THE OKLAHOMA BAR
Journal
Volume 89 — No. 12 — 4/28/2018

Court Issue

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with Travis Pickens

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THE OKLAHOMA BAR
Journal

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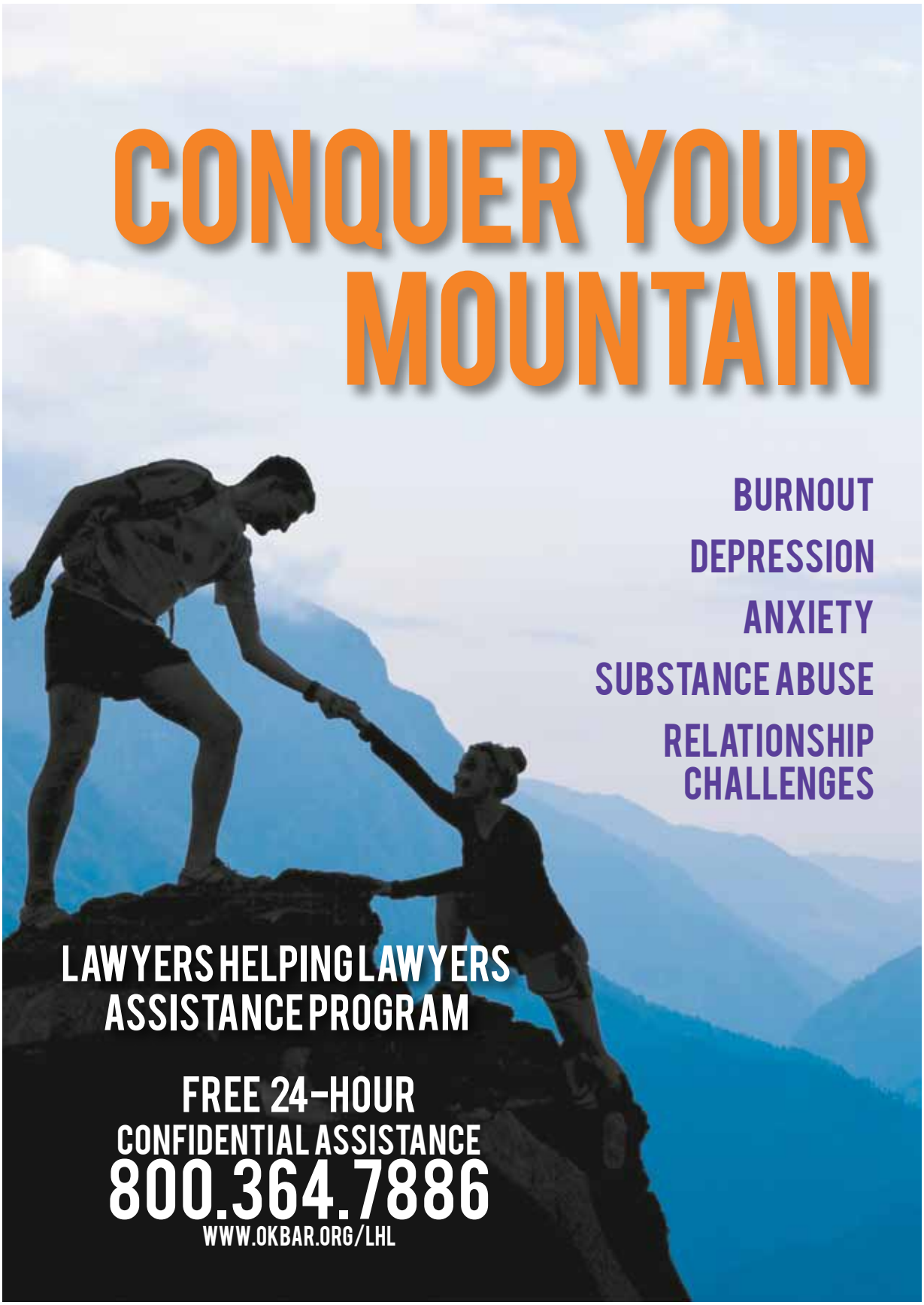
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table of contents

April 28, 2018 • Vol. 89 • No. 12

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Criminal Appeals

Index to Opinions of Court of Civil Appeals

Supreme Court Opinions

Manner and Form of Opinions in the Appellate Courts;
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

2018 OK 28

IN THE MATTER OF THE REINSTATEMENT OF CHARLENE L. BOONE TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

SCBD-6534. April 10, 2018

ORDER

Petitioner Charlene L. Boone voluntarily tendered her resignation from the Oklahoma Bar Association (OBA) on February 23, 2007, which the OBA accepted on March 2, 2007. On June 26, 2017, Boone petitioned this Court for reinstatement. As required by Rule 11.3 of the Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A, a panel of the Professional Responsibility Tribunal held a hearing on Boone's application. The panel, in a 2-1 decision, advised against reinstatement. All three members of the panel agreed that Boone demonstrated by clear and convincing evidence that she had not engaged in the unauthorized practice of law in Oklahoma and that she possesses the requisite competency in the law required for reinstatement without re-examination. The panel split, however, on whether Boone established by clear and convincing evidence that she possesses the good moral character and fitness necessary for reinstatement to the OBA. The OBA, meanwhile, supports Boone's application for reinstatement.

Upon de novo review of the record, we find:

1. Boone has complied with the procedural requirements necessary for reinstatement;

2. Boone has established by clear and convincing evidence that she has not engaged in the unauthorized practice of law during the period following her resignation;

3. Boone has established by clear and convincing evidence that she possesses the competency and learning in the law required for reinstatement without re-examination; and

4. Boone has established by clear and convincing evidence that she possess the good moral character and fitness necessary for reinstatement to the Oklahoma Bar Association.

The petition of Charlene L. Boone for reinstatement to the Oklahoma Bar Association is therefore GRANTED, and her membership shall be reinstated.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10TH DAY OF APRIL, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

2018 OK 29

RE: Suspension of Credentials of Registered Courtroom Interpreters

SCAD-2018-21. April 10, 2018

ORDER

The Oklahoma Board of Examiners of Certified Courtroom Interpreters has recommended to the Supreme Court of the State of Oklahoma the suspension of the credential of the Oklahoma Registered Courtroom Interpreter listed on the attached Exhibit for failure to comply with the annual continuing education requirements for 2017 and certificate renewal requirements for 2018.

Pursuant to 20 O.S., Chapter 23, App. II, Rule 18(c), failure to satisfy the annual renewal requirements on or before February 15 shall result in administrative suspension on that date. Pursuant to 20 O.S., Chapter 23, App.II, Rule 20(e), failure to satisfy the continuing education reporting requirements on or before February 15 shall result in administrative suspension on that date.

IT IS THEREFORE ORDERED that the credentials of each of the interpreters named on the attached Exhibit is hereby suspended effective February 15, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 10th day of APRIL, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Exhibit

Maria Ferri-Haro	Renewal Fee & Continuing Ed
Maria LaMar	Renewal Fee
Mary McCormick	Renewal Fee & Continuing Ed

2018 OK 30

IN RE: AMENDMENT TO THE OKLAHOMA SUPREME COURT RULE, 1.4

S.C.A.D. No. 2018-24. April 10, 2018

ORDER

On April 10th, 2018, the Oklahoma Supreme Court in Conference approved the attached amendments to Oklahoma Supreme Court Rule 1.4, Okla. Stat. tit. 12, ch. 15, app. 1. These amendments shall be immediately effective, and shall apply to all pending cases before this Court or the Court of Civil Appeals.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10th DAY OF April, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

RULE 1.4. SUPREME COURT CLERK, FILINGS, MAILING, COPIES, AND NOTICE TO PARTIES

(a) Supreme Court Clerk.

All briefs, motions, and other papers are to be filed with the Clerk of the Supreme Court. The Clerk of the Supreme Court shall serve ex officio as Clerk of the Court of Civil Appeals. See Rule 1.172.

The Clerk shall not allow an original opinion to be removed from the Office of the Clerk. The Clerk shall not allow an original motion, pleading, or record to be taken from the Office of the Clerk without an order of the Court or one of the Justices thereof.

(b) Filings.

(1) Form. The pages of all filings shall be numbered unless excused by a specific rule herein. The forms provided by Rule 1.301 shall be used when applicable.

(2) Time for Filing. Except for petitions in error, petitions for review, and petitions for certiorari mailed in conformance with Rule 1.4(c), all briefs, motions, petitions, and other papers shall be deemed filed on the date of receipt by the Clerk of the Supreme Court during regular office hours, Monday through Friday between 8:00 A.M. and 5:00 P.M., state holidays excluded. Any documents which are electronically filed after 5:00 P.M. will be deemed filed the next business day.

(c) Petition in Error, Petition for Review of an Order of the Workers' Compensation Court, Petition for Certiorari to the Court of Civil Appeals, Costs, and Mailing.

