however, § 706(D) "specifically requires that '[e]xecution shall be issued only from the court which granted the judgment being enforced.'" *Vaughan*, ¶ 13. "Thus, while domestication of a foreign judgment may be obtained by its filing in any county, execution of that foreign judgment requires that it be filed in the county of the court that enforces the judgment." *Id.* (footnote omitted).

¶19 In *Vaughan*, while the bankruptcy judgments were domesticated in July 2002 in Oklahoma upon their filing in Payne County, the county in which the debtors owned property, they were not filed in the Oklahoma County case until after the 2007 and 2010 orders in that case. It was in this context the Supreme Court stated, "The belated registration of the foreign judgment in 2011 did not authorize the trial court to retroactively enforce orders which were void for lack of jurisdiction." *Id.* ¶ 17. The Court further stated,

> The 2011 judgment registration did not make the void portions of the prior orders any less so. "A trial court may not take judicial notice of findings of fact and conclusions of law encompassed within a void judgment." New findings of fact and conclusions of law regarding any attempt to enforce the bankruptcy judgments are required.

Id. ¶ 18 (citation omitted).

¶20 The issue presented in *Vaughan* is different from the one presented in the current appeal. Unlike the facts in *Vaughan*, here the foreclosure petition was filed in Oklahoma County against the Dasoviches in April 2007 and they filed an answer in June 2007. The case was then removed to the federal district court and a foreclosure judgment was entered in March 2009 against the Dasoviches and in favor of BANA. The foreclosure judgment also remanded the case to the Oklahoma County District Court for enforcement of its foreclosure judgment. On July 6, 2010, a letter to the Oklahoma County Court Clerk from the Deputy Court Clerk of the United States District Court for the Western District of Oklahoma dated June 23, 2010, was filed in the present case. That letter informed the Oklahoma County Court Clerk that pursuant to the foreclosure judgment the case was remanded to the state court for all matters pertaining to enforcement of the foreclosure judgment and stated "a certified copy of the remand order and a certified copy of the docket sheet" were enclosed. A copy of the foreclosure judgment was attached with an attestation from the Deputy Court Clerk that the judgment was "[a] true copy of the original." Thereafter, BANA repeatedly sought special execution on that judgment, an attempt at execution that the Dasoviches successfully thwarted over more than five years of litigation prior to the filing of their motion to dismiss. Unlike the bank in *Vaughan*, BANA does not seek to enforce any orders of the state district court entered prior to registration of the foreclosure judgment. Further, unlike the bank in *Vaughan*, a copy of the foreclosure judgment was filed in the very Oklahoma County court from which enforcement of that judgment was sought. The jurisdictional infirmity present in *Vaughan* is not present here.

¶21 While we agree that authentication of the foreign judgment pursuant to the UEFJA is a requirement to registering that judgment, we do not agree that lack of authentication is a jurisdictional requirement that cannot be waived by a party. In *Concannon v. Hampton*, 1978 OK 117, 584 P.2d 218, the Oklahoma Supreme Court was presented with an argument similar to the argument raised by the Dasoviches. There, the defendant argued a sister-state judgment was not authenticated as required by § 721 and, therefore, the district court lacked authority – jurisdiction – to enforce it under the UEFJA. *Concannon*, ¶ 3. In addressing the lack of authentication argument, the Supreme Court stated: "Authentication may be defined as the act of giving legal authority to a written instrument or a certified copy thereof, so as to render it legally admissible into evidence. . . . Authentication is evidentiary, not jurisdictional." *Id.* ¶ 7 (footnotes omitted). The Court held the defendant, who did not raise the issue of authentication at trial and who stipulated to the judgment's admissibility, "waived any objections to the lack of authentication[.]" *Id.*[10]

¶22 BANA asserts the Dasoviches waived any objections they might have had to authentication because during over five years of litigation in this action, they never objected to the lack of authentication. Further, we note, the

Dasoviches do not, in fact, claim the foreclosure judgment is not authentic, though they argue they contest the "validity" of the foreclosure judgment, because they "'never received notification of the filing of the Motion for Summary Judgment' that led to the 'Foreclosure Judgment' and . . . they had not been aware that the 'Foreclosure Judgment' had been entered."[11] While the Dasoviches, unlike the defendants in *Concannon*, raised the issue of authentication below, their failure to raise that evidentiary defect for more than five years in the present case and their failure to assert what prejudice they suffered thereby – as opposed to asserting some legal argument they may have about whether the foreclosure judgment is void or otherwise subject to collateral attack – leads us to conclude they waived that evidentiary defect and the trial court has jurisdiction to proceed with this action.

¶23 Consequently, we conclude the trial court erred as a matter of law in dismissing BANA's action.[12]

CONCLUSION

¶24 We conclude the trial court erred in dismissing BANA's action on the federal foreclosure judgment. Accordingly, we reverse and remand the cause for further proceedings.

¶25 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

THORNBRUGH, V.C.J., and WISEMAN, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. The Dashoviches filed two motions on appeal: a motion to dismiss, which was denied by the Oklahoma Supreme Court; and a motion to strike a supplemental brief filed by BANA in the district court that was deferred by the Supreme Court to the decisional stage. We deny the motion to strike because while the authority set forth in the supplemental brief was not identified in BANA's briefs in response to the Dashoviches' motion to dismiss, the issue had been raised in the responsive briefs. Moreover, we do not conclude, as asserted by the Dashoviches, that the trial court did not consider the supplemental brief filed a week prior to the court's order even though it was filed one day late.

2. While we agree with BANA that the Oklahoma Supreme Court has not yet addressed the issue of whether motions and pleadings filed in a federal case upon remand to the state court from which the case originated are automatically incorporated into the state case, another division of this Court has considered what federal filings are part of a state court file on remand. In *Pellebon v. State ex rel. Board of Regents of the University of Oklahoma*, 2015 OK CIV APP 70, 358 P.3d 288, in which after removal the federal court remanded because it determined it lacked subject matter jurisdiction, the appellate court addressed the pleadings in the state case after remand.

> It appears that the parties and the trial court treated Plaintiff's federal "First Amended Complaint" as an "amended petition" although it has never been filed in this case. On remand from federal court after removal, the issue of the viability and effect to be given to pleadings filed in federal court is left to the state courts. 77 C.J.S. Removal of Cases § 180 (2015) ("As a general rule, the state court determines the effect of pleadings filed and proceedings taken in the federal court."); *see also Ayres v. Wiswall,* 112 U.S. 187, 190-91, 5 S. Ct. 90, 92 (1884) ("It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."). Some state courts "have given effect to pleadings filed in federal court prior to a remand to state court." *See Banks v. Allstate Indem. Co.*, 757 N.E.2d 776, 778 (Ohio Ct. App. 2001) (holding "a party need not refile documents in the court of common pleas after a case is remanded from federal court so long as that party makes the trial court aware of the filing's existence and, if challenged, shows proof of service on the other party at the time the document was filed in federal court"); *see also New Hampshire v. Hess Corp.*, 982 A.2d 388, 393-95 (N.H. 2009) (giving effect to the first amended complaint filed in federal court before remand to state court and holding "the trial court did not err when it concluded that the first amended complaint remained viable after remand").

Pellebon, ¶ 17. The *Pellebon* Court, however, was persuaded by the approach taken by a Missouri court that held "it was error to enter a default judgment based on the failure to file a responsive pleading to the federal complaint [that] was not part of the state court file" because the plaintiff failed to comply with Missouri Supreme Court Rule requirements. *Id.* ¶ 18 (citation omitted). The *Pellebon* Court concluded:

> To avoid any confusion or question regarding what federal documents have become incorporated into the state court file, we conclude, as Missouri has, that the better practice is to require Plaintiff to file a list of all documents filed in federal court that are to be made a part of the state court file and to provide a copy of each document to the court for filing in the state court case.

Id. ¶ 19. Thus, assuming the federal district court had discretion to remand enforcement of its judgment to the state court, *Pellebon* is persuasive authority that the filing of the federal court docket in the state case could become part of the state court file at least with respect to pleadings and motions filed in the federal case.

3. *Crumpton*, 956 P.2d at 672 (remand after removal because removal was not permitted pursuant to statute upon which defendants relied for removal); *Teamsters Local 515 v. Roadbuilders, Inc. of Tenn.*, 291 S.E.2d 698, 701 (Ga. 1982), *overruled in part on other grounds, Shields v. Gish,* 629 S.E.2d 244 (Ga. 2006) ("The time has [passed] when technical rules were applied to those who sought *unsuccessfully* to remove cases to the federal courts. We therefore hold that a timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded from district court.") (emphasis added) (citations omitted); *Citizens Nat'l Bank of Grant Cnty. v. First Nat'l Bank in Marion,* 331 N.E.2d 471, 475 (Ind. Ct. App. 1975) (federal court, having assumed jurisdiction upon defendants' petition for removal, remanded the cause to state court without ruling on motions to dismiss); *Laguna Village, Inc. v. Laborers Int'l Union of N. Am.*, 672 P.2d 882, 883 (Cal. 1983) (after removal, federal court remanded to state court because no federal issues were presented); *Grone v. N. Ins. Co. of N.Y.,* 130 A.2d 452, 453 (Pa. 1957) (cause properly removed to federal court on diversity grounds was later remanded to state court upon federal court's determination that diversity was lacking as to several defendants); *Edward Hansen, Inc. v. Kearny Post Office Assocs.,* 399 A.2d 319, 320 (N.J. Super. Ch. Div. 1979) (after removal, federal court remanded to state court because diversity of citizenship was lacking; thus, it lacked jurisdiction); and *Banks v. Allstate Indemn. Co.*, 757 N.E.2d 776, 776 (Ohio Ct. App. 2001) (remanded because federal court lacked diversity jurisdiction).

4. *McKethan v. Wells Fargo Bank, N.A.*, 779 S.E.2d 671, 673 (Ga. Ct. App. 2015) (remand was granted because federal court determined the only issues involved were state issues and no diversity jurisdiction existed); and *Swarey v. Stephenson*, 112 A.3d 534, 540 (Md. Ct. Spec. App. 2015) (case alleging both state claims and RICO claim removed to federal court and subsequently remanded on the state claims after RICO claim dismissed).

5. In one of the cases upon which BANA relies the question presented to the appellate court was whether "orders" of the federal court must be given effect even though the federal court lacked subject matter jurisdiction at the time it rendered that order. *New Hampshire v. Hess Corp.*, 982 A.2d 388 (N.H. 2009). The Hess Court concluded:

> Moreover, even if the court order were material, after a case has been remanded for lack of subject matter jurisdiction, the effect to be given federal court orders is a matter of state policy. While federal court orders made before remand are not binding upon a state court, the state court nonetheless has discretion to give them effect.

Id. at 392 (citations omitted).

6. For a discussion of the limited discretion a federal court has to remand a properly removed case, *see Buchner v. F.D.I.C.*, 981 F.2d 816 (5th Cir. 1993).

7. While BANA had that choice, 12 O.S. 2011 § 725, we note the judgment roll does not reveal that it filed a petition to enforce the foreclosure judgment or otherwise complied with procedural rules for bringing such an action.

8. Section 2012(G) provides, in part, as follows: "On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed."

9. The debtors in *Vaughan* filed for bankruptcy in 1999. In 1995, the debtors became guarantors of a commercial loan from a bank. In 2002 the bankruptcy court denied a discharge of the bank's debt and entered judgment against the debtors in a certain sum and also entered an order for costs and attorney fees against debtors. The bank initiated various collection procedures against the debtors and registered the bankruptcy judgments in Payne County, the county in which the debtors' homestead was located. In 2001, while the bankruptcy stay was in effect, the bank filed a lawsuit in Oklahoma County against debtors' relatives and a family trust pursuant to the Uniform Fraudulent Transfer Act. In September 2007, the Oklahoma County trial court entered an order finding the debtors' income had been fraudulently transferred to a sham corporation to avoid garnishment of that income and ordered the corporation to turn over a percentage to the bank. Debtors, however, were not joined in the UFTA case until November 2007. In 2010, upon the bank's motion for contempt against debtors, the Oklahoma County trial court withdrew its 2007 order, but issued a new order finding one of the debtors in contempt of the 2007 order but giving the debtor an option to avoid imprisonment. In April 2011, the bank sought contempt to enforce the 2010 order. It was not until August 18, 2011, that the bank filed one of the bankruptcy judgments – the one for costs and attorney fees – in the UFTA case. In 2012, the Oklahoma County court entered an order for contempt of the 2010 order noting "open and willful violations" of both the 2007 and 2010 orders.

10. The *Concannon* defendants also argued the plaintiff failed to give the notice required by § 722 because the notice that was provided did not list the plaintiff's address. Although strict compliance with the notice requirement had not occurred, the *Concannon* Court explained, "The purpose of the address requirements is to insure defendant will be informed of the proceeding." *Id.* ¶ 8. The omission of plaintiff's address, in the Court's view, "in no way prejudiced" the defendant. *Id.*

Other courts have also addressed the issue of the effect of a judgment creditor's failure to strictly comply with the notice provisions of their state's version of § 722. For example, in *Miller v. Eloie Farms, Inc.*, 625 P.2d 332 (Ariz. Ct. App. 1980), the Arizona appellate court addressed the issue of whether strict compliance with the notice requirements of the UEFJA "is a condition precedent to enforcement of a validly filed Oklahoma judgment in Arizona." *Id.* at 333. The court held "the failure to follow the statutory notice procedures [was] not fatal to the judgment" because "[t]here [was] abundant evidence that [the defendant's] statutory agent was aware that the Oklahoma judgment had been filed[.]" *Id. See also The Cadle Co., II, Inc. v. Hubbard,* 329 S.W.3d 706, 710 (Mo. Ct. App. 2010) ("When the judgment debtor has actual knowledge of the filing, the failure of the clerk and/or the judgment creditor to follow the notice provisions in the UEFJA is not prejudicial and provides no basis for a trial court to prohibit registration of the foreign judgment.") (citations omitted); *State, Inc. v. Sumpter & Williams*, 553 N.W.2d 719, 723 (Minn. Ct. App. 1996) (citing *Concannon* for the proposition that the purpose of the notice requirement is to assure notice of the judgment to the debtor). In *Sparaco v. Sparaco*, 309 A.D.2d 1029 (N.Y. App. Div. 2003), in which the defendant alleged several procedural deficiencies in his challenge to the entry of a Michigan judgment in New York, the appellate court stated:

> Finally, defendant points out that plaintiff failed to comply with the service requirements of [the UEFJA] pursuant to which plaintiff was obligated to mail notice of filing of the foreign judgment to defendant within 30 days of the filing. Plaintiff apparently served copies of her affidavit and the certification of records on defendant within the allotted time, but did not specifically state in the notice that the judgment had been filed in New York. Nevertheless, the nature and content of the documents sent to defendant and defendant's prompt action thereafter seeking a stay make it clear that he was actually aware that the Michigan judgment had been filed in New York. Where, as here, no prejudice has resulted to defendant from this technical violation of [the UEFJA], [the trial court] did not err in rejecting [the] objection to the service as a defense to enforcement of the Michigan judgment.