A petition in error, petition for review, or petition for certiorari may be filed either by delivery to the Clerk of the Supreme Court, or by deposit with the United States Postal Service, or by delivery with a third party commercial carrier, and addressed to the Clerk of the Supreme Court, Oklahoma Judicial Center, 2100 N. Lincoln Boulevard, Suite 4, Oklahoma City, OK, 73105, or Clerk of the Supreme Court, P.O. Box 53126, Oklahoma City, OK 73152. See Rule 1.4(e). When a petition is delivered to the Clerk for filing it must be delivered at the Office of the Clerk of the Supreme Court during regular office hours, Monday through Friday between 8:00 A.M. and 5:00 P.M., state holidays excluded, or as provided in the Rules for Electronic Filing in the Oklahoma Courts.

When a petition is delivered to the Clerk by the United States Postal Service, the date of mailing as shown by the postmark or other proof from the post office, such as the date stamped by the post office upon a certified mail receipt **or post office tracking history**, will be deemed to be the date of filing the petition. *Whitehead v. Tulsa Public Schools,* 1998 OK 71, 968 P.2d 1211. When a petition is mailed through the United States Postal Service, a postmark date from a privately

owned postage meter or commercial postage meter label will not suffice as proof of the date of mailing and, in the absence of other proof of date of mailing from the United States Postal Service, a document bearing only such a postmark will be deemed filed upon date of delivery to the Clerk. The Court may require the party or person who mailed a petition to the court to provide proof from the United States Postal Service showing date of mailing. **Online-printed postage from a United States Postal Service-Authorized PC Postage Provider will also not suffice in the absence of other proof of the date of mailing from the United States Postal Service.**

When a petition is delivered to the Clerk by a third-party commercial carrier, the petition must be received by the carrier from the party on or before the last day the petition may be timely filed with the Clerk. The party must require the third-party commercial carrier to deliver the petition to the Supreme Court Clerk within three calendar days. The date the third-party commercial carrier receives the petition for delivery to the Supreme Court Clerk shall be deemed the date of filing with the Clerk when the third-party commercial carrier provides documentation with delivery to the Clerk showing the date the petition was received by the carrier. If the third-party commercial carrier does not provide the date the document was received by the carrier, the Court will require the person who sent the petition to submit a notarized statement or declaration in compliance with 12 O.S. § 426 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time. Documentation of the date a petition is received by a third-party commercial carrier shall be by a document showing the actual date of receipt, and the date of receipt must be affixed or printed on the document by the third-party commercial carrier. A date of receipt on a document that may be affixed or printed thereon by anyone other than a third-party commercial carrier shall not be used as documentation of date of delivery to the carrier for the purposes of Rule 1.4.

The date a petition is mailed or date of receipt by a third-party commercial carrier shall be deemed the date of its filing only when it is mailed or received by the third-party commercial carrier in accordance with this rule, and when it is properly addressed to the Clerk of the Supreme Court and contains sufficient postage. Where a petition is mailed or delivered by third-party commercial carrier following the requirements of this rule, the petition shall not be deemed filed on the date of mailing or receipt by the commercial carrier unless the full amount of the required cost deposit for filing the petition, or properly executed pauper's affidavit, has also been mailed or received by the commercial carrier, conforming to the same requirements for mailing or receipt by the commercial carrier, or such cost deposit or affidavit is actually delivered to the Court Clerk within the time period for perfecting the appellate procedure. *Matter of K.L.F.*, 1994 OK 66, 878 P.2d 1067; Okla.Sup.Ct.R. 1.23.

(d) Mailing by Prisoner.

A prisoner's appeal is commenced on the date that he or she places the petition in error in the prison mailbox for mailing or otherwise delivers it to a prison official for mailing. Proof of the date of the placement of the petition in error in the prison mailbox shall be supplied by affidavit attached to the petition in error. *Woody v. State*, 1992 OK 45, 833 P.2d 257.

(e) Scope of Rule 1.4(c).

Rule 1.4(c) applies to petitions in error in appeals from the District Courts; petitions in error in appeals from the Corporation Commission, and other tribunals, including but not limited to, the Tax Commission, Banking Board, State Banking Commissioner, and the Court of Tax Review; to petitions to review orders of the Workers' Compensation Court in the Supreme Court; to petitions for certiorari to review opinions of the Court of Civil Appeals; to petitions for certiorari to review certified interlocutory orders of the District Courts; and to rehearing petitions to the Court of Civil Appeals as well as to the Supreme Court.

(f) Copies.

The original shall be filed with the following number of copies, unless the Rules for Electronic Filing in the Oklahoma Courts

provide otherwise when a document is electronically filed.

1. Petition in Error - Fourteen copies (Rule 1.23).

2. Response to Petition in Error, - Fourteen copies (Rule 1.25).

3. Amended and Supplemental Petitions in Error - Fourteen copies, (Rule 1.26).

4. Entry of Appearance - Two copies (Rule 1.5).

5. Motions in an appeal - Ten copies (Rule 1.6).

6. Briefs in an appeal - Fourteen copies (Rule 1.10).

7. Waiver of brief - Fourteen copies (Rule 1.10).

8. Record on appeal from summary judgment, etc. - Four copies (Rule 1.36).

9. Rehearing before Supreme Court - Ten copies (Rule 1.13).

10. Rehearing before Court of Civil Appeals - Ten copies (Rule 1.177).

11. Petition for Certiorari to Court of Civil Appeals - Ten copies (Rule 1.179).

12. Answer to Petition for Certiorari to Court of Civil Appeals - Ten copies (Rule 1.179).

13. Reply to Answer to Petition for Certiorari to Court of Civil Appeals - Ten copies (Rule 1.179).

14. Petition to Review Certified Interlocutory Order - Fourteen copies, (Rule 1.52).

15. Response to Petition to Review Certified Interlocutory Order -Fourteen copies, (Rule 1.53).

16. Application to assume original jurisdiction - Fourteen copies (Rule 1.191).

17. Responses and Briefs in an original action - Fourteen copies (Rule 1.191).

18. Appendix in original action - One copy (Rule 1.191).

19. Corrections to filed instruments - Same number of copies as document corrected, (Rule 1.7).

(g) Notice to Parties.

(1) By Parties. Service of all documents filed with the Supreme Court or Court of Civil Appeals shall be made in the manner provided in 12 O.S. § 2005(B), or as provided in the Rules for Electronic Filing in the Oklahoma Courts. Proof of service may be by a certificate of service endorsed on the filing. The Court, a Justice thereof, or a Referee of the Supreme Court may require other methods of service and proof of service.

No brief, motion, petition, application or suggestion will be considered by the Supreme Court or the Court of Civil Appeals without proof of service as required herein, except where the Court determines that notice is not required.

(2) By Clerk.

Orders and notices required to be mailed to parties will be mailed on the date shown by the Clerk's file stamp unless otherwise indicated, and such date will serve as notice of the date of mailing. Notice by the Clerk shall be made to attorney or party pro se at the address shown by the entry of appearance or notice of change of address. See Rule 1.5.

Whenever in any case filed in this Court it shall be made to appear to the Clerk of this Court by the affidavit of an appellant or a petitioner, appellant's agent or attorney, that the appellee or the respondent has no attorney of record, or that appellee is beyond the limits of the state, or that appellee's residence is unknown, so that it is impossible or impracticable to serve citation upon appellee (or respondent) in the ordinary method provided by law, it shall be the duty of the Clerk of this Court, upon the appellant or the petitioner making provision for the payment of the expense thereof, to cause notice of the pendency of such cause to be published once each week for four weeks successively in some newspaper published in the county in which the case was tried.

2018 OK 31

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR COMMISSION APPROVAL OF THE COMPANY'S PLAN TO INSTALL DRY SCRUBBERS AT THE SOONER GENERATING FACILITY: SIERRA CLUB INC. and OKLAHOMA

ENERGY RESULTS LLC., Appellants, v. THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and OKLAHOMA GAS & ELECTRIC COMPANY, Appellees.

No. 115,029; w/115,030. April 24, 2018

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201600059.

Bob Anthony, Chairman; Dana Murphy, Vice Chairman; and Todd Hiett, Commissioner.

¶0 In 2014, Oklahoma Gas & Electric Company sought the Corporation Commission's approval for a capital expenditure to comply with certain environmental regulations. The Commission denied the application pursuant to 17 O.S. 2011 §286(B). Then in 2016, OG&E submitted a similar application, which the Commission granted pursuant to Okla. Const. art. 9, §18 and 17 O.S. 2011 §151 *et seq.* We retained jurisdiction to determine whether res judicata pre-cluded the second application and whether the Commission lacked authority to grant approval outside of 17 O.S. 2011 §286(B). We hold that although res judicata did not preclude the second application, the Commission lacked authority to grant approval outside of §286(B).

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED.