309 A.D.2d at 1031 (citations omitted).

We note that in these cases a "technical" error occurred such that the notice attempted was not strictly in compliance with UEFJA notice requirements, while in the current appeal it appears no notice was issued by the clerk or BANA. However, like the judgment debtors in those cases, the Dasoviches had actual notice of the filing of the foreclosure judgment. The record demonstrates the Dasoviches had actual notice of the foreclosure judgment since about two months after the foreclosure judgment was filed in the present case and they have had an opportunity to contest the foreclosure judgment and have done so for more than five years of continuous litigation. The trial court did not identify lack of notice as a reason for its dismissal of BANA's action. We agree with the trial court's implicit finding that whatever defect may have been present as to notice has long since been resolved and the Dasoviches have suffered no prejudice as a result.

11. We note the majority of the Dasoviches' argument about notice concerns their purported lack of notice of the filing of the motion for summary judgment in the federal case. They appear to argue the multiple applications for temporary injunction they filed in the present case concern this alleged deficiency that eventually resulted in the foreclosure judgment. This argument, however, does not support the trial court's dismissal of BANA's action because of needed registration requirements under the UEFJA. They are, instead, an attack on the foreclosure judgment itself. Whether such a collateral attack is permissible concerns facts and legal issues not encompassed within the dismissal order and this appeal.

12. Given our conclusion, we find unpersuasive the Dasoviches' argument that the foreclosure judgment is now dormant because more than five years have lapsed since the judgment was filed in March 2009, citing 12 O.S. 2011 § 735. An execution on a foreclosure judgment is a special execution. *Paschal Inv. Co. v. Atwater,* 1935 OK 869, ¶ 0, 50 P.2d 357 (Syllabus by the Court) ("It has long been [s]ettled in this state that special execution is the proper process for enforcement of decrees of foreclosure of mortgages and other liens.") (citation omitted). The docket sheet amply supports the conclusion that BANA has repeatedly sought to enforce the foreclosure judgment and defeat the Dasoviches' attempts to thwart that enforcement.

2018 OK CIV APP 23

JILLIAN RAMICK and CLAYTON RAMICK, Plaintiffs/Appellees, vs. HOWARD-GM II, INC., d/b/a, SMICKLAS CHEVROLET, and BBVA COMPASS FINANCIAL CORPORATION, Defendants/ Appellants.

Case No. 115,795. November 16, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS AND APPEAL DISMISSED WITHOUT PREJUDICE IN PART

M. Kathi Rawls, Minal Gahlot, RAWLS GAHLOT, PLLC, Moore, Oklahoma, for Plaintiffs/ Appellees

C. Craig Cole, John E. Gatliff II, Kendra N. Avila, C. CRAIG COLE & ASSOCIATES, Oklahoma City, Oklahoma, for Defendants/Appellants

KEITH RAPP, JUDGE:

¶1 The defendants, Howard-GM II, Inc. d/b/a Smicklas Chevrolet (Smicklas) and BBVA Compass Financial Corporation (Com-

pass), appeal an Order denying their motion to compel arbitration in an action filed by Jillian Ramick and Clayton Ramick (collectively, Ramicks). The defendants also appeal an order sustaining in part only their motion to dismiss.

BACKGROUND

¶2 Ramicks purchased a used automobile from Smicklas. The transaction was financed through Compass.

¶3 Ramicks began to have trouble with the vehicle and assert that it had previously been damaged. They claim that Smicklas' sales personnel misrepresented material facts regarding the automobile. Compass refused their demand to rescind the transaction. Ramicks sued and, in their amended petition, alleged claims for fraud, rescission, breach of contract, defamation, violation of the Oklahoma Consumer Protection Act and the Uniform Commercial Code, negligence and intentional infliction of emotional distress.

¶4 Smicklas and Compass moved to compel arbitration based upon an arbitration provision in the Purchase Agreement Contract (Contract).[1] They also sought dismissal for failure to plead definitely allegations of fraud and for failure to state a claim.

¶5 The Contract provides that Ramicks agree to buy and Smicklas agrees to sell a vehicle for a price paid in accord with the Contract. A portion of the Contract is outlined in a box titled in bold print as "Please read carefully! Notice of Arbitration." The text explains the right to exercise arbitration and its consequences. The text further provides:

> The Federal Arbitration Act (9 U.S.C. § 1, et seq.) governs this arbitration agreement and not any state law concerning arbitration, including state law arbitration rules and procedures. This arbitration agreement survives any termination, payoff or transfer of the Contract.

¶6 In addition to the Contract, Ramicks and Smicklas executed a separate Retail Installment Sales Contract (RISC).[2] The RISC is dated the same day as the Contract. Both involve the same automobile purchase transaction. The RISC recites:

> You, the Buyer (and co-Buyer, if any) may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Seller-Creditor (sometimes "we" "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-in-Lending Disclosures below are part of this contract.

¶7 The RISC sets out the credit terms and financing details of interest, consequences of failure to make payments, etc. The closing provisions provide, in part:

> HOW THIS CONTRACT MAY BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding. (Signatures of Ramicks).

¶8 Smicklas assigned the RISC to Compass. The RISC makes no mention of the Contract and it does not contain an arbitration clause.[3] There were several additional documents included in the transaction.[4]

¶9 The trial court denied the motion to compel arbitration.[5] In doing so, the trial court ruled that the RISC expressed all of the contract agreements of the parties and did not contain a merger clause to merge the Contract (and its arbitration provision) into the RISC. The trial court relied on *Walker v. BuildDirect.com Technologies, Inc*., 2015 OK 30, 349 P.3d 549.[6]

¶10 The trial court also denied the motion to dismiss, except as to the fraud claim. The plaintiffs were given an opportunity to amend, but that amendment, if any, is not in the Appellate Record.

¶11 This Court notes that Ramicks' trial court response and their appellate brief argue that the arbitration clause was fraudulently induced and that it is unconscionable. Last, Ramicks argue that Compass is not a party to the arbitration provisions of the original contract and cannot compel arbitration. However, the motion hearing focused upon the holding of Walker and did not address these additional points. Moreover, the trial court's decision did not rule on these points. The development of applicable facts and legal analysis are first accomplished in the trial court. *Bivins v. State ex rel. Oklahoma Mem'l Hosp.*, 1996 OK 5, ¶ 19, 917 P.2d 456, 464. Therefore, these issues are not addressed in this Opinion.

¶12 Smicklas and Compass have appealed. Their appeal includes the ruling denying the motion, in part, based on a failure to state a claim. Ramicks challenge this part of the appeal on the ground that it is not an appeal of a final order. Smicklas and Compass essentially concede that point by asking this Court to deem the appeal as an application to assume original jurisdiction.

¶13 This Court will consider only the appeal of the denial of the request to compel arbitration. The remainder of the appeal does not involve an appeal of a final order and that part of the appeal is dismissed without prejudice. This Court declines to deem the appeal as an application to assume original jurisdiction.

STANDARD OF REVIEW

¶14 The sole appellate issue is whether the parties have a contract calling for arbitration. Generally state law principles apply to determine the existence of such a contract. *Walker v. BuildDirect.com Technologies, Inc.*, 733 F.3d 1001, 1004 (10th Cir. 2013); *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 14, 138 P.3d 826, 830. Clearly, the initial Contract with Smicklas does have an arbitration provision and the RISC does not have an arbitration provision. Equally apparent is that both documents, on their face, are contracts and neither incorporates the other.

¶15 The trial court's decision is based upon an interpretation of the RISC. The interpretation of a contract is a matter of law. *Corbett v. Combined Commc'ns Corp. of Oklahoma, Inc.*, 1982 OK 135, ¶ 5, 654 P.2d 616, 617. A trial court's legal decision is reviewed *de novo*. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, 932 P.2d 1100 n.1.

ANALYSIS AND REVIEW

¶16 The resolution of this appeal depends upon whether the RISC is the entire agreement of the parties or whether there are multiple contracts. There is no question that multiple documents were executed as a part of this transaction and that one of them, the Contract, provides for arbitration.

¶17 Thus, Ramicks must have the Contract "go away." They reach this result by arguing that the RISC is the entire agreement and the Contract is merged without including an agreement for arbitration either specifically, or by incorporation of the Contract's arbitration clause. The Ramicks' conclusion must be in accord with *Walker,* where the Oklahoma Supreme Court instructs that before the Contract, or at least its arbitration clause, may be considered as merged into the RISC, the RISC must meet the following criteria:

> Under the Oklahoma law of contracts parties may incorporate by reference separate writings . . . where (1) the underlying contract [here the RISC] makes clear reference to the extrinsic document [here the Contract], (2) the identity and location of the extrinsic document may be ascertained beyond doubt, and (3) the parties to the agreement had knowledge of and assented to its incorporation.

Walker, 2015 OK 30 ¶ 16, 349 P.3d at 554.

¶18 The RISC does not incorporate the Contract in accord with *Walker.*

¶19 Therefore, in order for Smicklas and Compass to prevail there must be several contracts as a part of the transaction which must be construed together. In this case, the Oklahoma statutes instruct that:

> Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.

15 O.S.2011, § 158.

¶20 Here, the facts clearly satisfy the statutory criteria of (1) "relating to the same matters"; (2) "between the same parties"; and. (3) "made as parts of substantially one transaction." In *Pauly v. Pauly*, the Oklahoma Supreme Court construed together a deed to real estate and an agreement regarding the reservation of oil and gas rights. There, the Court held:

> Where several instruments are made a part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, *although the instruments do not in terms refer to each other.* So if two or more agreements are *executed at different times* as parts of the same transaction they will be taken and construed together.

Pauly v. Pauly, 1946 OK 336, ¶ 16, 176 P.2d 491, 495 (quoting 17 C.J.S. *Contracts*, § 298) (emphasis added).[7]

¶21 Thus, the question in this case under review is whether there is one contract (the RISC as the surviving contract after merger) or

two contracts (RISC and Contract) jointly interpreted under Section 158.

¶22 All of the documents used in this transaction are on forms required and approved by the Oklahoma Used Motor Vehicle and Parts Commission (Commission).[8] 47 O.S. Supp. 2016, § 582(E)(1)(a).[9]

¶23 It is reasonable to infer that the content of the contract forms used in this transaction have been approved inasmuch as they are contained in the list of required forms required by the Commission. The Commission regulations list the required forms for a used automobile retail sale.[10]

¶24 Therefore, by virtue of controlling regulations, the transaction between Ramicks and Smicklas involved the Contract and the RISC as two separate contracts. Thus, the "several contracts' component of Section 158 is present along with the remaining components as stated above. The transaction documents are then to be construed together as required by Section 158. This results in a provision for arbitration as specified in the Contract.

¶25 It is noted that the "entire agreement" provision in the RISC states that it is the entire agreement "relating to this contract" and, in context, related to the RISC. This would mean that the RISC is the "entire agreement" only insofar as financing is part of the transaction. The Court in *HHH Motors, LLP v. Holt*, 152 So.3d 745 (Fla. Dist. Ct. App. 2014)[11] concluded that this language constituted a merger and absent inclusion of arbitration in the new agreement, there was no arbitration agreement. However, there the Court made no mention of whether a Florida regulatory agency specified the documents for a used vehicle sale.

¶26 In *Knight v. Springfield Hyundai*, 81 A.3d 940, 948 (Pa. Super. Ct. 2013), the Court ruled that the Retail Installment Sale Contract "subsumes all other agreements relating to the sale." The Court referenced a statute (subsequently repealed) requiring a written contract which "shall contain all of the agreements between the Buyer and the Seller relating to the installment sale of the motor vehicle." The Court interpreted the statute as requiring one document that covers all of the contracting parties' agreements. By regulation, such is not the case in Oklahoma and this Court has not been provided an Oklahoma statute similar to the statute cited in *Knight*.

¶27 Ramicks also cite *Gonzalez v. Consumer Portfolio Services, Inc*., 2004 WL 2334765 (Va. Cir. Ct. 2004). There the statute required a "buyer's Order" "during the negotiating phase of a sale and prior to any sales agreement." The parties then entered a retail installment sales contract with "entire agreement" language as here. The Court ruled that the retail installment sale contract was the controlling agreement. There is no clear decision that the Buyer's Order was itself a contract. However, the Oklahoma regulatory scheme calls for a sale contract as well as a retail installment sale contract in a sale-on-credit transaction.

¶28 This Court finds that the cases from other jurisdictions are not persuasive and may be distinguished because of the Oklahoma regulatory scheme.

CONCLUSION

¶29 The trial court erred in finding merger of agreements without arbitration in the surviving agreement. Here, this transaction necessarily involved two separate contracts because of controlling regulations promulgated by the Oklahoma Used Motor Vehicle and Parts Commission. 15 O.S.2011, § 158, requires that these two contracts be construed together to determine the parties contractual intent.[12] It is undisputed that the Purchase Agreement calls for arbitration. Therefore, the trial court erred regarding this lone issue and the cause is reversed.

¶30 The trial court begins by finding whether the parties have an agreement to arbitrate. *Rogers v. Dell Computer Corp*., 2005 OK 51, 135 P.3d 826. Here, based upon a single issue, the trial court incorrectly ruled that the parties did not have an agreement to arbitrate. However, Ramicks' contentions of fraudulent inducement and unconscionability pertain to the existence of an agreement to arbitrate. Because these issues were not decided by the trial court, the Record is insufficient for an appellate court's determination of whether the parties have an agreement to arbitrate. *Id*. In light of those undecided issues, this cause is remanded for further proceedings to address those issues.

¶31 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS, AND APPEAL DISMISSED WITHOUT PREJUDICE IN PART.**

FISCHER, P.J., concurs, and GOODMAN, J., concurs in result.

KEITH RAPP, JUDGE:

1. Contract, Ex. 1 to Motion to Dismiss, Record, at 39.

2. Contract, Ex. 2, Record, p. 40; Response to Motion to Dismiss, Ex. 1, Record, p. 65.

3. The Appellate Record does not affirmatively show which of the two documents was signed first.

4. Exs. 3-6 to Motion to Dismiss, Record, p. 16.

5. Journal Entry. Record, p. 226.

6. The Journal Entry shows a cite for *Walker* also as 733 F.3d 1001. This is the case where the Tenth Circuit Court of Appeals certified the question addressed in the Oklahoma case. *Walker v. BuildDirect.com Technologies, Inc.*, 733 F.3d 1001 (10th Cir. 2013) (Federal District trial court subsequently affirmed in unpublished Opinion in *Walker v. BuildDirect.com Technologies, Inc.*, 604 F. App'x 792 (10th Cir. 2015)).

7. *Compare, High Sierra Energy, L.P. v. Hull*, 2010 OK CIV APP 96, 241 P.3d 1139. The parties executed a purchase-sale agreement containing an arbitration clause. They also executed an employment agreement, but it did not contain an arbitration provision. The *Hull* Court found that the two agreements referenced and incorporated each other and would, therefore, be constructed together in accord with Section 158.

8. Okla.Admin. Code § 765:1-1-2 (2005), provides, in part:

(a) Creation. The Used Motor Vehicle and Parts Commission (hereinafter "Commission") is created by 47 O.S. Section 581 et seq. Applicable definitions and the powers and the duties of the Commission are set forth in 47 O.S. Section 581 et seq. and 47 O.S. Section 591.1 et seq.

9. Section 582 creates the Commission and provides, in part:

E. 1. a. The Commission is hereby vested with the powers and duties necessary and proper to enable it to fully and effectively carry out the provisions and objectives of Section 581 et seq. of this title, and is hereby authorized and empowered, pursuant to the Administrative Procedures Act, to make and enforce all reasonable rules and to adopt and prescribe all forms necessary to accomplish said purpose.

10. Okla. Admin. Code, § 765:10-3-1(2015) provides:

(a) Retail Sales Forms. The following forms shall be required in the sale of a used motor vehicle by a used motor vehicle dealer to anyone other than a licensed dealer:
(1) Sales contract or bill of sale,
(2) Odometer statement,
(3) Federal Trade Commission Buyer's Guide conforming to FTC and state standards,
(4) Written notice of thirty (30) day title-transfer requirement and receipt for delivery of certificate of title to buyer,
(5) Used motor vehicle dealer's temporary tag,
(6) Condition of sale:
(A) warranty, or
(B) vehicle service contract, or
(C) warranty disclaimer,
(7) Finance or security agreement, if applicable, and
(8) Consignment agreement, if applicable,
(9) Spot delivery form, if applicable,
(10) 'We Owe' form, if applicable,
(11) Any other form which affects the rights of either party.
(b) Dealer to dealer forms. The following forms shall be required in dealer to dealer transactions:
(1) Bill of sale, and
(2) Odometer statement, if required.
(c) Approval. All forms must be approved by the Commission. The content and forms to be used shall be filed thirty (30) days prior to use, and if not rejected in thirty (30) days from the filing date, the forms will be conditionally approved.
(d) Standards. The forms required shall contain substantially the following information:
(1) Sales contract or bill of sale.
(A) The sales contract or bill of sale shall state the names of the parties, the make, model, tag number and vehicle identification number (VIN) of the vehicle subject to the transaction, a statement of the selling amount, a description of the vehicle traded in, if any, and the consideration given therefore, and the statement referring to the FTC Buyer's Guide as required by federal law or rule, and proper signatures of the parties.
(B) Said form shall also contain or have attached a statement of any terms that create any contingencies in the completion of the contract, including contingencies relating to financing, whether by the dealer or a third party, and any limitations to which the contingencies may be subject.
(C) Said form shall also state, in clearly understandable terms, the type of title the purchaser shall receive, whether it be an "original" green title; an insurance loss dated title; a title with a theft or flood damage notation; or a rebuilt, salvage or junk title, or any other disclosures or discrepancies noted on the face of the title, including special notations regarding mileage or odometer readings, but shall not include a "repossessed" or "repo" title, together with some form of written acknowledgment by the purchaser that the purchaser is aware of the type of title to be received. Failure to make said disclosure shall create a presumption that the type of title to be received shall be an "original" green title without discrepancies of any sort.
(D) Said form shall not contain statements such as "trade in value does not reflect actual cash value of trade in" or any language that suggests the amounts stated are not the true value agreed upon by the parties.
(2) Odometer statement. The odometer statement must conform to the requirements of federal and state law.
(3) Federal Trade Commission Buyer's Guide.
(A) From and after May 9, 1985, in all sales to consumers, as defined in Title 16 Code of Federal Regulations Section 455.1(4), it shall be required that dealers display and complete the "Buyer's Guide" form required by the Federal Trade Commission. Display and completion of the "Buyer's Guide" as required by Federal Trade Commission Used Motor Vehicle Trade Regulation Rule shall be deemed compliance with this rule.
(B) The "Buyer's Guide" required herein shall not be used in lieu of warranty disclaimer forms to disclaim warranties, actual or implied. In order to disclaim any warranties, a separate warranty disclaimer form must be used.
(C) From and after May 9, 1985, conditions of sale forms must include the following language, conspicuously written on that form: "The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale." Condition of sale contracts which do not contain this language shall not be approved by this Commission. Nothing in this rule shall be construed to make any additional informational or substantive requirements as to warranties, implied warranties or service contracts beyond that presently required by the Used Motor Vehicle Trade Regulation Rules or state law.
(4) Title, tax stamp and tax transfer notice requirement. It shall be the duty of every person licensed to sell new or used motor vehicles to advise each purchaser in writing about his title requirements and payment of any taxes due. It shall be the duty of the selling dealer to affix the applicable used motor vehicle dealer's tax stamp in the appropriate place on the assignment or re-assignment area of the certificate of title. Dealers failing to comply with provisions of this section shall be responsible for all taxes due on such sales or on such vehicles.
(5) If a prospective purchaser makes a deposit of anything of value to obtain the option to complete a purchase (of a used motor vehicle) in the future, the dealer shall acknowledge the deposit in writing, the time period for which the option to purchase is valid, whether the deposit is refundable in whole or in part, and the conditions, if any under which the deposit may be refunded. The deposit shall be deemed refundable unless it is clearly stated in writing that the deposit or a portion thereof is non-refundable.
(e) Used motor vehicle dealer's temporary tags. Misuse of the used motor vehicle dealer's temporary tag may be grounds for the assessment of a fine or, suspension or revocation of the used motor vehicle dealer's license.

11. HHH Motors, LLP sought review in the Florida Supreme Court, but voluntarily dismissed so no further review occurred. *HHH Motors, LLP v. Holt*, 173 So.3d 962 (Table) (Fla. 2015). Thus, the value of the decision as persuasive authority is questionable.

12. It is noted that the "entire agreement" provision in the RISC is limited to the RISC and is not a provision covering the Contract agreements. The specific language of the RISC states that it is the entire agreement "relating to this contract" and in context related to the RISC. This means that the RISC is the "entire agreement" only insofar as financing is part of the transaction.

2018 OK CIV APP 24

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK OF MINNESOTA, NATIONAL ASSOCIATION AS TRUSTEE, F/K/A NORTHWEST BANK MINNESOTA, N.A., AS TRUSTEE FOR THE

REGISTERED HOLDERS OF STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2003-BC4, Plaintiff/Appellee, vs. CHARLES W. TAYLOR and KATHERINE L. TAYLOR, Defendants/Appellants, and Mortgage Electronic Registration Systems, Inc.; Centurion Capital Corp., LLC DBA Centurion Capital Corp.; Allied Equity Corp.; Wells Fargo Bank, N.A.; Midland Funding, LLC; John Doe; and Jane Doe, Additional Parties.

Case No. 115,330. March 9, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE JEFFERSON D. SELLERS, JUDGE

AFFIRMED

Brian J. Rayment, KIVELL, RAYMENT, and FRANCIS, P.C., Tulsa, Oklahoma, for Plaintiff/Appellee,

Michael W. McCoy, McCOY LAW OFFICE, Broken Arrow, Oklahoma, for Defendants/Appellants.

ROBERT D. BELL, PRESIDING JUDGE:

¶1 Defendants/Appellants, Charles W. Taylor and Katherine L. Taylor, appeal from the trial court's order denying their motion to vacate a mortgage foreclosure judgment in favor of Plaintiff/Appellee, Wells Fargo Bank, N.A., as trustee for an asset investment trust. For the reasons set forth below, we affirm.

¶2 In March 2003, Charles Taylor borrowed $369,000.00 from Finance America, LLC, to finance the purchase of a home. He signed a promissory note (Note) promising to repay the loan. Charles and his wife, Katherine, also granted a mortgage (Mortgage) against the real property located at 6634 E. 112th Place South in Bixby, Oklahoma (Subject Property). The mortgage instrument stated that Mortgage Electronic Registration Systems, Inc. (MERS), was mortgagee "solely as a nominee for Lender and Lender's successors and assigns." In 2010, MERS, as nominee, assigned the Mortgage to Plaintiff.

¶3 Charles defaulted on the Note in September 2009. In April 2012, Plaintiff filed a Petition to foreclose the Mortgage. Attached to Plaintiff's Petition were copies of the Note endorsed in blank and the Mortgage. Both documents recited the street address of the Subject Property. However, the page containing the legal description of the Subject Property was inadvertently omitted from the Mortgage. The district court granted summary judgment to Plaintiff in October 2013, but vacated the judgment in March 2014 because of the missing legal description in the Mortgage. The court's docket entry from March 4, 2014, states in relevant part:

> Court vacates summary judgment and grants partial summary judgment as to all issues except description of property. Standing issues granted in favor of Wells Fargo. Plaintiff[] granted leave to amend petition. (all capital letters in original converted to lower case as warranted).

¶4 Plaintiff filed its First Amended Petition on March 11, 2014, with the attached Mortgage containing the Subject Property legal description. The Petition stated *inter alia*:

> [T]he legal description attached to the Mortgage Document was inadvertently left off the original petition when filed. That the legal description has always been a part of the Mortgage Document and was filed in the Tulsa County Land Records with the Mortgage Document. That this Amended Petition is filed simply to correct the Court's record as to the complete Mortgage Document as found in the Tulsa County Land Records. Judgment having previously been awarded as to all other issues but as to the subject property.

Defendants answered with a general denial of the allegations.

¶5 Plaintiff thereafter moved for summary judgment. In addition to the Note, Mortgage and other documents, Plaintiff attached to the motion an affidavit from an employee of the loan servicing company who was authorized to sign on behalf of Plaintiff. The affidavit recited that Plaintiff is entitled to enforce the Note and Mortgage, and that the loan has "been in constant default since September 1, 2009." The trial court granted summary judgment to Plaintiff by order dated February 9, 2016. The Defendants' motion to vacate or reconsider the judgment was denied by the trial court on May 10, 2016. The court thereafter filed a Corrected Order Denying Motion to

Vacate (which amended only the style) that is the subject of this appeal.

¶6 This Court's standard of review in this appeal is as follows:

> The standard of review of a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion. *Ferguson Enters. Inc. v. H. Webb Enters. Inc*., 2000 OK 78, ¶ 5, 13 P.3d 480, 482. In reviewing an order which refuses to vacate a final judgment, "the appellate court's inquiry does not focus on the underlying judgment, but rather on the correctness of the trial court's response to the motion to vacate." *Central Plastics Co. v. Barton Indus. Inc.*, 1991 OK 103, ¶ 2, 818 P.2d 900, 900. An abuse of discretion has occurred when, among other things, the decision "represents an unreasonable judgment in weighing relevant factors." *Oklahoma City Zoological Trust v. State ex rel. Pub. Employees Relations Bd.*, 2007 OK 21, ¶5, 158 P.3d 461, 464.

Erbar v. Rare Hospitality Int'l, Inc., 2013 OK CIV APP 109, ¶11, 316 P.3d 937.

¶7 Defendants advance a litany of arguments on appeal. The first group of propositions concern Plaintiff's standing to bring this action when it filed suit. "To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing." *Deutsche Bank Nat'l Trust Co. v. Matthews*, 2012 OK 14, ¶5, 273 P.3d 43. "[A] foreclosing entity has the burden of proving it is a "person entitled to enforce an instrument" by showing" *inter alia* it was "the holder of the instrument." *Id.* "To show you are the 'holder' of the note you must prove you are in possession of the note and the note is either 'payable to bearer' (blank indorsement) or to an identified person that is the person in possession (special indorsement)." *Id.* "Therefore, both possession of the note and an indorsement on the note or attached allonge are required in order for one to be a 'holder' of the note." *Id.* In the present case, Plaintiff attached to its Petition a copy of the endorsed Note. Thus, Plaintiff satisfied its burden of establishing standing when it filed its foreclosure petition. *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶8, 890 P.2d 906 (party invoking court's jurisdiction has burden to establish standing).

¶8 Defendants' second proposition attacks the sufficiency of the evidence to support foreclosure. In addition to the Note, Plaintiff's summary judgment motion attached an affidavit from its servicer attesting that Plaintiff was in possession of the Note when the foreclosure action was filed, Plaintiff was entitled to enforce the Note, and the borrower was in default. The affidavit also set forth the amount due. Defendants presented no evidentiary material to dispute these facts.

> Summary judgment should be granted where facts set forth in detail in affidavits, depositions, admissions on file, and other competent extraneous materials show there is no substantial controversy as to any material fact. The mere denial in a pleading . . . unsupported by any proof is not sufficient to require the credibility of the opposing party to be determined on trial.

Weeks v. Wedgewood Village, Inc., 1976 OK 72, ¶12, 554 P.2d 780 (footnote omitted).

¶9 We specifically reject Defendants' eleventh proposition that Plaintiff failed to controvert a Securitization Audit that concluded the Note was not placed in the Trust. As Plaintiff correctly asserts, the audit was unsigned and prepared by an unknown and unnamed individual. Such inadmissible and unproved evidence was incapable of controverting Plaintiff's possession of the Note, Plaintiff's business records and the servicer's affidavit. We also reject Defendant's contention that the trial court erred in allowing Plaintiff to file an amended petition for the sole purpose of attaching a complete copy of the Mortgage. Title 12 O.S. 2011 §2015(A) states that leave to file an amended pleading "shall be freely given when justice so requires." Defendants have not shown the trial court abused its discretion by permitting Plaintiff to file the First Amended Petition.

¶10 In their fifth and sixth propositions of error, Defendants urge Plaintiff was required to follow 24 C.F.R. §203.604 prior to filing its foreclosure petition. However, the Mortgage at issue is not a federally insured mortgage and thus not subject to federal regulations governing the foreclosure of HUD loans. Moreover, Defendants presented no evidence the Mortgage was subject to such federal regulations. A party opposing a summary judgment motion that is adequately supported "must respond with some evidentiary material that would demonstrate a need for a trial on the issue."

Lowery v. Echostar Satellite Corp., 2007 OK 38, ¶16, 160 P.3d 959.