Sanjay Narayan, Kristin Henry, Oakland, California.

Jon Laasch, Edmond, Oklahoma.

Cheryl A. Vaught, Scot A. Conner, David A. Elder, Matthew W. Brockman, Jacquelyn L. Dill, Oklahoma City, Oklahoma, for Appellants.

Robert G. McCampbell, Travis V. Jett, Kimber L. Shoop, Robert J. Campbell, Jr., Oklahoma City, Oklahoma, for Appellees.

KAUGER, J.:

¶1 This case involves an order of the Oklahoma Corporation Commission that granted Oklahoma Gas & Electric Company pre-approval to install pollution-control devices at one of its power plants. The order raises two issues: 1) whether res judicata precluded the Commission from pre-approving OG&E's capital expenditure; and 2) whether the Commission could grant pre-approval under Okla. Const. art. 9, §18[1] and 17 O.S. 2011 §151 *et seq.* rather than 17 O.S. 2011 §286(B).

¶2 We hold that although res judicata did not preclude the Commission from pre-approving the expenditure, it lacked authority outside of 17 O.S. 2011 §286(B)[2] to do so.

FACTS

¶3 Pursuant to the Clean Air Act and other federal statutes,[3] the United States Environmental Protection Agency set certain emission limits that affect coal and natural gas facilities operated by Oklahoma Gas & Electric Company ("OG&E"). These emission requirements must be met by January 4, 2019, and OG&E consequently prepared an environmental compliance plan.[4] The plan involved a rate base proposal to add 1.1 billion dollars for a number of construction projects at various OG&E facilities and included the installation of "dry scrubbers"[5] at the Sooner Power Plant.

¶4 On August 6, 2014, OG&E submitted an application to the Oklahoma Corporation Commission (the "Commission") seeking pre-approval of the environmental compliance plan and a recovery rider to recoup its expenditures through rate adjustments.[6] The Commission denied this application because OG&E failed to demonstrate that its plan would be fair, reasonable, and non-prejudicial to ratepayers.[7] The Commission noted that OG&E failed to consider alternative energy sources such as wind and electric power. It also took issue with the fact that future environmental regulations had been ignored. Concluding that OG&E failed to demonstrate the financial benefit of its plan over potential alternatives, the Commission denied authorization. OG&E moved to modify the order, requesting that the projects be approved without a recovery in rates until the reasonableness of the costs could be determined in a later proceeding. The Commission declined to modify its final order.

¶5 In the 2014 application, OG&E sought the Commission's authorization under 17 O.S. 2011 §286(B).[8] Section 286(b) provides that an electric utility may seek the Commission's approval to make capital expenditures on equipment that is necessary to comply with environmental regulations. If the Commission approves the plan, the purchased equipment is presumed used and useful and the utility may

adjust its rates to recover the costs of the expenditure.

¶6 After OG&E's first application was denied, it filed a second application with the Commission on February 6, 2016.[9] The 2016 application involved only installation of the dry scrubbers with projected costs of roughly 490 million dollars. OG&E sought approval of the decision to install the scrubbers, but did not seek a determination on the reasonableness of cost recovery. It explicitly stated that any cost recovery would be addressed in a later proceeding.[10] The final order entered by the Commission, which is presently at issue, approved OG&E's decision to install the scrubbers. The Commission found that the decision "[was] – no more or no less – reasonable."[11]

¶7 Unlike the 2014 application, which sought approval under 17 O.S. 2011 §286(B), the 2016 application sought approval under Okla. Const. art. 9, §18[12] and 17 O.S. 2011 §§151 *et seq.*[13] The Oklahoma Constitution, art. 9, §18 grants the Commission general authority to supervise, regulate, and control transmission companies like OG&E. It further grants the Commission authority to promulgate and enforce rules, regulations, and requirements. Title 17 O.S. 2011 §152 similarly provides that the Commission "shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations." In its final order, the Commission concluded that while pre-approval under §286(B) raises issues about cost recovery, pre-approval under Okla. Const. art. 9, §18 and 17 O.S. 2011 §152 does not.[14]

¶8 Seeking review of the Commission's order pre-approving installation of the scrubbers, Oklahoma Energy Results, LLC., and Sierra Club, Inc. ("Appellants"), filed a Petitioner in Error. This Court retained jurisdiction and now vacates the Commission's order.[15]

STANDARD OF REVIEW

¶9 The Oklahoma Constitution, art. 9, §20 grants this Court the power to review decisions of the Commission.[16] It envisions two standards of review. When a "constitutional question is implicated," a *de novo* standard is applied.[17] In all other appeals, a more deferential standard is applied, and we "determin[e] whether the Commission adequately performed its duty under federal and state law and whether the Commission's findings are supported by substantial evidence."[18] Because the Commission granted pre-approval pursuant to Okla. Const. art. 9, §18, we review its decision *de novo*.

I.

Res Judicata Did Not Preclude The Commission From Pre-Approving OG&E's Capital Expenditure.

¶10 Both the 2014 and 2016 applications sought the Commission's approval to install the dry scrubbers. The Appellants have consequently argued that the second order was barred under the doctrines of claim and issue preclusion, or res judicata. We disagree.

¶11 The Commission may exercise legislative, judicial, or executive power.[19] When it exercises judicial power, the Commission is functionally a court of record, and judicial doctrines such as res judicata are applicable.[20] When it exercises legislative power, however, res judicata is not applicable.[21] Findings of fact or rules of law stated in a legislative proceeding have no preclusive effect.[22] For example, in Chicago, R.I. & P.R. Co. v. State, 1950 OK 297, ¶1 225 P.2d 363, the Commission issued a final order denying an application that sought to establish a grade crossing over a railroad track. A similar application was submitted three years later, which the Commission granted. The railway company argued that the first final order was a former adjudication of the same matter before the Commission and, therefore, preclusive. This Court rejected that argument, holding that "[t]he doctrine of res judicata is not recognized in proceedings of this character before the Corporation Commission."[23]

¶12 Whether res judicata is applicable in the present case thus turns on whether the Commission was exercising judicial or legislative power when it considered OG&E's applications.

¶13 A proceeding is "judicial" if it "investigates, declares, and enforces liabilities as they stand on present and past facts and under laws supposed already to exist."[24] In Monson v. State ex rel. Oklahoma Corp. Comm'n, 1983 OK 115, ¶¶ 2, 6, 673 P.2d 839, the Commission was exercising judicial power when it granted an application that allowed a drilling company to dispose of salt water by injecting it into a well located near the appellant-landowner's property. It was a judicial proceeding because the Commission heard evidence and decided an issue which resolved a dispute between private parties. Also, in Hair v. Oklahoma Corp.

Comm'n, 1987 OK 50, ¶ 26, 740 P.2d 134, the Commission was exercising judicial power when it determined the effective date of a previous order that established drilling units for the production of natural gas.

¶14 A proceeding is legislative, conversely, if it "looks to the future and changes existing conditions by making a new rule to be applied thereafter."[25] A ratemaking hearing, for example, is always a legislative proceeding because it establishes a rule for the future.[26] Consider also Cox Oklahoma Telecom, LLC, v. State ex rel. Oklahoma Corp. Comm'n, 2007 OK 55, ¶ 2, 164 P.3d 150, where Southwestern Bell Telephone asked the Commission to reclassify certain retail communication services as "competitive." Such a reclassification would affect whether the prices for those services could be changed without Commission approval. This Court found the proceeding to be legislative in nature because rather than reconstructing past events, the Commission was establishing a rule to guide future decision-making. While this was "not a ratemaking proceeding per se," it was closely related to a ratemaking proceeding.[27] Approving the application allowed Southwestern Bell to determine certain rates in the future with only minimal oversight. This close relation to ratemaking was evidence of the proceeding's legislative character.

¶15 Here, the Commission was exercising legislative power, and therefore res judicata is not applicable. Rather than enforcing an obligation, it was considering a change to existing conditions. The act of approving or denying OG&E's applications was more akin to making a rule than imposing liability. The Commission was not investigating past events in order to resolve a private dispute between the parties, but was instead looking to the future and considering an order that would be applied prospectively. Additionally, OG&E initially sought approval under 17 O.S. 2011 §286(B), which would allow it to make rate adjustments and recover the costs of the expenditure. The 2014 application specifically included a cost recovery rider, which would have caused rates to increase. As in Cox Oklahoma Telecom, this was not a ratemaking proceeding per se, but its relation to a ratemaking proceeding does provide support for its legislative character.