¶11 Defendants' remaining propositions of error assert the Mortgage is invalid for a variety of reasons. The bulk of Defendants' arguments in this respect focus on the fact the Mortgage at issue is a MERS mortgage, which Defendants assert are invalid under Oklahoma law. Specifically, Defendants insist that pursuant to the plain language of the Mortgage, MERS – not Finance America, LLC – must be considered the mortgagee. Because Finance America was never given a mortgage, Defendants contend, it could not transfer any mortgage to Plaintiff. Defendants also advance that MERS cannot legally be deemed a mortgagee under Oklahoma law because it provided no financing and was paid no consideration. Finally, Defendants aver the term "nominee" is alien to Oklahoma law related to mortgages.[1]

¶12 Title 46 O.S. 2011 §19 defines "mortgagee" as the "person who provides financing, in whole or in part, to a buyer for the purchaser of property and the financing is secured by the property." Here, the Note was taken by Finance America, not MERS. Thus, Defendants argue, MERS cannot be a "mortgagee" as a matter of law. They further argue any mortgage contract with MERS fails for lack of consideration.

¶13 The Mortgage at issue states in relevant part:

> This Security Agreement secures to Lender: (i) the repayment of the Loan, . . . For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) . . . , with power of sale, the following described property . . . ."

The severability provision of the Mortgage states in relevant part:

> In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

¶14 The "Definitions" section of the Mortgage contains the phrase "MERS is the mortgagee under this Security Instrument." Defendants rely on this provision in arguing there is no mortgage. Defendants' argument lacks merit. Assuming for purposes of our analysis that MERS cannot be a mortgagee pursuant to Oklahoma law, we find the security agreement is defective or ambiguous in only one respect: A party that cannot legally be a mortgagee was named a mortgagee. We are left with a security agreement, styled as a mortgage, which has all the required elements of a mortgage, with the exception of the party named as mortgagee.

¶15 A mortgage is a contract. We find that, in this case, the contract is ambiguous if the named mortgagee does not qualify as a mortgagee pursuant to Oklahoma law. Pursuant to that law, the primary consideration in interpreting a contract is to determine the parties' intent. 15 O.S. 2011 §152 ("A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful").

¶16 The intent of the parties in this case was clearly and indisputably to mortgage the Subject Property as security for a loan. Both parties understood they were creating a mortgage and intended to do so. In Oklahoma, it is a "well settled principle that the applicable law is a part of every contract." *Buckles v. Wil-Mc Oil Corp.*, 1978 OK 137, ¶10, 585 P.2d 1360. The "applicable law" on which Defendants rely is the "definitions" section of 46 O.S. 2011 §19. The definition of a mortgagee is the "person who provides financing, in whole or in part, to a buyer for the purchase of property and the financing is secured by the property." This would be Finance America, LLC, the party that provided the financing and requested a mortgage in return.

¶17 Accepting, for the purpose of this analysis, Defendants' argument that 46 O.S. 2011 §19 requires the party providing financing to be the mortgagee, Finance America, LLC, was the mortgagee by statute. This decision conforms to the fundamental law that it is not possible to bifurcate a note and mortgage in Oklahoma. *Deutsche Bank Nat'l Trust Co. v. Byrams*, 2012 OK 4, ¶5, 275 P.3d 129. We therefore interpret the Mortgage to reflect the applicable law contained therein and the undisputed intent of the parties. Even though the Mortgage identifies MERS one time as the mortgagee, we conclude Finance America, LLC, was the mortgagee and the Mortgage does not fail.

¶18 We turn next to Defendants' contention that the term "nominee" is alien to the mort-

gage laws of Oklahoma. The status of MERS as a nominee is of little importance, given that MERS is not a party and is not attempting to exercise any power or right based on its status as nominee. In any event, we note the Oklahoma Supreme Court and Oklahoma Legislature do recognize the term "nominee." "By definition a 'nominee' is substantially the same as the definition of an 'agent.' The legal status of a nominee/agent, then, depends on the context of the relationship of the nominee/agent to its principal." *U.S. Bank, N.A. v. Alexander*, 2012 OK 43, ¶23, 280 P.3d 936 (footnote omitted). Oklahoma's Title Examination Standard 24.12, 16 O.S. 2011 Ch.1, App., also recognizes the status of "nominee" regarding a mortgage lien.

¶19 To the extent Defendants challenge MERS' standing to transfer the Mortgage, we reiterate Oklahoma jurisprudence is clear that the right to enforce the note is fundamental in foreclosure cases. "An assignment of the mortgage, however, is of no consequence because under Oklahoma law 'proof of ownership of the note carried with it ownership of the mortgage security.'" *Deutsche Bank*, 2012 OK 4 at ¶5, quoting *Engle v. Federal Nat'l Mortg. Ass'n*, 1956 OK 176, ¶7, 300 P.2d 997. "Therefore, in Oklahoma it is not possible to bifurcate the security interest from the note." Deutsche Bank at ¶5. Consequently, Defendants cannot challenge the standing of MERS to transfer the Mortgage because it is transferred as a matter of law by transfer of the Note. Nor is there any other standing question regarding MERS, as it is not the foreclosing party, nor is it claiming any interest in the property.

¶20 Finally, to the extent Defendants assert the Mortgage is invalid under any other theory not previously discussed, 16 O.S. 2011 §11 states in relevant part:

> Any person or corporation, having knowingly received and accepted the benefits or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; . . .

Accord Kaylor v. Kaylor, 1935 OK 530, ¶14, 45 P.2d 743. In the present case, Defendants knowingly accepted the benefits of the Mortgage when they accepted the loan to finance their house. They make no allegation of fraud. Thus, Defendants are estopped from denying the validity of the Mortgage in this proceeding.

¶21 On the basis of the foregoing, we cannot say the trial court abused its discretion by denying Defendants' motion to vacate the judgment. Accordingly, the judgment of the trial court is affirmed.

¶22 AFFIRMED.

JOPLIN, J.; and BUETTNER, J., concur.

ROBERT D. BELL, PRESIDING JUDGE:

1. It is interesting to note that "[o]ver half of the nation's mortgage loans are now recorded under MERS name." *CPT Asset Backed Certificates, Series 2004-EC1 v. Cin Kham*, 2012 OK 22, ¶4, 278 P.3d 586 (citing a 2010 survey).

2018 OK CIV APP 25

CONN APPLIANCES, INC., d/b/a CONN'S, Plaintiff/Appellant, vs. TERESA E. POWERS, Defendant.

Case No. 115,878. March 9, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JAMES B. CROY, JUDGE

REVERSED AND REMANDED

Clyde A. Muchmore, Melanie W. Rughani, Lysbeth L. George, CROWE & DUNLEVY, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant.

Kenneth L. Buettner, Judge:

¶1 Plaintiff/Appellant Conn Appliances, Inc., d/b/a Conn's (Conn) appeals from the trial court's order denying Conn's motion for default judgment against Defendant Teresa E. Powers and ordering Conn to submit its claim to binding arbitration.[1] Powers has not filed an appellate brief and this case proceeds on Conn's brief only. The trial court erred in refusing to grant default judgment and in ordering arbitration in the absence of a motion to compel arbitration. We reverse and remand.

¶2 Conn filed its Petition July 9, 2015, in which it alleged that in order to purchase goods or services from Conn, Powers had entered a retail installment agreement March 4, 2014, in which she agreed to make monthly payments with interest until the total due was paid in full. Conn alleged Powers had defaulted on the account and had last made a payment August 29, 2014. Conn averred it had given Powers notice of its intent to accelerate

the balance and that Powers then owed Conn $2,074.35 and had failed to pay in response to Conn's written demand. Conn sought judgment for breach of Powers's agreement to pay.

¶3 Conn filed proof July 21, 2015 that Powers was personally served summons July 15, 2015. The docket sheet shows Powers failed to answer or otherwise appear.

¶4 The next activity in the docket is the trial court's Order for Binding Arbitration, filed February 16, 2017, in which the trial court ruled on Conn's request for default judgment. In that order, the trial court noted that the parties' agreement contained an arbitration clause which provided, in pertinent part:

> ARBITRATION: You agree that any claim, dispute or controversy arising from or relating to this Agreement, including, but not limited to, disputes relating to any documentation governing your obligations under this Agreement, any claim, dispute, or controversy alleging fraud, misrepresentation, or other claim, whether under common law, equity, or pursuant to federal, state or local statute or regulation, any dispute relating to collection activities taken by Conn's, our affiliates, subsidiaries, agents, officers, employees, servicers, directors, or assigns regarding monies owed under this Agreement, or the scope or validity of this arbitration clause including disputes as to the matters subject to arbitration, or the enforcement or interpretation of any other provision of this agreement, shall be resolved by binding individual (and not class) arbitration . . . You and we are waiving the right or opportunity to litigate disputes in a court of law ….
>
> * * *
>
> This arbitration clause does not apply to any legal remedies that may be pursued to collect monies owed under this agreement. This arbitration clause is an independent agreement and shall survive the termination, payoff or transfer of this agreement. If any part of this arbitration clause is found by a court to be unenforceable for any reason, the remainder of this clause shall remain enforceable.[2]

The trial court found that a binding arbitration agreement existed and that the paragraphs quoted above were in conflict. Specifically, the trial court found that the first paragraph provided that "any and all disputes" were subject to arbitration while the third paragraph carved out a particular legal remedy for Conn. The court noted its statutory duty to interpret the agreement against Conn, citing 15 O.S.2011 § 170. The court concluded that the intent of the agreement was to submit all disputes, including collection claims, to arbitration. The court further found that the third paragraph's exception for collection claims was repugnant to the arbitration agreement; the court therefore concluded it could not be enforced. The trial court found that the arbitration agreement, subject to the court's modification, was binding. The court directed that Conn's claim in this case must be resolved by binding arbitration.

¶5 Conn appeals. An order compelling arbitration is an appealable interlocutory order. *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc*., 2007 OK 12, ¶17, 160 P.3d 936. We review an order responding to a motion to compel arbitration *de novo. Thompson v. Bar-S Foods Co*., 2007 OK 75, ¶9, 174 P.3d 567. However, Powers has failed to file a response or brief. In a case proceeding on an appellant's brief only, "this Court is under no duty to search the record for some theory to sustain the trial court judgment; and where the brief in chief is reasonably supportive of the allegations of error, this Court will ordinarily reverse the appealed judgment with appropriate directions." *Cooper v. Cooper*, 1980 OK 128, ¶6, 616 P.2d 1154. Conversely, reversal is never automatic for failure to file an answer brief. *Hamid v. Sew Original*, 1982 OK 46, ¶7, 645 P.2d 496.

¶6 Conn argues the trial court erred in ordering the parties to arbitration rather than entering default judgment against Powers. We have found no Oklahoma case considering whether a trial court may *sua sponte* enforce an arbitration agreement. The Uniform Arbitration Act directs that a court may order arbitration "*on application and motion of a person* showing an agreement to arbitrate and alleging another person's refusal to arbitrate . . . ." 12 O.S.2011 §1858(A) (emphasis added). Section 1856(A) of the Act also provides that judicial relief under the Act must be made by application and motion. The Act also expressly provides that the parties to an arbitration agreement may waive the requirements of the Act, except, among other provisions, for the requirement to seek arbitration by filing an application and motion. 12 O.S.2011 §1855(A)(1). Nothing in the Act suggests the trial court may order arbitration in

the absence of an application and motion by a party to an agreement to arbitrate. In a case involving application of the Federal Arbitration Act, the United States Supreme Court explained, "(t)he Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – *upon the motion of one of the parties* – of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985) (emphasis added).[3]

¶7 Conn urges that the right to compel arbitration under an arbitration agreement may be waived, not only because a motion for arbitration is required by the Act, but also because such an agreement is effectively a forum selection clause and because the existence of an arbitration agreement is an affirmative defense. Conn correctly notes that Oklahoma cases refer to arbitration as an alternate forum for resolution of disputes. See *Oklahoma Oncology, supra*, 2007 OK 12 at ¶30, and *Thompson, supra*, 2007 OK 75 at ¶8. A challenge to venue or forum may be waived and the trial court errs in *sua sponte* transferring a case to a more convenient forum. See *Stevens v. Blevins*, 1995 OK 6, 890 P.2d 936. Additionally, it is settled that in Oklahoma, the existence of an arbitration agreement is an affirmative defense, which by definition may be waived.

> The contractual right to compel arbitration has been treated as a defense to an action on the contract. . . . An agreement to arbitrate is treated as an affirmative defense by the Federal Arbitration Act. . . . Thus, a party may waive its contractual right to compel arbitration.

Shaffer v. Jeffery, 1996 OK 47, ¶6, 915 P.2d 910. See also *Towe Hester & Erwin, Inc. v. Kansas City Fire & Marine Ins. Co.*, 1997 OK CIV APP 58, 947 P.2d 594 (*cert. denied*).

¶8 The trial court erred in ordering the parties to arbitration in the absence of a motion by a party.[4] Powers waived her right to arbitration by failing to appear or answer. Where a party has been properly served and fails to appear, default judgment will be granted. 12 O.S.2011 §2004(B)(1) and Okla. Dist. Ct. Rule 10. For these reasons, we reverse the trial court's Order for Binding Arbitration. On remand, the trial court is directed to enter default judgment in favor of Conn.

¶9 REVERSED AND REMANDED.

BELL, P.J., and JOPLIN, J., concur.

Kenneth L. Buettner, Judge:

1. The Oklahoma Supreme Court entered its order March 21, 2017, directing that this case be made companion to Case Nos. 115,879; 115,880; 115,881; and 115,882.

2. This quoted language is found in the trial court's Order for Binding Arbitration. The designated record does not include a copy of the parties' agreement (or indeed any exhibits).

3. A number of courts have held that federal district courts may not *sua sponte* enforce arbitration clauses. See *Auto. Mechs. Local 701 Welfare and Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir.2007); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2006 WL 3422198 (N.D.Cal. 2006); *Matter of Arbitration Between Standard Tallow Corp., and Kil-Mgmt.*, 901 F.Supp. 147, 151 (S.D.N.Y.1995); *Amiron Dev. Corp. v. Sytner,* 2013 WL 1332725 (E.D.N.Y. 2013); *Lopardo v. Lehman Bros., Inc.*, 548 F.Supp.2d 450, 457 (N.D.Ohio 2008).

4. Because we find the trial court erred in failing to enter default judgment based on Powers's failure to appear or answer, thus waiving any right to arbitrate, we need not consider the trial court's interpretation of the arbitration provisions of the parties' agreement. We remind the trial court, however, that a court must enforce the contract as it is written and a court may not rewrite a contract. *Oxley v. General Atlantic Resources, Inc.*, 1997 OK 46, ¶14, 936 P.2d 943. We agree with Conn that it was error to compel it to arbitrate an action specifically excluded from the arbitration agreement.