¶16 Moreover, even if res judicata were applicable, it still would not have precluded the second application because different issues were addressed. Claim preclusion prevents parties (or their privies) from relitigating a claim that "either w[as] or could have been litigated in a prior action which resulted in a prior judgment on the merits."[28] Issue preclusion prevents parties (or their privies) from relitigating an issue of fact or law that was "necessary to" and "determined by a valid and final judgment."[29] It is applicable only when the party to be precluded had a "full and fair opportunity" to litigate the issue.[30]

¶17 The 2014 and 2016 applications addressed different issues. The 2014 application involved roughly 1.1 billion dollars for a number of construction projects at a number of different facilities. The 2016 application, on the other hand, involved roughly 490 million dollars for only the installation of the dry scrubbers at the Sooner facility. Because the 2014 application included a cost recovery rider, the Commission was considering the fairness of the project to ratepayers. The 2016 application, however, specifically disclaimed any cost recovery until a later proceeding and the Commission was considering only whether installation of the scrubbers was "reasonable." Finally, the 2014 application sought approval under the specific provision of 17 O.S. 2011 §286(B), while the 2016 application sought approval under the Commission's general authority to oversee utilities found in Okla. Const. art. 9, §18 and 17 O.S. 2011 §152.[31]

¶18 Because the proceedings before the Commission were legislative in nature, and because the applications raised different issues, res judicata is inapplicable.

II.

The Commission Lacked the Authority To Approve OG&E's Capital Expenditure Outside of 17 O.S. 2011 §286(B).

¶19 Utilities are given the privilege of providing services on an essentially monopolistic basis and are therefore subject to regulation by the Commission.[32] This regulatory authority was initially created and outlined in the Oklahoma Constitution[33] and its scope has been further defined by statute.[34] The resolution of the present issue involves the interplay between the broad grant of constitutional authority and a specific statute that governs pre-approval of capital expenditures.

A. The Applicable Constitutional and Statutory Authority

¶20 In the 2014 application, OG&E sought approval of the environmental compliance plan under 17 O.S. 2011 §286(B). It provides, in pertinent part:

> An electric utility subject to rate regulation by the Corporation Commission may file an application seeking Commission authorization of a plan by the utility to make capital expenditures for equipment or facilities necessary to comply with the federal Clean Air Act . . . .[35]

Section 286(B) was enacted in 2005 and currently exists as amended in 2008. It allows electric utilities, like OG&E, to seek pre-approval of capital expenditures to comply with environmental regulations.[36] Prior to the enactment of §286(B), a utility would construct or purchase the necessary equipment and then seek approval after the fact in a rate case.[37] Section 286(B) allows a utility to seek pre-approval, thus avoiding the risk of a large capital expenditure prior to initiating a cost recovery proceeding.

¶21 In the 2016 application, conversely, OG&E sought approval of the scrubbers under Okla. Const. art. 9, §18 and 17 O.S. 2011 §151 *et seq*. The Oklahoma Constitution, art. 9, §18 provides in pertinent part:

> The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State . . . and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations . . . . The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws.[38]

Section 18 grants the Commission broad authority to supervise, regulate, and control public utilities. Specifically, the Commission can establish rates, charges, rules, and regulations. Section 18 then clarifies that while the Commission's authority to establish rates and charges is paramount, its authority to establish any other rule or regulation is subject to the legislature's superior authority as prescribed by statute.

¶22 Title 17 O.S. 2011 §151 *et seq*. similarly involves a broad grant of authority. Section 151 defines "public utility," and the subsequent sections then outline the Commission's jurisdiction and authority over public utilities. Section 152(A) provides:

> The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted.

Section 152 was enacted in 1913 and currently exists as amended in 1994. It broadly grants the Commission supervisory authority over public utilities and grants it the power to establish rates, rules, requirements, and regulations. The Commission's power to regulate under §152 "is not unfettered," but is instead limited by the Constitution and must be exercised within the confines of other statutes.[39] When interpreting §152, this Court will find that the Commission has "only those additional duties that would be consistent with and within the purview of its constitutional authority."[40]

¶23 Appellants have argued that the Commission exceeded its power when it granted OG&E pre-approval to install the scrubbers based on its "general authority."[41] We agree.

B. Title 17 O.S. 2011 §286(B) Provides The Only Authority For Pre-Approval Of Capital Expenditures To Comply With Environmental Regulation.

¶24 The legislature created a specific procedure by which a utility can seek pre-approval of a capital expenditure to comply with environmental regulation: 17 O.S. 2011 §286(B). Unsurprisingly, when OG&E first sought pre-approval for a capital expenditure to comply the Clean Air Act, it did so pursuant to §286(B). It was not until this application was denied that an alternative source was considered.

¶25 As a general rule, the Commission lacks authority to grant pre-approval of an expenditure. Prior to the enactment of §286(B) in 2005, this Court held so repeatedly. It made clear that the Commission's authority "does not include the power to approve or disapprove contracts about to be entered into nor to approve or veto the expenditures proposed."[42] It reiterated that the Commission's "powers are not to be exercised except for the purpose of determining the fair and reasonable effect of acts already performed."[43]

¶26 The Commission has general authority to address the fairness of a completed project, not a future one. For example, in Public Service Company of Oklahoma v. Oklahoma Corporation Commission, 1983 OK 124, ¶ 1, 688 P.2d 1274, Public Service Company of Oklahoma (PSO) applied to the Commission for a rate increase. One issue on appeal was whether a power-generating facility that was under construction but not yet completed could be included in the rate base. The Commission said it would not include that facility in the rate base unless it had approved the construction plans. This Court held that "the Commission has no power to demand prior approval of construction plans for a new plant, but once it is built, the Commission is empowered to ascertain its effect upon the public rates."[44] This case is, of course, distinguishable from the present one in that OG&E is now seeking prior approval rather than the Commission demanding it. Nevertheless, just because OG&E has asked does not mean that the Commission can give. Again, it cannot "approve or veto the expenditures proposed."[45]

¶27 The legislature, however, has created a limited exception to this general rule. It explicitly allows utilities to seek pre-approval under §286(B). And two principles of statutory construction support the proposition that the Commission does not have the authority to grant pre-approval outside of §286(B). First, a statute cannot be interpreted as superfluous.[46] If the Commission has the ability to grant pre-approval outside of §286(B), then it had the ability to grant pre-approval prior to the enactment of §286(B). If the Commission had the ability to grant pre-approval prior to the enactment of §286(B), then §286(B) was not needed to confer the power to pre-approve. Statutes, though, must be construed so as to not render them superfluous.[47] Thus, the Commission does not have the ability to grant pre-approval outside of §286(B).

¶28 The second relevant principle of statutory construction is that where two statutes address the same subject, one specific and one general, the specific statute will control over the general.[48] Title 17 O.S. 2011 §152 broadly grants the Commission supervisory authority over public utilities and grants it the power to establish rates, rules, requirements, and regulations.[49] Specifically, 17 O.S. 2011 §286(B) addresses how the Commission exercises that supervisory authority in the context of pre-approval. Section 286(B), the specific statute, thus controls how the Commission can grant pre-approval.

¶29 Finally, the Commission's decision to grant pre-approval in a way completely untethered from the project's effect on ratepayers further calls its order into question. The powers of the Commission over utilities "are limited to an investigation of the[ir] acts to determine whether or not they have a reasonable and fair effect upon the rights of the public," and it must act to avoid an "unfair or prejudicial effect upon the public rights."[50] In proceedings before the Commission, the interests of the public "must be considered."[51]

¶30 In the first proceeding under §286(B), the Commission did so. In the second proceeding, however, the Commission determined only that the installation of the scrubbers would be "reasonable." Any fairness to ratepayers (or lack thereof) was to be addressed at a later cost recovery proceeding. OG&E consequently received pre-approval for a project costing approximately half a billion dollars without its effect on ratepayers being considered. More pointedly, when a similar project was considered in the first proceeding, the Commission found that it would not be fair to ratepayers.[52] The legislature saw fit in §286(B) to link pre-approval with the project's fairness to ratepayers. Neither OG&E nor the Commission has provided any cogent argument demonstrating that pre-approval can be detached from fairness.

CONCLUSION

¶31 This decision does not leave OG&E without recourse. To the extent that it wants to continue with installation of the scrubbers, it can initiate a standard ratemaking proceeding under 17 O.S. 2011 §152 after the fact. Pre-approval, however, of capital expenditures to comply with environmental regulation must

occur pursuant to 17 O.S. 2011 §286(B). Because the Commission granted pre-approval for such an expenditure outside of §286(B), it erred. Although res judicata did not preclude the Commission from pre-approving the expenditure, it lacked the authority to do so. Consequently, its order is vacated.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED

COMBS, C.J., KAUGER, EDMONDSON, COLBERT, REIF, JJ., concur.

GURICH, V.C.J., concurs in result.

WINCHESTER, J., dissents (by separate writing).

WYRICK, J., recused.

DARBY, J., not voting.

1. Okla. Const. art. 9, §18 provides in pertinent part:
> The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void.
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> *****
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> The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.
2. Title 17 O.S. 2011 §286(B) provides:
> An electric utility subject to rate regulation by the Corporation Commission may file an application seeking Commission authorization of a plan by the utility to make capital expenditures for equipment or facilities necessary to comply with the federal Clean Air Act (CAA), the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Emergency Planning & Community Right-to-Know Act (EPCRA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Occupational Safety and Health Act (OSHA), the Oil Pollution Act (OPA), the Pollution Prevention Act (PPA), the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), the Toxic Substances Control Act (TSCA), all as amended, and, as the Commission may deem appropriate, federal, state, local or tribal environmental requirements which apply to generation facilities. If approved by the Commission, after notice and hearing, the equipment or facilities specified in the approved utility plan are conclusively presumed used and useful. The utility may elect to periodically adjust its rates to recover the costs of the expenditures. The utility shall file a request for a review of its rates pursuant to Section 152 of this title no more than twenty-four (24) months after the utility begins recovering the costs through a periodic rate adjustment mechanism and no more than twenty-four (24) months after the utility begins recovering the costs through any subsequent periodic rate adjustment mechanism. Provided further, that a periodic rate adjustment or adjustments are not intended to prevent a utility from seeking cost recovery of capital expenditures as otherwise may be authorized by the Commission. However, the reasonableness of the costs to be recovered by the utility shall be subject to Commission review and approval. The Commission shall promulgate rules to implement the provisions of this subsection, such rules to be transmitted to the Legislature on or before April 1, 2007.
3. 42 U.S.C. §§7491-92; 76 Fed. Reg. 81,727.
4. OG&E and the Oklahoma Attorney General initially fought implementation in federal court. Oklahoma v. U.S. E.P.A., 723 F.3d 1201 (10th Cir. 2013). The challenges ended when the United States Supreme Court denied a writ of certiorari. Oklahoma v. U.S. E.P.A., 134 S. Ct. 2662 (2014).
5. Sierra Club v. Costle, 657 F.2d 298, 324–25 (D.C. Cir. 1981), describes a dry scrubber as an air pollution-control device that:
> removes sulfur dioxide in two stages which incorporate the use of a spray dryer and a baghouse. In this system a spray dryer (similar to a wet scrubber) is used with lime, soda ash, or other reagents to scrub sulfur dioxide from flue gases. Unlike wet scrubbing systems, since the flue gas leaving the spray dryer is "hot" (150-180o F) due to the minimal use of water in the spray dryer (by design), no additional reheating of the exhaust plume is required. Following the spray dryer, a baghouse is used to collect all particulate matter (including sulfur dioxide reactants).
6. Cause No. PUD 201400229.
7. Order No. 286 (Dec. 2, 2015).
8. Title 17 O.S. 2011 §286(B), see note 2, supra.
9. Cause No. PUD 201600059.
10. Application No. 139.
11. Cause No. PUD 201600059, Order No. 652208.
12. Okla. Const. art. 9, §18, see note 1, supra.
13. Chapter 8 – Water, Heat, Light, and Power Companies.
14. Cause No. PUD 201400229, Order 652208.
15. On 12-22-2016, the Appellants moved for oral argument. This motion is denied.
16. Okla. Const. art. 9, §20 provides in pertinent part:
> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States of the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.
17. Cox Oklahoma Telecom, LLC, v. State ex rel. Oklahoma Corp. Comm'n, 2007 OK 55, ¶ 9, n.17, 164 P.3d 150 ("We review *de novo* the Commission's decision to treat this proceeding as legislative rather than judicial because a constitutional question is implicated.").
18. Okla. Const. art. 9, §20, see note 15, supra; Cox Oklahoma Telecom, LLC, 2007 OK 55, ¶ 9, n.16.
19. Monson v. State ex rel. Oklahoma Corp. Comm'n, 1983 OK 115, ¶ 4, 673 P.2d 839; Cont'l Tel. Co. of Oklahoma, Inc. v. Hunter, 1979 OK 14, ¶ 5, 590 P.2d 667.
20. Monson, 1983 OK 115, ¶ 4.
21. Chicago, R.I. & P.R. Co. v. State, 1950 OK 297, ¶ 21, 225 P.2d 363; Cmty. Nat. Gas Co. v. Corp. Comm'n of Okla., 1938 OK 51, ¶ 15, 76 P.2d 393.
22. Cmty. Nat. Gas Co., 1938 OK 51, ¶ 15, 76 P.2d 393.
23. Chicago, R.I. & P.R. Co. v. 1950 OK 297, ¶ 21.
24. Prentis v. Atlantic Coast Line Company, 211 U.S. 210, 226 (1908). This Court has adopted the United States Supreme Court's definition of "legislative" and "judicial" proceedings. Cox Oklahoma Telecom,

LLC, 2007 OK 55, ¶ 11; Southwestern Bell Telephone Co. v. Okla. Corp. Comm'n, 1994 OK 38, ¶ 9, 873 P.2d 1001.

25. Prentis, 211 U.S. at 226; Cox Oklahoma Telecom, LLC, 2007 OK 55, ¶ 11.

26. Wiley v. Okla. Natural Gas Co., 1967 OK 152, ¶ 3, 429 P.2d 957; Turpen v. Okla. Corp. Comm'n, 1988 OK 126, ¶ 76, 769 P.2d 1309.

27. Cox Oklahoma Telecom, LLC, 2007 OK 55, ¶ 15.

28. State ex rel. Tal v. City of Oklahoma City, 2002 OK 97, ¶ 20, 61 P.3d 234; Deloney v. Downey, 1997 OK 102, ¶ 17, 944 P.2d 312.

29. Carris v. John R. Thomas & Associates, P.C., 1995 OK 33, ¶ 10, 896 P.2d 522; Salazar v. City of Oklahoma City, 1999 OK 20, ¶ 10, 976 P.2d 1056.

30. Salazar, 1999 OK 20, ¶ 10.

31. The two proceedings presented different issues. Indeed, Appellants have alleged error because of these differences. They have argued that the Commission's final order from the second proceeding should be vacated because it failed to consider whether the project was fair to ratepayers and instead considered only whether the project was "reasonable" in the abstract. Determining whether a project is "reasonable" is different than determining whether later recovery would be fair to ratepayers, which is what occurred in the first proceeding. Similarly, Appellants have argued that the order should be vacated because the Commission granted approval under its general constitutional authority rather than under §286(B), which was the applicable standard in the first proceeding.

32. Data Transmission Co. v. Corp. Comm'n, 1976 OK 148, ¶ 14, 561 P.2d 50.

33. Okla. Const. art. 9, §§15–35.

34. Title 17: Corporation Commission.

35. 17 O.S. 2011 §286(B), see note 2, supra.

36. Okla. Admin. Code 165:35-38-4.

37. Cause no. PUD 201400229, Order No. 647346.

38. Okla. Const. art. 9, §18, see note 1, supra.

39. Pub. Serv. Co. of Oklahoma v. State ex rel. Corp. Comm'n ex rel. Loving, 1996 OK 43, ¶ 21, 918 P.2d 733.

40. Oklahoma Gas & Elec. Co. v. Corp. Comm'n, 1975 OK 15, ¶ 28, 543 P.2d 546.

41. Cause No. PUD 201600059, Order No. 652208.

42. Lone Star Gas Co. v. Corp. Comm'n of Okla., 1934 OK 396, ¶ 23, 39 P.2d 547 (emphasis supplied).

43. Lone Star Gas Co., 1934 OK 396 (in the syllabus by the Court) (emphasis supplied).

44. Pub. Serv. Co. of Oklahoma, 1983 OK 124, ¶ 11.

45. Lone Star Gas Co., 1934 OK 396, ¶ 23.

46. Globe Life & Acc. Ins. Co. v. Oklahoma Tax Comm'n, 1996 OK 39, ¶ 15, 913 P.2d 1322; Anderson v. O'Donoghue, 1983 OK 76, ¶ 9, 677 P.2d 648.

47. Globe Life & Acc. Ins. Co., 1996 OK 39, ¶ 15; Anderson, 1983 OK 76, ¶ 9.

48. Bruner v. Timberlane Manor Ltd. P'ship, 2006 OK 90, ¶ 25, 155 P.3d 16; Trimble v. City of Moore, 1991 OK 97, ¶ 30, 818 P.2d 889.

49. Title 17 O.S. 2011 §152, see ¶ 22, supra.

50. Lone Star Gas Co., 1934 OK 396, ¶ 23, 39 P.2d 547.

51. Cmty. Nat. Gas Co., 1938 OK 51, ¶ 23, 76 P.2d 393.

52. Order No. 286 (Dec. 2, 2015).

WINCHESTER, J., dissenting:

¶1 As noted by the majority opinion, the Oklahoma Constitution provides the Corporation Commission with broad authority to regulate and oversee public utilities. Okla. Const. art. 9, § 18. *See also* 17 O.S.2011, § 152 ("The Commission shall have general supervision over all public utilities..."). Nevertheless, today's majority opinion dials back this authority and effectively reduces the Commission's general supervision.