Legal Aid Services of Oklahoma, Inc.
presents

A SPRING SEMINAR FOR OUR VOLUNTEER ATTORNEYS

Wednesday, May 2, 2018

Conference Center, OSU Tulsa, 700 North Greenwood, Room 150
MCLE Credit of 6 Hours
FREE for Attorneys Actively Serving on a Pro Bono Panel
To register, go to: www.probono.net/ok/cle

AGENDA

8:30 a.m.	Registration
9:00 - 9:50	"Fair Housing: Current Trends, Hot Topics, and Landlord Expectations" Eric Hallett, Legal Aid Services
9:50-10:05	BREAK
10:05-10:55	"Understanding and Communicating with Clients Who May Have Mental Health Issues" Kathy LaFortune, J.D., Ph.D., Psychological Services Coordinator for the Tulsa County Juvenile Bureau
10:55 - 11:10	BREAK
11:10 – 12:00	"An Expert's Overview of Domestic Violence" Kelly Stoner, Native Alliance Against Violence Coordinated Indigenous Resource Center for Legal Empowerment Project Attorney Consultant, Tribal Law and Policy Institute Victim Advocacy Legal Specialist, and Judge, Seminole Nation Tribal Court
12.00 – 1:00	LUNCH (on your own)
1:00 – 1:50	""What if I Fail To Pay? Handling Contempt and Purge Hearings" Julie Goree, Legal Aid Services
1:50 – 2:00	BREAK
2:00 – 2:50	"Re-Entry Issues: Fines, Costs, Fees and More" Sara Cherry, Legal Aid Services
2:50-3:00	BREAK
3:00 – 4:00	"How Can I Present Evidence Successfully, Succinctly, and Smoothly?" District Judge Daman Cantrell, District Judge Kelly Greenough, and Judge Theresa Dreiling, District Court of Tulsa County, with skit presentations by Legal Aid Services attorneys

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, March 15, 2018

F-2015-555 — Joshua Caleb Addington, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2014-14, in the District Court of Wagoner County. The jury returned a verdict of guilty and recommended as punishment Life Imprisonment. The trial court sentenced accordingly. From this judgment and sentence Joshua Caleb Addington has perfected his appeal. AFFIRMED. Appellant's Application for Evidentiary Hearing on the Sixth Amendment Claim is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2017-0341 — Appellant, Wesley Eugene Walton, entered a plea of no contest on October 9, 2007, to one count of Lewd or Indecent Proposals or Acts to Child Under 16, a felony, in Washita County District Court Case No. CF-2007-60, and to one count of Lewd or Indecent Proposals or Acts to Child Under 16, a felony, in Washita County District Court Case No. CF-2007-59. He was sentenced to ten years in each case, suspended except as to the first nine months, with credit for time served. The sentences were ordered to run concurrently. The State filed a third motion to revoke Appellant's remaining suspended sentences on October 29, 2015. Following a revocation hearing on March 21, 2017, the Honorable Christopher S. Kelly, Associate District Judge, revoked the remaining balance of Appellant's suspended sentences. The sentences were ordered to run concurrent with each other, but consecutive to Custer County Case Nos. CF-2016-146, CF-2016-179, CF-2016-211 and Kiowa County Case No. CF-2015-100. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-307 — On March 1, 2016, Appellant Christy Adelle Goff, represented by counsel, entered a guilty plea to Driving a Motor Vehicle Under the Influence of Alcohol and Transporting an Open Container of Beer in Jefferson County Case No. CF-2015-52. Sentencing was deferred pending Goff's completion of the Jefferson County Drug Court program. On October 26, 2016, the State filed an Application to Terminate Goff from Drug Court, citing her plea of *nolo contendere* to charges of Driving a Motor Vehicle While Under the Influence of Alcohol and Driving With a Suspended License in Jefferson County Case No. CF-2016-23. On March 21, 2017, the Honorable Dennis L. Gay, Associate District Judge, terminated Goff's Drug Court participation and sentenced her as specified in her plea agreement, ordering her sentence in Case No. CF-2015-52 to run consecutively with her sentence in Case No. CF-2016-23. From this judgment and sentence Goff appeals. Goff's termination from Drug Court is AFFIRMED. Opinion: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2017-191 — On December 7, 2007, Appellant Willie Green was charged with two counts of Lewd Molestation in Tulsa County District Court Case No. CF-2007-6472. Appellant entered a plea of guilty to both counts and was convicted and sentenced on each count to twenty-five years imprisonment, with all but the first ten years suspended. The sentences were ordered to be served concurrently. On January 5, 2017, the State filed an Application to Revoke Appellant's suspended sentences in Case No. CF-2007-6472. Following a hearing on the application, the Honorable Kelly Greenough, District Judge, found Appellant had violated his rules and conditions of probation and revoked Appellant's remaining suspended sentences in full. Appellant appeals. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

Thursday, March 22, 2018

S-2016-1126 — The State charged Appellee, David James Miller, with Shooting with Intent to Kill, in District Court of Tulsa County Case Number CF-2013-6193. On April 7, 2014, the

Honorable Stephen Clark, Special Judge, conducted a preliminary hearing in this matter and bound Appellee over for trial on the amended charge of Assault and Battery with a Deadly Weapon. On August 17, 2016, Appellee filed his Defendant's Notice of Self-Defense and Prayer for Pre-Trial Evidentiary Hearing on the Stand Your Ground Issue asserting immunity under 21 O.S.2011, § 1289.25. On October 13, 2016, the District Court held an evidentiary hearing on Appellee's motion. Appellee testified in support of his claim of immunity. The State introduced a copy of the preliminary hearing transcript to counter Appellee's testimony. The District Court provided the parties with an opportunity to brief the issue. Both parties fully briefed the issue with the State supporting its argument with citation to the transcript of the preliminary hearing. On November 28, 2016, the District Court heard argument on the issue and ruled in Appellee's favor. The District Court sustained Appellee's motion thus granting his request for immunity. The State announced its intent to appeal the ruling in open court. On December 8, 2016, the State timely filed its written notice of intent to appeal. This appeal is DISMISSED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-75 — Phillip Libby, Appellant, was tried by jury for the crimes of 20 counts of Child Sexual Abuse in Case No. CF-2015-249 in the District Court of Oklahoma County. The jury acquitted on 11 counts and convicted on nine counts. In accordance with the jury's recommendation, the trial court sentenced Appellant as follows: Count 1, ten years imprisonment and a $5000 fine; Count 15, ten years imprisonment; Counts 2, 3, 5, 16, 17, 18, and 19: $5000 fine. The prison terms are to be served consecutively, and Appellant must serve at least 85% of each sentence before parole eligibility. The trial court also imposed a ten-year period of post-imprisonment supervision. From this judgment and sentence Phillip Libby 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-2017-26 — On January 23, 2014, Appellant John Curtis Davis, represented by counsel, entered a guilty plea to Concealing a Lost or Mislaid Credit Card in Oklahoma County Case No. CF-2013-6483. Davis was sentenced to five (5) years with all but the first thirty (30) days suspended, subject to rules and conditions of probation. On June 5, 2015, Davis entered no contest pleas to Count 1, Forgery and Count 2, Falsely Impersonating Another, both after former conviction of a felony, in Oklahoma County Case No. CF-2015-3747. Davis was sentenced to seven (7) years for each offense, all suspended. The sentences were ordered to be served concurrently with each other and with his conviction in Oklahoma County Case No. CF-2013-6483. On November 16, 2015, Davis entered a plea of no contest to Concealing Stolen Property after former conviction of two or more felonies in Oklahoma County Case No. CF-2015-7600. Davis was sentenced to ten (10) years with all but the first ninety (90) days suspended. The sentence was ordered to be served concurrently with Davis's other suspended sen-tences. As part of the plea agreement, the State agreed to forego filing applications to revoke in Davis's other cases. On December 9, 2016, the State filed an Application to Revoke Davis's sus-pended sentences in Oklahoma County Case Nos. CF-2013-6483, CF-2015-3747 and CF-2015-7600. The application alleged Davis violated his terms and conditions of probation by committing the new crime of Possession of a Controlled Dangerous Substance as alleged in Oklahoma County Case No. CF-2016-8649. At a hearing conducted December 28, 2016, Oklahoma District Court Judge Timothy R. Henderson re-voked in full Davis's suspended sentences in all three cases. The revocation of Davis's suspended sentences is AFFIRMED. Opinion by: Kuehn, J.: Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2016-1041 — Larry L. Lawson, III, Appellant, was tried by jury for the crimes of Count I - Felony Murder in the First Degree and Count II - Committing a Felony with a Firearm with Defaced ID Number in Case No. CF-2015-409 in the District Court of Garfield County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count I and three years on Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence Larry L. Lawson, III has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-0349 — Appellant, Blake Wesley Blackburn, was charged on December 20, 2013, in the District Court of Delaware County, Case No.

CM-2013-1136A with Count 1 – Obtaining Cash by Trick or Deception, a misdemeanor, and Count 2 – Larceny of Merchandise from Retailer, a misdemeanor. Appellant was charged with Possession of Controlled Dangerous Substance (Methamphetamine), a felony, after former conviction of two or more felonies, in Delaware County District Court Case No. CF-2013-150 on May 3, 2013. And, on September 26, 2013, in Delaware County Case No. CF-2013-335, Appellant was charged with Bail Jumping, AFCF x 2. On July 29, 2015, Appellant entered a plea of guilty in each case and was accepted into the Delaware County Drug Court Program. Sentencing was passed to July 29, 2017. The State filed an application to terminate Appellant from Drug Court in each case on February 25, 2016. Following a hearing on the State's application on June 7, 2016, the Honorable Robert G. Haney, District Judge, sustained the State's application in each case and terminated Appellant from the Delaware County Drug Court Program. In Case No. CM-2013-1136A Appellant was sentenced to one year on Count 1 and thirty days on Count 2. He was fined $100.00 on each count. The sentences were ordered to run concurrent with CF-2013-335 and CF-2013-150. In Case No. CF-2013-150 Appellant was sentenced to twenty-five years and fined $2,000.00. The sentence was ordered to run concurrent with CF-2013-335 and CM-2013-1136A. In Case No. CF-2013-335 Appellant was sentenced to twenty-five years and fined $500.00. The sentence was ordered to run concurrent with CF-2013-150 and CM-2013-1136A. Appellant appeals from his termination from Drug Court. Appellant's termination from Drug Court is AFFIRMED. Opinion by: Lewis, V.P.J., P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

C-2017-787 — Jason Bernard Rollins, Petitioner, entered a negotiated plea of guilty to misdemeanor disorderly conduct in Case No. CF-2015-4722 in the District Court of Oklahoma County. The Honorable Bill Graves, District Judge, accepted the plea, deferred sentencing for two years, imposed a $500.00 fine and various fees and costs. Rollins filed a motion to withdraw his plea that was denied by Judge Graves following an evidentiary hearing. Rollins now seeks a writ of certiorari. The Petition for Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

J-2017-985 — In the District Court of Tulsa County, Case No. CF-2015-4387, Appellant, D.M.R., is charged as a youthful offender with five felony counts. On September 7, 2017, the Honorable James Caputo, District Judge, sustained a motion by the State to certify Appellant eligible for adult sentencing if convicted. Appellant appeals that final certification order. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Specially Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-186 — Appellant Daequan Marquis Gay was tried by jury and convicted of Possession of a Firearm after Prior Adjudication as a Juvenile for Robbery with a Firearm in the District Court of Oklahoma County, Case No. CF-2016-4392. The jury recommended as punishment imprisonment for ten (10) years and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The judgment and sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recuse.

C-2017-570 — Jerimiah Don Newcomb, Petitioner, entered negotiated pleas to the crimes of Count 1 - Manufacturing Methamphetamine, Counts 2-6 - Child Neglect, Count 7 - Speeding in a School Zone, Count 8 - Driving Under Suspension, Count 9 - Failure to Maintain Insurance in Case No. CF-2014-406 in the District Court of Delaware County. The plea agreement required Petitioner to enter the county Drug Court Program, and upon successful completion of the program, charges would be dismissed. If Petitioner failed the program, the following negotiated sentences would be imposed: life imprisonment with all but 20 years suspended and a $50,000.00 fine in Count 1, life imprisonment with all but 20 years suspended and a $500.00 fine in Counts 2-6, a $20.00 fine in Count 7, a $250.00 fine in Count 8, and a $250.00 fine in Count 9. In August 2016, the State sought to terminate Petitioner from the Drug Court Program, and at a hearing on April 26, 2017, the trial court did so. Petitioner timely moved to withdraw his original plea, and the trial court denied the request after a May 25, 2017 hearing. From the denial of his motion to withdraw plea, Jerimiah Don Newcomb has perfected his certiorari appeal. PETITION FOR CERTIORARI DENIED; Judgment and Sentence of the District Court AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis,

V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2016-1134 — The Honorable Kyle Waters, Associate District Judge, found Appellant Tony Douglas White, guilty in a non-jury trial for the crime of Assault and Battery with a Deadly Weapon, After Former Conviction of a Felony in Case No. CF-2015-235 in the District Court of Sequoyah County. Judge Waters sentenced White to thirty years. From this judgment and sentence Tony Douglas White has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Hudson, J., Concurs; Kuehn, J., Concurs.

C-2017-542 — Petitioner Laquient Lynn King entered blind pleas of *nolo contendre* in the District Court of Oklahoma County, Case No. CF-2014-7871, to Kidnapping (Count I); Assault and Battery with a Dangerous Weapon (Count II); Domestic Abuse by Strangulation (Counts III and IX); Assault and Battery with a Deadly Weapon (Counts IV and V); Domestic Abuse Resulting in Great Bodily Injury (Count VI); and Larceny of a Motor Vehicle (Count X), all counts After Former Conviction of Two or More Felonies. The Honorable Glenn M. Jones, District Judge, accepted the pleas and sentenced Petitioner to thirty-five (35) years imprisonment in each count, ordering the sentences to run concurrently. Petitioner subsequently sent a letter to the court asking to withdraw the pleas. The court accepted the letter as a timely filed Motion to Withdraw Plea. Counsel was appointed to represent Petitioner and a hearing was held where the motion to withdraw was denied. From this judgment and sentence Laquient Lynn King has perfected his appeal. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, March 29, 2018

F-2016-1094 — Robert Lawrence Long, Appellant, was tried by jury for the crimes of Count 1 - First Degree Felony Murder and Count 3 - Possession of a Firearm After Conviction of a Felony, both After Conviction of Two or More Felonies in Case No. CF-2014-608 in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count 1 and 18 years on Count 3. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Robert Lawrence Long has perfected his appeal. Appellant's request for an evidentiary hearing DENIED; costs imposed on Count 2 VACATED; in all other respects, the Judgment and Sentence of the District Court AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

C-2017-535 — Brenda Kaye Alexander, Appellant, entered a negotiated plea of no contest to the crime of Child Abuse in Case No. CF-2014-3620 in the District Court of Oklahoma County. The Honorable Larry Jones accepted Alexander's plea and in accordance with the plea agreement, deferred sentencing for ten years. From this judgment and sentence, Brenda Kaye Alexander has perfected her appeal. Petition for a Writ of Certiorari is DENIED. Motion to Supplement Direct Appeal Record and/or for an Evidentiary Hearing is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in result; Lewis, V.P.J., concurs in result; Hudson, J., concurs; Kuehn, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, March 16, 2018

115,642 — Rodney Rotert, d/b/a D&R Fab, Plaintiff/Counter-Defendant Appellant, vs. Philadelphia Corporation, Philadelphia Indemnity Insurance Company, a Pennsylvania Corporation, Defendants/Counter-Claimants/Appellees, and Copart, Inc., an Oklahoma Corporation, Copart Auto Auctions, an Oklahoma Corporation, Copart of Oklahoma, Inc., an Oklahoma Corporation, The City of Tulsa, a Municipal Corporation, J.J. Gray, an Individual, Rick Eberle, An Individual and John Does 1 through 5. Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda Morrissey, Judge. Plaintiff/Counter-Defendant/Appellant Rodney Rotert, d/b/a D&R Fab (Rotert) appeals from the trial court's Journal Entry of Final Judgment awarding attorney fees and costs and ordering Rotert's bond forfeited. Rotert made claims for conversion, conspiracy, replevin, and civil rights violations against Defendants/Counter-Claimants/Appellees Philadelphia Insurance Companies and Philadelphia Indemnity Insurance Company (collectively, Insurer) and other defendants. Insurer's counterclaim sought a declaratory judgment and asserted claims for conversion, abuse of process, and negligence. Rotert and Insurer entered an agreed temporary injunction. After the trial court vacated the temporary injunction and increased the bond

amount, Insurer sought an award of storage costs, attorney fees, and recovery on the bond. Following summary judgment in favor of Insurer, the trial court awarded it fees, costs, and recovery of bond. The record shows the injunction should not have been entered and Insurer was therefore entitled to an award of fees and costs. We find no abuse of discretion in the award of fees and costs and AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

115,787 — Tony Mullins, Guardian Ad Litem for The Minor Child, Tony Lee Mullins, Plaintiff/Appellant, vs. State of Oklahoma, ex rel., Audrey Jeanne McMaster, M.D.; Audrey Jeanne McMaster, M.D., in her individual capacity; HCA, INC., a Delaware Corporation; HCA Health Partner; d/b/a OU Medical Center, d/b/a Presbyterian Hospital; University Physicians Medical Group; and Patricia D. Scott, A.R.N.P., individually, Defendants, Teresa Rutledge, M.D., individually, and Niquel Gordon, M.D., individually, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Judge. Plaintiff/Appellant Tony Mullins, Guardian Ad Litem for the minor child, Tony Lee Mullins, seeks review of the trial court's order granting the motion for summary judgment of Defendants/Appellees Teresa Rutledge, M.D., individually, and Niquel Gordon, M.D., individually, on Plaintiff's claims to damages caused by the alleged medical negligence of Defendants. Plaintiff asserts the trial court erred in holding Defendants immune from liability pursuant to the Oklahoma Governmental Tort Claims Act (OGTCA), 51 O.S. §§151, et seq., §152(5)(B)(5). As a result of the declared emergency, amended §152(5)(B)(5) became effective upon its approval by the Governor on May 28, 2003. The law in effect at the time of the injury, expressed in amended §152(5)(B)(5), defined Defendants as "employees" of the State of Oklahoma, and immune from liability under the provisions of the OGTCA. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,951 — In the Matter of the Estate of Dorothy Cleo Walker, Deceased: Patricia Louise Rich and Linda Kitchel., Heirs at Law of Dorothy Cleo Walker, Deceased, Plaintiffs/Appellants, vs. Joseph Brant Stubblefield, Defendant/Appellee. Appeal from the District Court of Garvin County, Oklahoma. Honorable Steven Kendall, Judge. Plaintiffs/Appellants Patricia Louise Rich and Linda Kitchel, Heirs at Law of Dorothy Cleo Walker, Deceased, seek review of the trial court's order denying their objection to the admission to probate of the Decedent's Last Will and Testament offered by Defendant/Appellee Joseph Brant Stubblefield (Proponent), and their objection to appointment of Proponent as co-personal representative of Decedent's estate, over their proof of Proponent's undue influence of Decedent. We have reviewed the record and transcript of hearing. We cannot say the trial court's judgment finding of no undue influence by Proponent, and admitting the Decedent's Last Will and Testament offered by Proponent, is against the clear weight of the evidence. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,492 — In The Matter of R.B., III, Deprived Child: Roger Beal, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lydia Green, Judge. Appellant, Roger Dean Beal, Jr., biological father of R.B. III, a minor child (Father), appeals from the trial court's order, entered upon a jury's verdict, terminating his parental rights to the child. This Court finds the clear and convincing evidence supports the trial court's determination that it would be in the child's best interests to terminate Father's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(12) due to Father's incarceration because continuation of Father's parental rights would result in harm to the child due to the extended duration of Father's incarceration and incarceration's detrimental effect on the parent/child relationship. The trial court's order is AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

Friday, March 30, 2018

115,476 — Susan Jordan, Plaintiff/Appellee, vs. Board of County Commissioners of Oklahoma County, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barbara G. Swinton, Judge. Defendant seeks review of the trial court's order granting judgment on a jury's verdict for Plaintiff on Plaintiff's claim to damages for personal injuries sustained on Defendant's premises where Plaintiff was an employee of Defendant's tenant. In this appeal, Defendant asserts the trial court erred (1) in denying its demurrer to the evidence, and (2) in instructing the jury that Plaintiff was an invitee, not licensee. In the present case, Plaintiff was present on

the premises only as the result of (1) Defendant's lease of the premises to the Department of Human Services for use by the Oklahoma County Juvenile Bureau (OCJB), and (2) Plaintiff's employment by OCJB. Plaintiff's use of the stairs adjacent to her office clearly was an incident of her employment in the building. Under such circumstances, Plaintiff cannot be considered a mere licensee, but rather is a business invitee to whom Defendant owed the duty of reasonable care to keep the premises in a reasonably safe condition for the visitor's reception. The Plaintiff presented evidence from which the jury could properly conclude that Defendant did not so maintain the stairway is such a reasonably safe condition. Finding competent evidence to support the trial court's determination of Plaintiff's status as an invitee, and competent evidence to support the jury's verdict, the judgment of the jury is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,490 — American Star Energy and Minerals Corporation, Plaintiff/ Appellee, vs. Armor Petroleum, Doyle Bentley, Carroll B. Laing, Jerry Arthur, Russell Hallulm, Sherry Fitts, C. Blake Laing, Lynettte Laing Hall, Kari L. Bentley, Solari, Inc., and Laing Oil and Gas Trust, Defendants/Appellants. Appeal from the District Court of Texas County, Oklahoma. Honorable Jon K. Parsley, Judge. In this breach of contract action, Defendants/Appellants appeal from the trial court's judgment in favor of Plaintiff/Appellee, American Star Energy and Minerals Corporation. In 1994, Plaintiff assigned certain Texas County mineral rights in the Rice Morrow Sand Formation to Defendants' predecessor in interest. The Assignment contractually required Plaintiff be provided with notice - and the option to purchase - in the event an oil well within the assigned leasehold was to be plugged and abandoned. At the time of the conveyance, only one well was producing from the Rice Morrow Sand Formation in the leasehold area. The formation was unitized by the Oklahoma Corporation Commission in late November 1994. The Well was plugged and abandoned on December 3, 2009. Defendants did not notify Plaintiff of the impending closure or afford Plaintiff the opportunity to exercise its purchase option prior to the Well's closure. Plaintiff filed the instant breach of contract action seeking damages for the cost of drilling a new well. Defendants answered, claiming (1) the Unit, rather than Defendants, had control over the Well and should have been named as a defendant; (2) establishment of the Unit abrogated and/or modified Plaintiff's notice rights as to plugging and abandonment of the Well; and (3) a contradictory finding would be an impermissible collateral attack on the Commission's order of unitization. Following a bench trial, the trial court held for Plaintiff, finding the contractual obligations contained in the Assignment were continuing, assumed by Defendants, and did not conflict with the unitization plan or statutes. Plaintiff was awarded damages plus "statutory interest at 5.5%, calculated from June 6th, 2016, until paid." On *de novo* review, we hold the trial court properly entered judgment in favor of Plaintiff: the Unit is not an indispensable party to these proceedings and neither the unitization plan nor relevant statutes conflict with the contractual requirements of the Assignment. We modify that portion of the judgment regarding post-judgment interest to read, "The judgment shall earn statutory interest in accord with 12 O.S. Supp. 2013 §727.1 from June 6, 2016, until paid." AFFIRMED AS MODIFIED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,022 — Security State Bank, Plaintiff/Appellee, vs. Jack Colten and Samantha Colten, Husband and Wife, Defendants/Appellants, John Doe and Jane Doe, as unknown occupants of the premises; Board of County Commissioners of Pottawatomie County, State of Oklahoma; and Treasurer of Pottawatomie County, State of Oklahoma, Defendants. Appeal from the District Court of Pottawatomie County, Oklahoma. Honorable John Canavan, Judge. Defendants seek review of the trial court's order granting the motion for summary judgment of Plaintiff Bank in Plaintiff's action to collect a promissory note and foreclose a mortgage. In the present case, Plaintiff submitted the affidavit of its vice-president which established Bank's status as owner and holder of the note and mortgage, and Defendants' default. The trial court found Defendants had been duly served with the Petition and Summons, as well as a copy of Plaintiff's Motion for Summary Judgment, Brief in Support and notice of hearing, but that Defendants failed to appear at the hearing. Defendants' affidavit established *only* that they did not receive the copy of the motion for summary judgment and brief "at their *correct* address," *not* that they did not receive a copy *at all*. We have reviewed the materials included in the record before us. We hold the trial court did not err in granting the motion for summary judgment of Plaintiff. The order of the trial

court is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 2)
Friday, March 16, 2018

115,194 — Kermit P. Schafer, Jr., in his capacity as Trustee of the Kermit P. Schafer, Jr. Trust; Kimberly K. Timmons, Trustee of the Kermit P. Schafer Jr., Trust No. 1, Plaintiffs/Appellants/Counter-Appellees, and Investment Property Specialists, Inc., Plaintiff, vs. Robert D. Stearns; Defendant/Appellee/Counter-Appellant, and Westlake Development, LLC; Westlake Common LLC; Wam, Inc.; and Westside Auto Mall, LP, Defendants. Appeal from Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge. Trustees appeal the district court's order denying their motion to enforce an indemnification provision against Robert D. Stearns contained in the Westlake Development, LLC, operating agreement. Stearns appeals the district court's order denying his motion to enforce the same indemnification provision against the Trustees and the order denying his motion for new trial. Because the Trustees did not prove that Stearns failed to perform any of his obligations as a member of Westlake and because Stearns failed to prove that the trusts represented by the Trustees failed to perform all of their obligations as members, neither party was entitled to indemnification; therefore, we affirm the decision of the district court. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Monday, March 19, 2018

115,796 — Center for Media and Democracy, a Wisconsin corporation, Plaintiff/Appellee, v. Michael J. Hunter, in his official capacity as Attorney General of The State of Oklahoma, Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. The defendant, Michael J. Hunter, in his official capacity as Attorney General of the State of Oklahoma (OAG) appeals an Order which made certain findings and also directed the OAG to furnish records to the plaintiff, Center For Media and Democracy (CMD) and to the trial court. CMD has moved to dismiss the appeal as moot. CMD issued a series of records requests to OAG starting in January 2015 and the last in January 2017. OAG did not provide records as to any of the requests, nor did OAG formally deny CMD's records requests. CMD filed suit for declaratory and injunctive relief. Prior to hearing, OAG provided records to CMD pursuant to the First Request. The trial court ruled that OAG must provide records as to all requests except the last, most recent two and made no ruling regarding those requests. Subsequent production of records pertaining to all ordered responses rendered the appeal moot regarding the basic order to produce records. The Open Records Act authorizes legal action when a request is denied. Here, there was never a formal denial and the trial court characterized the OAG's inaction as an "abject failure" to comply with the Open Records law. The Open Records Act creates a mandatory duty to provide requested records promptly. Under the circumstances, CMD's action is one in the nature of a mandamus. The trial court needed only to find a duty and the failure to perform that duty, so the characterization is surplus and unnecessary. The Order is modified to strike that characterization. In all other respects the Order of the trial court is undisturbed in part as moot and affirmed in part as modified. AFFIRMED IN PART AS MODIFIED, AFFIRMED, IN PART AS MOOT, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Goodman, J., concurs, and Fischer, P.J. concurs specially.