¶2 The majority opinion misinterprets § 286(B) as providing the only authority for pre-approval of a capital expenditure to comply with an environmental regulation. Yet, the plain text of § 286(B) indicates that it is not mandatory for a public utility to utilize this statute when purchasing equipment to meet environmental requirements. The statute specifically gives a utility the *option* of applying for early cost recovery by providing: "An electric utility... ***may*** file an application seeking Commission authorization of a plan by the utility to make capital expenditures for equipment or facilities necessary to comply" with certain environmental requirements. 17 O.S. 2011, § 286(B) (emphasis added).

¶3 Here, OG&E did not seek, nor did the Commission approve, any rate increase or cost recovery from rate payers. OG&E formulated its own plan to install the scrubbers and voluntarily submitted the plan to the Commission for a reasonableness determination. The Commission specifically indicated that its finding of reasonableness would "not result in an automatic right to recover costs or a determination of used and useful." There is no conflict between the Commission's actions under its general authority and a § 286(B) pre-approval of costs. The canon of statutory construction which requires a specific statute to control over a general statute only applies if the two statutes conflict with one another and that is not the case herein. *Humphries v. Lewis*, 2003 OK 12, n.4, 67 P.3d 333; *Rogers v. QuikTrip*, 2010 OK 3, ¶ 13, 230 P.3d 853. Accordingly, I respectfully dissent.

2018 OK 32

TARACORP, LTD., TARA BARLEAN, and KELLY BARLEAN, Plaintiffs/Appellants, v. JEFF DAILEY and A.J.'s Bargain World, d/b/a BARGAIN WORLD, Defendants/Appellees.

No. 115,383. April 24, 2018

APPEAL FROM THE COURT OF CIVIL APPEALS, DIVISION III

Honorable J. Wallace Coppedge, Trial Judge

¶0 On June 4, 2007, the plaintiffs/appellants, Taracorp and Tara and Kelly Barlean, (collectively Taracorp) obtained a default judgment against the defendants/appellees, Jeff Dailey and AJ's Bargain World in Colorado. Three days later, Taracorp sought to collect on the judgment by filing a lien on the real estate of the judgment debtors in Pottawatomie County, Oklahoma. Taracorp abandoned the Pottawatomie case, but refiled the Colorado judgment in Marshall County, Oklahoma, nearly nine years later

in 2016. The judgment debtors sought to quash the Colorado judgment because Oklahoma's five year limitation for enforcing judgments had lapsed. The trial court agreed, and quashed the Colorado judgment. Taracorp appealed, and the Court of Civil Appeals vacated the trial court's ruling and remanded for further proceedings. We granted certiorari to address whether the Colorado judgment, which is enforceable in Colorado for twenty years after the judgment, is also enforceable in Oklahoma by re-filing it a second time in Oklahoma, after Oklahoma's five year limitation period for enforcing judgments lapsed. We hold that when a judgment creditor seeks to enforce a Colorado judgment a second time in Oklahoma, after Oklahoma's limitation period has lapsed on the original judgment, the underlying original Colorado judgment which is enforceable for twenty years may be enforced in Oklahoma.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Reynolds Ridings, Jason McCart, Oklahoma City, Oklahoma, for Plaintiffs/Appellants.

Jeffrey S. Landgraf, Madill, Oklahoma, for Defendants/Appellees.

KAUGER, J.:

¶1 We retained this cause to address the dispositive issue of whether a Colorado judgment, which is enforceable in Colorado for twenty years after the judgment is entered, is also enforceable in Oklahoma when the first attempt is abandoned and it is re-filed after Oklahoma's five year limitation period lapsed. We hold that when a judgment creditor seeks to enforce a Colorado judgment a second time in Oklahoma, after Oklahoma's limitation period has lapsed on the original judgment, the underlying original Colorado judgment which is enforceable for twenty years may be enforced in Oklahoma.

FACTS

¶2 On June 4, 2007, the District Court of Logan County, Colorado, granted the plaintiffs/appellants, Taracorp, LTD., and Tara and Kelly Barlean (collectively, Taracorp) a default judgment against the defendants/appellees, Jeff Dailey d/b/a A.J.'s Bargain World (collectively Dailey). The lawsuit apparently stemmed from Taracorp's allegations that Dailey breached a fiduciary duty and defrauded Taracorp by withholding inventory, skimming inventory, and wrongfully converting money given to them from Taracorp to broker inventory of salvaged merchandise. The Colorado Court awarded Taracorp $76,200.00 in damages, $76,200.00 in exemplary damages, and costs of $391.00 which totaled $152,791.00.

¶3 Three days later, on June 7, 2007, Taracorp filed the Colorado judgment in the District Court of Pottawatomie County, Oklahoma, Case No. C-07-659. Taracorp is located in Sterling, Colorado, and Dailey resided in Pottawatomie County, Oklahoma in 2007. The filing sought to impose a lien on real estate of the judgment debtors pursuant to 12 O.S. 2001 §706.[1] On July 27, 2007, Taracorp filed an Ap-plication to Require Judgment Debtor to Answer Assets. A court minute filed September 6, 2007, reflects that a hearing on assets was scheduled, but stricken because neither party appeared. The September 6, 2007, court minute is the last docket entry in that case.

¶4 Approximately nine years later, on May 23, 2016, Taracorp re-filed the 2007 Colorado judgment in the District Court of Marshall County, Oklahoma. Apparently, Dailey, now resides in Marshall County, Oklahoma. On June 8, 2016, Dailey filed a Motion to Quash Filing of Foreign Judgment, arguing that it was not enforceable pursuant to 12 O.S. 2011 §735 because five years had lapsed from the 2007 date when the Colorado judgment was entered.[2] Dailey also relied upon our decision in Drllevich Construction, Inc., v. Stock, 1998 OK 39, 958 P.2d 1277, which provides that an out-of-state judgment is enforceable in Oklahoma when it is filed in Oklahoma.

¶5 Taracorp argues that because Colorado Revised Statutes 13-52-102 allows a judgment entered in a District Court of the State of Colorado to be enforced for up to twenty years after the date of issuance, the motion to quash must be denied.[3] Taracorp also relied on the published Court of Civil Appeals opinion of Yorkshire West Capital, Inc. v. Rodman, 2006 OK CIV APP 152, 149 P.3d 1088 as persuasive authority in support of its argument.[4] Yorkshire held that nothing prevented the re-filing a second time in Oklahoma as long as the foreign judgment remained valid and enforceable in the original state.

¶6 After an August 3, 2016, hearing, the trial court filed an order on August 31, 2016, granting Dailey's motion to quash the Colorado judgment. Taracorp appealed on September 23, 2016, and on July 6, 2017, the Court of Civil Appeals vacated the trial court's order which had quashed the Colorado judgment and remanded the cause for further proceedings. We granted certiorari on December 11, 2017.

¶7 THE COLORADO JUDGMENT IS ENFORCEABLE IN OKLAHOMA AS LONG AS IT IS ENFORCEABLE IN COLORADO.

¶8 Dailey argues that once a domesticated foreign judgment has become unenforceable due to dormancy and the lapse of five years, it cannot become enforceable by merely refiling the same judgment in another Oklahoma district court. Taracorp argues that as long as the Colorado judgment remains valid and enforceable in Colorado, it can be filed in Oklahoma regardless of whether it is only filed once or re-filed a second time.

¶9 The Uniform Enforcement of Foreign Judgments Act (the Act) 12 O.S. 2011 §§719-726, governs judgments issued in another state and then filed in Oklahoma for purposes of execution/collection.[5] The Act provides that such judgments, once filed in Oklahoma, are treated the same as if they were initially issued in Oklahoma.[6] While the Act requires construction to effectuate uniformity and conformity to its general purpose, it does not address re-filing of judgments.[7]

¶10 Initially, we addressed the filing of such judgments in Oklahoma in First of Denver Mortg. Investors v. Riggs, 1984 OK 36, 692 P.2d 1358. Riggs involved a judgment creditor who obtained a money judgment against a judgment debtor in Colorado on Janauary 20, 1977. The judgment creditor filed the Colorado judgment in Oklahoma County, Oklahoma, on October 17, 1977. Subsequently, the judgment debtor made a partial payment and the creditor executed a partial release, but no writ of execution was ever issued on the Oklahoma filing.

¶11 Five years later, the judgment creditor re-filed the Colorado judgment in Oklahoma County, Oklahoma, on December 31, 1982. The judgment debtor sought to quash the judgment, arguing that the re-filing did not revive the judgment, which had been dormant after five years pursuant to Oklahoma's dormancy statute, 12 O.S. 2011 §735.[8] The Riggs Court held that the rendition of judgment in the originating forum state starts the dormancy period running when the Act is brought into play. The Act in Oklahoma gives the foreign judgment the same effect as a judgment of this state. Consequently, the Colorado judgment, filed in Oklahoma, was to be treated as if it were rendered in Oklahoma on the same date it was rendered in Colorado. Under the facts of Riggs, the judgment became dormant in January of 1982.

¶12 Riggs, supra, did not remain the law for long. Five years later, in Drllevich Construction, Inc. v. Stock, 1998 OK 39, 958 P.2d 1277, we overruled Riggs, supra, noting that it was a minority view. Although Drllevich did not involve a second filing attempt in Oklahoma, it did concern a construction company which attempted to enforce a Washington state judgment in Oklahoma nearly ten years after the judgment was entered. The Washington judgment was rendered on November 14, 1985, as a result of an embezzlement case. Nearly ten years later, on July 6, 1995, the judgment debtor was served with a "Notice of Filing of Foreign Judgment" via certified mail.

¶13 In overruling Riggs, supra, we said in ¶10-12:

> ¶10 *Riggs'* approach places its only real emphasis on the judgment's date of rendition in the originating state. Any ability to enforce the judgment in the state of origin plays no role in the ability to register the judgment for enforcement in Oklahoma under *Riggs*. This lack of focus on the original judgment's enforceability is not a universally shared approach. In fact, Oklahoma's position is a minority one.
>
> ¶11 The Uniform Enforcement of Foreign Judgments Act "shall be interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." 12 O.S. 1991 § 726. Oklahoma's minority position is such that it does not achieve the purpose expressly outlined in § 726, "to make uniform the law of those states which enact it." In addition, the current interpretation of the law under *Riggs* provides a framework within which judgment debtors may be able to shield themselves from legitimate judgments, simply by making Oklahoma their home.

> ¶12 We can find nothing in Oklahoma's Uniform Enforcement of Foreign Judgments Act or any other enactments of our Legislature indicating this is a public policy either adopted or encouraged by our state. In an effort to achieve the goals of § 726 and provide a framework within which legitimate judgments may be executed upon in a timely manner, *Riggs'* limited and unwavering focus on the judgment's rendition in the originating state must be reconsidered.

¶14 The Court relied on the Utah Supreme Court's decision in Pan Energy v. Martin, 813 P.2d 1142 (Utah 1991) to illustrate the rationale that foreign judgments should be treated as local judgments once they have been filed with the clerk of a district court. Once filed, the foreign judgment is subject to the same procedures to attack or enforce it as a local judgment. The filing of a foreign judgment creates a new local judgment which is governed by the local statute of limitations. Because the Drllevich construction company registered the November 14, 1985, Washington judgment in Oklahoma on July 6, 1995, within ten years of the original judgment,[9] the Washington judgment was as enforceable as if it had been rendered as an Oklahoma judgment on July 6, 1995.

¶15 Pan Energy, supra, involved a 1982 judgment rendered in Oklahoma and filed in Utah in August of 1987. Pursuant to 12 O.S. 1991 §735,[10] the Oklahoma judgment lapsed after five years. In August of 1987, one month before the Oklahoma judgment became dormant, the plaintiff filed the Oklahoma judgment in Utah. Because the judgment subsequently became unenforceable in Oklahoma, the judgment debtor sought to prevent enforcement in Utah. The Utah Supreme Court held that if a foreign judgment is filed in Utah, and subsequently becomes dormant in the state of rendition, its enforceability in Utah is unaffected.

¶16 While the policies supporting both the Drllevich, supra, and Pan Energy, supra, remain persuasive, neither case is wholly dispositive of this cause. Here, the Colorado judgment was timely filed in Oklahoma in 2007. However, it was abandoned without following any of Oklahoma's or Colorado's renewal statutes, and subsequently re-filed in 2016, after Oklahoma's dormancy period of five years had lapsed, but within Colorado's twenty year dormancy period. Neither Drllevich, supra, nor Pan Energy, supra, address this situation di-rectly. Nor does Watkins v. Conway, 385 U.S. 188, 87 S. Ct. 357, 17 L.Ed.2d 286 (1966), a United States Supreme Court case relied upon by Taracorp.

¶17 In Watkins, the judgment creditor obtained a Florida judgment where the limitation period for domestic judgments was twenty years. Five years and one day later, he sought to enforce the Florida judgment in Georgia where a Georgia statute required that suits on foreign judgments be brought within five years after obtained in their issuing state. The United States Supreme Court held that no full faith and credit issue existed because all the judgment creditor had to do was return to Florida, revive his judgment, and come back to Georgia and file suit within five years. The Court interpreted the Georgia statute as barring suits only if the plaintiff could not revive the judgment in the state originally obtained. Although the facts of Watkins are also not wholly dispositive of this cause because there was no initial filing which was abandoned and then re-filed a second time years later, the rationale remains persuasive.

¶18 When we decided Drllevich, supra, we aligned ourselves with other jurisdictions who were also in the majority view.[11] Some of these jurisdictions and others have since addressed the issue of re-filing, or second filing of the foreign judgments similar to this cause. For example, in Wells Fargo Bank, N.A., v. Kopeman, 226 P.3d 1068 (2010), the Colorado Supreme Court addressed the issue in a cause involving a 1999 Arizona judgment which was timely filed in Colorado. Within three months after filing, the Colorado Court established a judgment lien against real property owned by the judgment debtors in Colorado. Subsequently, the judgment debtors filed for bankruptcy which discharged their debts, but not the judgment lien.

¶19 In January of 2004, one year before the Colorado judgment lien was to expire, the judgment creditor renewed the judgment in Arizona for another five-year period. The Kopeman Court held that the Arizona judgment was enforceable in Colorado. In Worthington v. Miller, 11 Kan.App.2d 396, 727 P.2d 928, a judgment creditor obtained a default judgment against a defendant in Colorado in 1974. When the judgment remained unsatisfied for 10 years, the judgment creditor obtained an order from the Colorado courts, reviving the Colorado judgment in January of 1984. The judgment creditor then pursued enforcement

in Kansas in June of 1984. Because Kansas had a five-year limitation period, the debtor argued that the revival was untimely. The Court disagreed and held that it was timely filed in Kansas, and that it was entitled to full faith and credit.

¶20 Most similar to our facts is Bianchi v. Bank of America, 124 Nev. 472, 186 P.3d 890 (2008). In Bianchi, the judgment creditor obtained a California judgment in 1993, and in 1994, registered the judgment in Nevada as a foreign judgment. However, the creditor failed to take any action on the judgment, and Nevada's six-year limitation period for enforcement of judgments lapsed. Then, in 2002, one year prior to the running of California's ten-year limitation period for the enforcement of judgments, the creditor successfully revived the judgment in California, and then sought again to enforce the renewed judgment in Nevada. The Nevada Supreme Court held that where the underlying judgment rendered by the issuing state is valid and enforceable in the issuing state, it may be filed again in the foreign jurisdiction.

¶21 The cumulative teachings of Drllevich, supra, Watkins, supra, Wells Fargo, supra, Worthington, supra, and Bianchi, supra, instruct that even if the Oklahoma limitation period for enforcement has expired, and the initial attempt at timely enforcing a Colorado judgment has been abandoned, a Colorado judgment creditor may still enforce a domesticated judgment in Oklahoma. The Colorado statute of limitations on domestic judgment is twenty years,[12] thus Taracorp still has ample time to enforce its Colorado judgment because it is still valid and enforceable in the issuing state. This ensures, rather than denies, full faith and credit or equal protection.[13]

CONCLUSION

¶22 The Uniform Enforcement of Foreign Judgments Act (the Act) 12 O.S. 2011 §§719-726, governs judgments issued in another state and then filed in Oklahoma for purposes of execution/collection.[14] The Act provides that such judgments, once filed in Oklahoma, are treated the same as if they were initially issued in Oklahoma.[15] Although the Act does not address re-filing of sister-state judgments, a judgment creditor may enforce a domesticated judgment in Oklahoma. Enforcement may be done, even if Oklahoma's limitation period for enforcement of judgments has run on the original domesticated foreign judgment.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GURICH, V.C.J., KAUGER, WINCHESTER, COLBERT, REIF, WYRICK, JJ., KUEHN, S.J. and KILGORE, S.J., concur.

COMBS, C.J., EDMONDSON, J., disqualified.

KAUGER, J.:

1. The version of 12 O.S. 2001 §706 in effect at the time of the Pottawatomie County filing provided in pertinent part:

> A. Scope. This section applies to all judgments of courts of record of this state, and judgments of courts of record of the United States not subject to the registration procedures of the Uniform Federal Lien Registration Act, Section 3401 et seq. of Title 68 of the Oklahoma Statutes, which award the payment of money, regardless of whether such judgments also include other orders or relief.
>
> B. Creation of Lien. A judgment to which this section applies shall be a lien on the real estate of the judgment debtor within a county only from and after a Statement of Judgment made by the judgment creditor or the judgment creditor's attorney, substantially in the form prescribed by the Administrative Director of the Courts, has been filed in the office of the county clerk in that county.
>
> 1. Presentation of a Statement of Judgment and tender of the filing fee, shall, upon acceptance by the county clerk, constitute filing under this section.
>
> 2. A lien created pursuant to this section shall affect and attach to all real property, including the homestead, of judgment debtors whose names appear in the Statement of Judgment; however, judgment liens on a homestead are exempt from forced sale pursuant to Section 1 of Title 31 of the Oklahoma Statutes and Section 2 of Article XII of the Oklahoma Constitution.