Thursday, March 22, 2018

116,346 — The City of Bixby, Oklahoma, a municipal corporation, Plaintiff/Appellee, v. Fraternal Order of Police, Lodge 189 and Shad Lee Rhames, member of Fraternal Order of Police Lodge 189, Defendant/Appellants. Appeal from an Order of the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge. The Fraternal Order of Police, Lodge 189 (FOP) and Shad Lee Rhames (Rhames), member of Fraternal Order of Police, Lodge 189 appeal an Order granting summary judgment to the defendant, The City of Bixby, Oklahoma (City). There are two collective bargaining agreements. CBA-1 provided for wage continuation for covered employees injured at work. However, CBA-1 expired at the close of the fiscal year. Rhames, an injured employee, had received wages pursuant to CBA-1, but was lawfully terminated prior to the close of the fiscal year. He sought to extend the wage benefit beyond the close of the fiscal year under the terms of CBA-l. This Court holds that Rhames is entitled to the CBA-1 wage protection benefit payable during the fiscal year 2014-2015. Extending the CBA-1

wage protection provision beyond the close of the 2014-2015 fiscal year violates Article 10, Section 26 of the Oklahoma Constitution. Therefore, the trial court erred in totally voiding the CBA-1 and the Panel erred in extending the CBA-1 past its expiration. The judgment of the trial court is, therefore, modified in accord with this Opinion and as modified affirmed. JUDGMENT MODIFIED AND, AS MODIFIED, AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Friday, March 23, 2018

116,016 — Michael Schmauss, Plaintiff/Appellant, vs. Victor M. Regalado, Sheriff of Tulsa County, in his official capacity, Defendant/Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Dana Kuehn, Trial Judge. Michael Schmauss filed this retaliatory discharge action pursuant to 85 O.S.2011 § 341 (superseded February 1, 2014) after his employment with the Tulsa County Sheriff's Office was terminated. By order filed February 24, 2017, the district court granted the Sheriff's Office's motion. Subsequently, the parties drafted and submitted a document titled "Judgment" to the district court. The document was signed by the district court judge and filed on April 6, 2017. Schmauss filed his petition in error on May 4, 2017. The Sheriff's Office filed a motion to dismiss this appeal, arguing that it was filed more than thirty days after the February 2017 order granting its motion for summary judgment. An appeal from a final order must be brought within thirty days. 12 O.S.2011 § 990A(A). Schmauss' petition in error, filed more than thirty days after the February 24, 2017 order, was not timely to preserve review of that order. APPEAL DISMISSED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

116,027 — In the Matter of A.B., and B.B., Adjudicated Deprived Children, Nicole Taylor and Michael Burton, Appellants, v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Cassandra Williams, Trial Judge. Nicole Taylor (Mother) and Michael Burton (Father), (collectively, Parents), appeal separate judgments entered on jury verdicts in a joint trial terminating their parental rights to their children, A.B. and B.B. (collectively, Children). The State of Oklahoma (State), by the Oklahoma Department of Human Services (DHS) was the petitioner in the case. Children were removed from Parents' custody based on DHS's allegations that Mother had diminished mental capacity and was unable to properly care for them. Father had a history of criminal activity, having been convicted twice of sexual offenses against minors and being a registered sex offender. After review of the entire record and examination of testimony and descriptions regarding Mother's interaction with Children and with other adults, this Court finds the evidence firmly established that Mother is cognitively disabled. There is clear and convincing evidence to support a determination that Mother's cognitive disorder renders her "incapable of adequately and appropriately exercising parental rights, duties and responsibilities within a reasonable time considering the age of the child." Next, Father argues the trial court improperly instructed the jury on the law and, therefore, committed fundamental error. Father argues his second conviction would not be a crime in Oklahoma because California's age of consent is eighteen years of age and Oklahoma's age of consent is sixteen years of age and, therefore, the trial court erred in instructing the jury that the convictions are "comparable to Oklahoma offenses of Rape and Lewd Molestation of a Child Under Sixteen years of age." It is undisputed that Father was convicted of the California crimes set forth in Jury Instructions 7 and 12. At trial, Father testified that his first conviction was in 1999 when he was twenty-two years of age and the victim was twelve years old. Father also admitted he was convicted of statutory rape of a 17 year old in 2002 when he was twenty-four or twenty-five years old. Father also admitted that he was convicted in Oklahoma for failure to register as a sex offender. Father also argues the trial court erred by including the language that the California convictions were comparable to "Oklahoma offenses of Rape and Lewd Molestation of a Child Under Sixteen years of age" in the jury instructions. Assuming that Father's argument is correct and it was error to equate Father's second conviction to Oklahoma's offense of rape, such error was harmless. This Court finds that the language comparing the California convictions to Oklahoma crimes was harmless. After a review of the appellate record, this Court finds the State's evidence, coupled with Mother's and Father's testimony, provided clear and convincing evidence in support of the jury's conclusion that termination of the parental rights of Mother and Father was in the minor children's best interest. The trial court's

decision is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Wednesday, March 28, 2018

115,202 — In re the Marriage of: Valerie Lynn Scudder, Petitioner/Appellant, vs. Franklin Clark Scudder, Jr., Respondent/Appellee. Appeal from an Order of the District Court of Pontotoc County, Hon. Lori L. Jackson, Trial Judge. Wife appeals from the portion of the trial court's decree of divorce awarding certain real property located in Stratford, Oklahoma, to Husband as his separate property. The Stratford property was purchased with funds obtained by the sale of other property owned separately by Husband at the time the parties married. Although the deed to the Stratford property was titled in the names of both Husband and Wife as joint tenants, neither party disputes that they were unaware of the language of the deed until after divorce proceedings were filed. The trial court found that Husband lacked donative intent to gift to the marital estate the Stratford property. We find that this determination is not against the clear weight of the evidence nor is it an abuse of discretion. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Fischer, J., concurs, and Wiseman, P.J., concurs in result.

Thursday, March 29, 2018

116,295 — American Farmers & Ranchers Mutual Insurance Company, Plaintiff/Appellant, v. Tamara Powell, Defendant/Appellee. Appeal from an order of the District Court of Custer County, Hon. F. Douglas Haught, Trial Judge, granting Tamara Powell's motion to dismiss. The question under review is whether the dismissal was correct. Powell asserted that another action is pending between the parties involving the same claim, and attached her petition from the previous *Powell v. AFR* case showing the case filed in Custer County. The present case was brought by American Farmers pursuant to 12 O.S.2011 § 1651 seeking declaratory judgment that "Powell did not suffer a bodily injury as a result of the incident as alleged in *Powell v. AFR*" and therefore cannot recover from American Farmers pursuant to the second UM limit. It is clear that both American Farmers and Powell are the essential parties to both cases – and the only ones with remaining justiciable issues. The "same parties" element of 12 O.S.2011 § 2012(B)(8) has been satisfied. American Farmers also maintains that the cases do not involve the same claims, but it is clear that both cases involve the same incident, and Powell's claim against American Farmers in the earlier case turns on whether Powell suffered bodily injury. The present case rises or falls on exactly that issue. We agree with the trial court that to allow the declaratory judgment action to proceed "would be duplicating issues that not only can be, but have to be resolved in the original action." Accordingly, we conclude the trial court did not err in granting the motion to dismiss pursuant to 12 O.S.2011 § 2012(B)(8). Finding no error, we affirm the decision. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Friday, March 30, 2018

115,254 — Coady Pratt, Petitioner/Appellant, v. Amber Brown, Respondent/ Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Stephen Clark, Trial Judge, denying Coady Pratt's (Father) request to terminate joint custody between Father and Amber Brown (Mother), denying Father's contempt application, and entering an equal visitation schedule between them. Father failed to show abuse of discretion or a custody decision reached against the clear weight of the evidence, and we affirm the trial court's order on this issue. We also af-firm the trial court's decision finding Mother not guilty of indirect contempt. But we reverse the portions of the order granting the parties money judgments against each other and remand this issue to the trial court to modify its order in accordance with our Opinion. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

115,813 — C&M Exploration, LLC, Plaintiff/Appellant, vs. Duke Minerals, LLC, a Florida limited liability company, Defendant/Appellee, and Robert Brian Boeckman; C.D.S. Oil Company; Crown Exploration Resources, LLC; and Sooner Trend Leasing, LLC, Defendants, and Ronald James Abercrombie a/k/a R.J., an individual; Amerex Resources Corp., a Nevada corporation; Rockwell Energy, LLC, an Oklahoma limited liability company; Coffeyville Resources Refining and Marketing, LLC, a Delaware corporation; Pacer Energy Marketing, LLC, an Oklahoma limited liability company; EIG Petroleum, LLC, an Oklahoma corpora-

tion; Avondale Operating Co.; and State of Oklahoma, ex rel., Oklahoma State Treasurer, Unclaimed Property Division, Additional Defendants. Appellant C&M Exploration, LLC appeals the district court's judgment granting Appellee Duke Minerals, LLC's motion for summary judgment. Duke failed to submit evidence regarding its ownership of leases or wells described on the exhibit attached to the district court's judgment, except with respect to the Cottonwood Redfork Sand Unit. That portion of the judgment establishing that Duke's interest in the Cottonwood Redfork Sand Unit is superior to C&M Exploration's interest in that unit is affirmed. In addition, the material facts relating to C&M Exploration's alter ego claim are not controverted and summary judgment was appropriate. The district court's judgment is affirmed as modified. AFFIRMED AS MODIFIED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

115,981 — JP Morgan Chase Bank, N.A., Plaintiff/Appellee, vs. James Levings and Margaret Levings, Defendants/Appellants. Appeal from Order of the District Court of LeFlore County, Hon. Jonathan K. Sullivan, Trial Judge. James and Margaret Levings appeal the judgment entered in favor of JP Morgan Chase Bank, N.A., in this mortgage foreclosure action. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. The Bank was the holder of a promissory note executed by the Levings when this action was filed. The Bank proved that the note was in default and that it was entitled to judgment as a matter of law both as to its foreclosure action and as to the Levings' counterclaim. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

(Division No. 3)
Friday, March 30, 2018

115,633 — Shannon Bernice Nealy, Petitioner/Appellee, vs. William Dale Bryles, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Howard R. Haralson, Trial Judge. De-fendant/Appellant, William Dale Bryles, seeks review of the trial court's protective order restraining him from contacting, injuring, or threatening the Petitioner/Appellee, Sharon Bernice Nealy. Nealy presented evidence that she was alarmed, threatened, and intimidated by Bryles' repeated phone calls and his trip to California at the time he knew she was vacationing there. Because these acts could constitute a willful pattern of conduct satisfying harassment pursuant to 22 O.S. § 60.1(B), the protective order was not an abuse of discretion. We modify the duration of the protective order to conform to the statutory time limit and otherwise affirm. AFFIRMED AS MODIFIED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

115,712 — Board of County Commissioners of Delaware County and Sheriff of Delaware County, Plaintiffs/Appellants, vs. Association of County Commissioners of Oklahoma Self-Insurance Group, Defendant/ Appellee. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Judge. Plaintiffs/Appellants the Board of County Commissioners of Delaware County and Sheriff of Delaware County (the County) appeal from a journal entry of judgment awarding the County $330,996.05 for its breach of contract claim against Defendant/Appellee the Association of County Commissioners of Oklahoma Self-Insurance Group (ACCO-SIG). The sum represents the single occurrence limit of $1,000,000 provided in the County's Protection Plan (the Plan), minus legal costs expended by ACCO-SIG defending the County in a multi-plaintiff federal civil rights suit brought by female inmates against the Delaware County Sheriff. Prior to the $330,996.05 judgment, the court entered summary judgment in favor of ACCO-SIG, finding as a matter of law that coverage was afforded to the County under the Plan; that there was only one occurrence, thus, the $1,000,000 policy limit applied; and that ACCO-SIG did not breach any contractual duty to guide the defense or participate in the settlement of the civil rights suit. After *de novo* review, we affirm the court's application of one $1,000,000 policy limitation. Further, we agree with the trial court that the undisputed evidence shows ACCO-SIG did not breach any contractual duty to defend the County. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,744 — (Companion w/115,745) Northeast Rural Services, Inc., Appellant, vs. Corporation Commission of Oklahoma, Appellee. Appeal from the Oklahoma Corporation Commission. Appellant Northeast Rural Services, Inc. ("NRS") appeals an Order issued by Respondent Oklahoma Corporation Commission

("OCC") setting forth the reimbursement amount to be paid to NRS for providing internet service to Cleora Public Schools ("Cleora"). NRS argued the OCC improperly based the reimbursement amount on a "lowest cost reasonable bid" standard without notice to NRS. The OCC argued its consideration of the lowest cost reasonable bid, as evaluated by the Public Utility Division ("PUD") and presented to the Administrative Law Judge ("ALJ") who first heard NRS's challenge to the reimbursement determination, was not applied as a "rule" within the meaning of the Administrative Procedures Act. Rather, it was simply one factor considered by the OCC when determining the proper reimbursement amount. NRS challenged this position and argued the OCC Order, PUD's analysis, and the ALJ's determination were based upon a memorandum published on the OCC's website but not promulgated as a rule. NRS also argued the ALJ's refusal to allow the Cleora Superintendent to testify was reversible error. Following our review of the record on appeal, we find the OCC's Order was issued within its statutory authority. The order is AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,745 — (Companion w/115,744) Northeast Rural Services, Inc., Appellant, vs. Corporation Commission of Oklahoma, Appellee. Appeal from the Oklahoma Corporation Commission. Appellant Northeast Rural Services, Inc. ("NRS") appeals an Order issued by Respondent Oklahoma Corporation Commission ("OCC") setting forth the reimbursement amount to be paid to NRS for providing internet service to Chelsea Public Schools ("Chelsea"). By Order of the Supreme Court, this matter was made a companion case to Case No. 115,744, and the issues presented by the cases are substantially similar. As in Case No. 115,744, NRS also argued in this matter that the OCC improperly based the reimbursement amount on a "lowest cost reasonable bid" standard without notice to NRS. The OCC argued its consideration of the lowest cost reasonable bid, as evaluated by the Public Utility Division ("PUD") and presented to the Administrative Law Judge ("ALJ"), was not applied as a "rule" within the meaning of the Administrative Procedures Act. Rather, it was simply one factor considered by the OCC when determining the proper reimbursement amount. NRS challenged this position and argued the OCC Order and PUD's analysis were based upon a memorandum published on the OCC's website but not promulgated as a rule. Unlike in Case No. 115,744, the ALJ here recommended that NRS be fully reimbursed as requested. Following PUD's Objection to the Recommendation, the OCC sitting *en banc* issued an Order rejecting the ALJ's recommendations and adopting PUD's findings that NRS should reimbursed at a reduced amount. Following our review of the record on appeal, we find the OCC's Order was issued within its statutory authority. The order is AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,752 — Jana Wilkins, D.O., Plaintiff/Appellant, vs. Ryan Vaclaw, Elizabeth Sherrock, William Davito, Mark Erhardt, Primary Care Associates, PLLC, and Shevada, LLC, Defendants/Appellees. Appeal from the District Court of Washington County, Oklahoma. Honorable Carl G. Gibson, Judge. Plaintiff/Appellant Jana Wilkins, D.O. (Wilkins) appeals from an order granting a motion to compel arbitration in Wilkins' breach of contract action against her former business partners and entities to which she formerly belonged, Defendants/Appellees Ryan Vaclaw, Elizabeth Sherrock, William Davito, Mark Erhardt, Primary Care Associates, PLLC, and Shevada, LLC (Defendants). Wilkins brought claims arising out of three contracts with Defendants, two of which contained arbitration provisions. After *de novo* review, we find the arbitration clauses were binding on all of Wilkins' claims because each contract was part of a single transaction and relates to the same subject matter. Further, we find the procedural differences in the two arbitration provisions do not negate the parties' clear intent to arbitrate disputes arising out of the agreements. We also find Defendants did not waive their right to compel arbitration. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Friday, March 9, 2018

116,537 — Donald Dewayne Moore, Plaintiff/Appellant, v. Warr Acres Nursing Center, LLC, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. J. Don Andrews, Trial Judge, granting summary judgment to Employer Warr Acres Nursing Center, LLC, in this wrongful termination claim. The order addressed several motions pending before the trial court, granted summary judgment to Employer, and dismissed Employee's case. We find the record supports

the trial court's findings of fact that established Employer terminated Employee because he failed to follow the call-in policy of contacting his immediate supervisor and failed to report for his scheduled shifts. Employee's response does not dispute this allegation, and Employee presents no evidentiary material in this record which would place these material facts in controversy. We conclude the trial court correctly determined there are no material facts in controversy and Employer is entitled to summary judgment as a matter of law. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, March 13, 2018

115,583 — Gen-X Machine Technologies, Inc., Petitioner/Appellant, v. The Assessment Board of the Oklahoma Employment Security Commission, Respondent/Appellee. Appeal from the District Court of Tulsa County, Hon. Dana L. Kuehn, Trial Judge. Petitioner (Gen-X) appeals from the trial court's order affirming the order of the Respondent (the Commission). The Commission determined Gen-X continued the operations of another business and, thus, is a successor employer. The amount an employer must pay into Oklahoma's Unemployment Compensation Fund may be affected by the acquisition of another business; i.e., if the employer making the purchase is determined to be a "successor employer" to the seller under 40 O.S. Supp. 2015 § 3-111, a section which was repealed in 2016 but which is applicable to the present case. In the present case, the Commission based its determination that Gen-X is a successor employer on the terms of a certain purchase contract but (1) in the absence of any other evidence supporting the conclusion that the operation was in fact continued as a going business, and (2) in the face of uncontradicted, competent and relevant testimony supporting the contrary conclusion. We conclude the Commission's order is not supported by substantial evidence. Therefore, we reverse the trial court's order affirming the Commission's order. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Wednesday, March 14, 2018

116,703 — Primelending, A Plainscapital Company, Plaintiff/Appellee, v. Tinnakon Xaiyaratt, Defendant/Appellant, and Viravanh Douangdara; Khatsarinh Xaiyaratt; Brandall Stapleton; Spouse of Viravanh Douangdara if Married, Spouse of Khatsarinh Zaiyaratt if Married, and Occupant of Premises, Defendants. Appeal from an Order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge. The defendant, Tinnakon Xaiyaratt (Xaiyaratt), appeals an Order denying his motion to reconsider the trial court's Order granting summary judgment to the plaintiff, Primelending, A Plainscapital Company (Prime-lending). Xaiyaratt and other defendants executed a promissory note payable to Primelending. At the same time, they executed a real estate mortgage securing the promissory note. Primelending brought this action and alleged default for nonpayment. The promissory note and mortgage are part of the petition. Prime-lending alleged that it has possession of the promissory note and is entitled to bring the action. In summary, the petition contains all of the allegations to state a claim for foreclosure, including standing. Primelending obtained summary judgment in its suit on a promissory note and to foreclose a mortgage securing the promissory note. The Journal Entry adequately explains the basis for entry of judgment. Xaiyaratt sought to reconsider and vacate the judgment and obtain a new trial. His challenges on appeal are, in part, not preserved for review. The remaining challenges do not show that the trial court erred in granting summary judgment to Primelending. Therefore, the judgment denying the "Motion to Reconsider" is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,354 — In the Matter of the Adoption of K.R.E.R., Minor. Charles Jasper James Ratliff, Appellant, v. Kathryn Keene and Rikki Keene, Appellees. Appeal from the District Court of Washington County, the Hon. Russell C. Vaclaw, Trial Judge. In this adoption proceeding, the trial court entered its order determining the minor child was eligible for adoption without the consent of Appellant, the child's biological father, (Father) and finding Father's consent was not required because he willfully failed, refused or neglected to contribute to the minor child's support for a period of twelve consecutive months out of the last fourteen months immediately preceding the petition for adoption filed by Appellees Kathryn Keene (Mother) and Rikki Keene (Step-Parent) (collectively, Petitioners). Father stipulated that he paid no amount toward his court-ordered support obligation for minor child during the fourteen

months preceding the filing of the petition for adoption; however, the uncontradicted evidence was that Father had been incarcerated for the seven months preceding the filing of the petition and received no income during that period. Further, no evidence was produced that Father intentionally incapacitated himself for the purpose of avoiding his duty to pay child support. In these circumstances, the evidence was insufficient to show Father's financial inability to pay child support was a "willful" failure to pay child support. From our examination of the record and based on the applicable law, we conclude the trial court's finding that the minor child is eligible for adoption without Father's consent because he willfully failed to pay court-ordered child support during the relevant period is not clear and convincing evidence. Accordingly, we reverse. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, March 16, 2018

116,218 — In the Matter of the Estate of Bird Lance, Jr., Deceased. Lance Timothy Lance, Laura Ann Powers and Donna A. O'Neal, Plaintiffs/Appellants, v. Billy Frank Lance, Defendant/Appellee. Appeal from the District Court of Murray County, Hon. Leah Edwards, Trial Judge. In this consolidated action, Lance Timothy Lance, Laura Ann Powers (collectively, the Heirs) and Donna A. O'Neal appeal from the trial court's denial of their motion for new trial after the trial court granted summary judgment to Billy Frank Lance (Lance), the court-appointed administrator of the Estate of Bird Lance, Jr. Based on our de novo review of the record on appeal, we conclude the trial court erred in granting summary judgment to Lance and denying the Heirs' motion to set aside conveyances because material questions of fact remain concerning the Heirs' resulting trust and constructive trust theories of recovery. Consequently, the court abused its discretion in denying the Heirs' motion for new trial. We also conclude, however, the trial court did not err in granting summary judgment against O'Neal and denying her application for past-due child support because those judgments are dormant and unenforceable; consequently, the trial court did not abuse its discretion in denying her motion for new trial. Accordingly, we affirm in part, reverse in part, and remand for further proceedings. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., concurs, and Goodman, J., concurs specially.

Wednesday, March 21, 2018

115,886 — Gregory A Horvath, Plaintiff/Appellant, v. Kamran K. Momeni, an individual, Jennifer Hill, an individual, Cannon Momeni, PLLC, an Oklahoma Professional Limited Liability Company, James E. Thompson, an individual, Jason Bennett, an individual, Reza Ghavami, an individual, and Bixby Woodcreek Homeowners Association, Inc., an Oklahoma Corporation, Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Caroline E. Wall, Trial Judge, granting Kamran K. Momeni, Jennifer Hill, Cannon Momemi, PLLC, James E. Thompson, Jason Bennet, Reza Ghavami, and the Bixby Woodcreek Homeowners Association, Inc.'s (collectively, "Appellees") motions for summary judgment. Appellant asserted Appellees began a campaign to personally malign his personal and professional reputation, including making false and unprivileged publications to neighbors, clients and others that he was guilty of fraud, embezzlement, and other impropriety that have affected his health and profession. Appellees filed multiple motions for summary judgment, asserting they were entitled to judgment as a matter of law. Appellant alleged disputed issues of fact existed, and contended the trial court erroneously granted summary judgment to Appellees. Based upon our review of the facts and applicable law, we find that the trial court's order should be reversed with regard to Appellant's defamation theory of recovery. The matter is remanded to the trial court for further proceedings consistent with the opinion. The trial court's orders are affirmed in all other respects. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

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THE LAW OFFICES OF JEFF MARTIN IS SEEKING AN ASSOCIATE with 0-5 years of experience. Competitive salary with health, dental, vision, life insurance and 401k benefits. Customer service, sales, insurance or medical background is a plus. Please send all inquiries and resumes to hansen@jeffmartinlaw.com, or fax to 918-742-0275.

THE SAYER LAW GROUP, A MIDWEST REGIONAL LAW FIRM, seeks energetic candidates to fill full-time or part-time attorney positions in Oklahoma. Ideal candidate would be an Oklahoma licensed attorney also licensed in bankruptcy court. Must have strong communication and organization skills. Primary responsibilities would be as default foreclosure and bankruptcy attorney. Litigation skills preferred. Travel to court throughout Oklahoma required. Salary negotiable based on experience. Please send cover letter, resume and references to mlasley@sayeraw.com.

AV RATED OKC LAW FIRM SEEKS AN ASSOCIATE ATTORNEY with 1-5 years' experience for insurance defense practice, working primarily out of the firm's Norman office. Salary commensurate with experience. Insurance and benefits available. Please send resume, writing sample, salary requirements and references to "Box NN," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

VERY ESTABLISHED FIRM PRACTICING IN ROGERS, TULSA AND OTHER NORTHEASTERN COUNTIES SEEKING TO ADD ATTORNEY. Heavy litigation and trial practice opportunity. We offer competitive pay and health benefits. Please submit resumé and writing sample to "Box B," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152 by May 18.

POSITIONS AVAILABLE

OKC FIRM SEEKING FAMILY LAW ATTORNEY. Seeking attorney with 5+ years' experience for small OKC firm. Primary areas of practice: family and estate law. Compensation DOE. Email resume to resjudicata okc@gmail.com.

THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL IS CURRENTLY SEEKING TWO full-time legal assistants. One to serve as opinion coordinator for our Executive Division and the other as a paralegal in our Solicitor General Division. Each position requires completion of a paralegal program. Responsibilities include assisting attorneys with research, legal analysis and writing. The Office of the Attorney General is an Equal Opportunity Employer and all employees are "at will." Please send resumes to resumes@oag.ok.gov and indicate which particular position you are applying for in the subject line of the email, or visit www.oag.ok.gov for more information.

THE CIVIL DIVISION OF THE TULSA COUNTY DISTRICT ATTORNEY'S OFFICE is seeking applicants for an assistant district attorney with 0-2 years of experience. This position includes advising and representing county officials in various matters regarding all aspects of county government. Qualified applicants must have a J.D. degree from an accredited school of law and be admitted to the practice of law in the state of Oklahoma. Candidates for the July 2018 bar examination will be considered. Excellent research and writing skills are required. Excellent state benefits. Send cover letter, resume, professional references and a recent writing sample to gmalone@tulsacounty.org.

NORMAN BASED FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401K matching program. No tax experience necessary. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

THE OKLAHOMA TAX COMMISSION, LEGAL DIVISION is seeking an attorney for an opening in its Oklahoma City office. Applicants must be licensed to practice law in Oklahoma. Preference will be given to candidates with administrative hearing and/or litigation experience but all applicants will be considered. Submit resume and writing sample to Elizabeth Field, Deputy General Counsel, 100 N. Broadway Avenue, Suite 1500, Oklahoma City, OK 73102. The OTC is an equal opportunity employer.

POSITIONS AVAILABLE

SEEKING ASSISTANT DISTRICT ATTORNEY. Assistant district attorneys are the state of Oklahoma's prosecuting attorneys. They perform a wide array of functions in the field of criminal prosecution and are one of the central instruments in maintaining safety in the community. Some of the job functions include reviewing police reports for criminal charges, speaking to and meeting with victims, conducting court proceedings at all stages of the criminal process, researching and writing legal motions and arguing cases in front of a jury. Requirements: must possess excellent research and writing abilities; must demonstrate strong oral advocacy skills; must be able to thrive in fast-paced office where you will be given much discretion in individual situations; must have the ability to effectively interact with victims, family members of victims and witnesses as well as effectively work with a large office of co-workers and outside agencies, such as police department and social service agencies; must possess a strong work ethic coupled with the highest personal integrity; must pass a criminal background check. This is a full-time position; beginning at $42,000 annually with full State of Oklahoma benefits, including generous monthly allowance for purchasing health coverage; paid sick leave and vacation earned monthly, combined 30 days per year to start. Ten paid holidays. For consideration send cover letter, resume, references and recent writing sample to gmalone@tulsacounty.org.

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BASIC BANKRUPTCY SEMINAR

FRIDAY, MAY 4, 9 A.M. - 2:50 P.M.

6/0

Oklahoma Bar Center - Live Webcast Available

Join us by leaping into the law of Bankruptcy.

Learn the basics of Bankruptcy Law, case administration, how to prepare a case for filing and your client's discharge and more.

Early registration by April 27, 2018 is $150.00. Registration received after April 27, 2018 is $175.00 and walk-ins are $200.00. Registration includes continental breakfast and lunch. To receive a $10 discount on in-person programs register online at www.okbar.org/members/CLE. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 (late fees apply) for the in-person program and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

PROGRAM PLANNER:

William Mark Bonney,
Chapter 13 Trustee,
Eastern District of Oklahoma

Topics & Presenters:

- **Representing the Client**
  Jerry D. Brown, Jerry D. Brown, P.C., OKC
- **It's All in the Schedules**
  Brian Huckabee, Tulsa
- **I've Got the Automatic Stay, Now What?**
  Elaine M. Dowling, Dowling Law Office, OKC
- **Who are the United States Trustees**
  Charles Snyder, Trial Attorney, Office of the U.S. Trustee, OKC
- **Is Chapter 13 the Best Option for My Client?**
  Greggory T. Colpitts, The Colpitts Law Firm, Tulsa
  Linda Ruschenberg, Chapter 13 Trustee for the Northern District of Oklahoma
- **Panel Discussion**
  William Mark Bonney, Jerry D. Brown, Brian Huckabee, Elaine M. Dowling, Charles Snyder, Greggory T. Colpitts, & Linda Ruschenberg

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A GUIDE TO 42 U.S.C. § 1983 PRINCIPLES AND LITIGATION

FRIDAY, APRIL 27, 9 A.M. - 2:50 P.M.

6/0

Oklahoma Bar Center - Live Webcast Available

During this seminar, the most recent cases and principles involving 42 U.S.C. Section 1983 and the litigation of these issues in federal and state court will be discussed. This seminar will be useful for those who are presently Section 1983 litigators as well as those who are interested in getting involved with 1983 cases on both the plaintiff and defense side. The presenters are experienced in federal constitutional issues and litigation.

Early registration by April 20, 2018 is $150.00. Registration received after April 20, 2018 is $175.00 and walk-ins are $200.00. Registration includes continental breakfast and lunch. To receive a $10 discount on in-person programs register online at www.okbar.org/members/CLE. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 for the in-person program and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

PROGRAM PLANNER:

David W. Lee, Riggs, Abney Neal, Turpen, Orbison & Lewis

Topics & Presenters:

- **Recent Developments in 42 U.S.C. § 1983**
  David W. Lee, Riggs, Abney Neal, Turpen, Orbison & Lewis
- **First Amendment Developments in 42 U.S.C. § 1983 Cases**
  Andy Lester, Spencer Fane, LLP
- **Municipal Employment, Due Process, and Official and Individual Liability under 42 U.S.C. § 1983**
  Margaret McMorrow-Love, Love Law Firm
- **Arrest and Search and Seizure Issues in 42 U.S.C. § 1983 Cases**
  W. Brett Behenna, Coyle Law Firm
- **Depositions, Opening and Closing Arguments in a 42 U.S.C. § 1983 Case**
  Melvin C. Hall, Riggs, Abney Neal, Turpen, Orbison & Lewis
- **Education, Teachers, and Student Rights Under 42 U.S.C. § 1983**
  F. Andrew Fugitt, The Center for Education Law, P.C.

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