The pertinent portions of the current version remain substantially unchanged. *See also*, the Uniform Enforcement of Foreign Judgments Act, 12 O.S. 2001 §§719 *et seq*.

2. Title 12 O.S. 2011 §735 provides in pertinent part:

> A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state: . . .
>
> B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:
>
> 1. The last execution on the judgment was filed with the county clerk;
>
> 2. The last notice of renewal of judgment was filed with the court clerk;
>
> 3. The last garnishment summons was issued; or
>
> 4. The sending of a certified copy of a notice of income assignment to a payor of the judgment debtor.

3. Colorado Revised Statutes Annotated 13-52-102 provides in pertinent part:

> . . . (2)(a) Except as provided in paragraph (b) of this subsection (2), execution may issue on any judgment described in subsection (1) of this section to enforce the same at any time within twenty years from the entry thereof, but not afterwards, unless revived as provided by law, and, after twenty years from the entry of final judgment in any court of this state, the judgment shall be considered as satisfied in full, unless so revived. . . .

4. Title 12 Ch.15, App. 1, Rule 1.200, Opinions of the Supreme Court and of the Court of Civil Appeals provides in pertinent part:

> . . . (2) Opinions of the Court of Civil Appeals which resolve novel or unusual issues may be designated for publication, at the time the opinion is adopted, by affirmative vote of at least two members of the division responsible for the opinion. Such opinions shall remain unpublished until after mandate issues, after which time they shall be published in the Oklahoma Bar Journal,

the Oklahoma State Courts Network, and in any unofficial reporter. Such opinions shall bear the notation "Released for publication by order of the Court of Civil Appeals", and shall be considered to have persuasive effect. Any such opinion, however, bearing the notation "Approved for publication by the Supreme Court" has been so designated by the Supreme Court pursuant to 20 O.S. § 30.5, and shall be accorded precedential value. The Supreme Court retains the power to order opinions of the Court of Civil Appeals withdrawn from publication. . . .

5. Title 12 O.S. 2011 §720 provides:

In this act "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

6. Title 12 O.S. 2011 §721 provides:

A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner. Provided, however, that no such filed foreign judgment shall be a lien on real estate of the judgment debtor until the judgment creditor complies with the requirements of subsection B of Section 706 of this title.

7. 12 O.S. 2011 §726 provides:

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

8. We reference the current version of 12 O.S. 2011 §735, because, while the statute has been amended since 1977, the amendments have no bearing on the issues in this case. Section 735 provides:

A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state:

1. Execution is not issued by the court clerk and filed with the county clerk as provided in Section 759 of this title;

2. A notice of renewal of judgment substantially in the form prescribed by the Administrative Director of the Courts is not filed with the court clerk;

3. A garnishment summons is not issued by the court clerk; or

4. A certified copy of a notice of income assignment is not sent to a payor of the judgment debtor.

B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:

1. The last execution on the judgment was filed with the county clerk;

2. The last notice of renewal of judgment was filed with the court clerk;

3. The last garnishment summons was issued; or

4. The sending of a certified copy of a notice of income assignment to a payor of the judgment debtor.

C. This section shall not apply to judgments against municipalities or to child support judgments by operation of law.

9. The ten year period was applied from a Washington State Statute, Wa. St. §6.17.020(4) which provided:

Except as provided in subsection (2), (3), and (4) of this section, the party in whose favor a judgment of a court of record of this state or a district court of this state had been or may be rendered, or the assignee, may have an execution issued for the collection or enforcement of the judgment at any time within ten years from the entry of the judgment.

10. Title 12 O.S. 1991 §735.:

11. Drllevich Construction, Inc., v. Stock, 1998 OK 39, 958 P.2d 1277 relied on cases from Texas, Nevada, New Mexico, New York, South Carolina, Kansas, Missouri, Tennessee, Ohio, Connecticut, and North Carolina. Paragraphs 17-19 provides:

¶17 The Utah Supreme Court noted that its interpretation creating a new Utah judgment, upon the proper registration of a foreign judgment, was consistent with the approach taken by federal courts in their application of 28 U.S.C. § 1963, a similar federal registration statute.3 The Utah court noted a line of federal cases which found a new judgment was created with the registration of a foreign judgment. Id. (citing Stanford v. Utley, 341 F.2d 265, 268 (8th Cir. 1965) (Judge, later Justice, Blackmun wrote, "We feel that registration provides, so far as enforcement is concerned, the equivalent of a new judgment of the registration court.", emphasis added); United States v. Palmer, 609 F.Supp. 544, 548 (E.D.Tenn. 1985); Dichter v. Disco Corp., 606 F.Supp. 721, 724 (S.D.Ohio 1984); Anderson v. Tucker, 68 F.R.D. 461, 463 (D.Conn. 1975); Junaeu Spruce Corp v. Int'l Longshoremen's & Warehousemen's Union, 128 F.Supp. 715, 717 (N.D.Cal. 1955)); But see Robinson v. First Wyoming Bank, 909 P.2d 689 (Mont. 1995).

¶18 The Court of Appeals for the Western District of Missouri, applying Missouri law, made a finding similar to that of Pan Energy, viewing a foreign judgment filed in a Missouri court as a new judgment and applying Missouri's ten year statute of limitations from the effective date of that new Missouri judgment. Walnut Grove Prod. v. Schnell, 659 S.W.2d 6 (W.D.MO. 1983).

¶19 Other jurisdictions with holdings similar to that of Pan Energy include: The Texas Supreme Court dismissing an appeal for want of jurisdiction held that when a creditor proceeds under the Uniform Enforcement of Judgments Act, "the filing of the foreign judgment comprises both a plaintiff's original petition and a final judgment." Walnut Equipment Leasing Co. v. Wu, 920 S.W.2d 285, 286 (Tex. 1996); The Supreme Court of Nevada, citing Pan Energy v. Martin and others, found "that when a party files a valid foreign judgment in Nevada, it constitutes a new action for the purposes of the statute of limitations." Trubenbach v. Amstadter, 849 P.2d 288, 290 (Nev. 1993). See also Galef v. Buena Vista Dairy, 875 P.2d 1132 (N.M.Ct.App. 1994); Mee v. Sprague, 545 N.Y.S.2d 268 (N.Y.Sup. 1989); Payne v. Claffy, 315 S.E.2d 814 (S.C.Ct.App. 1984); Warner v. Warner, 668 P.2d 193, 195 (Kan. Ct.App. 1983) ("registration of a foreign judgment which is enforceable when registered gives the judgment creditor a new and additional five years to execute, regardless of when the judgment was rendered in the foreign state.").

12. Colorado Revised Statutes Annotated 13-52-102, see note 3, supra.

13. Watkins v. Conway, 385 U.S. 188, 87 S. Ct. 357, 17 L.Ed.2d 286 (1966).

14. Title 12 O.S. 2011 §720, see note 5, supra.

15. Title 12 O.S. 2011 §721 see note 6, supra.

2018 OK 33

JOHN HOPSON, Plaintiff/Appellant, v. EXTERRAN ENERGY SOLUTIONS, LP, A Foreign Limited Partnership, Defendant/Appellee.

No. 113,563. April 23, 2018

APPEAL FROM THE DISTRICT COURT OF LEFLORE COUNTY, THE HONORABLE TED KNIGHT, PRESIDING

ORDER OF SUMMARY DISPOSITION

¶1 Rule 1.201 of the Oklahoma Supreme Court Rules provides that "[i]n any case in which it appears that a prior controlling appellate decision is dispositive of the appeal, the court may summarily affirm or reverse, citing in its order of summary disposition this rule and the controlling decision." Okla. S. Ct. Rule 1.201.

¶2 After reviewing the record in this case, THE COURT FINDS that our recent decision in *Young v. Station 27, Inc.*, 2017 OK 68, 404 P.3d 829, disposes of the issues in this case.

¶3 In *Young*, we held that a plaintiff's retaliatory discharge action is based upon the retaliatory discharge statute in effect when the workers' compensation injury occurred. *Young*, 2017 OK 68, ¶ 0, 404 P.3d 830. Young's work related injuries that formed the basis for

her workers' compensation claim occurred prior to the effective date of the new Administrative Workers' Compensation Act (AWCA).[1] We were clear in *Young* that the retaliation statute under the AWCA[2] ***does not apply to conduct relating to other workers' compensation statutes***. *Young*, 2017 OK 68, ¶ 10, 404 P.3d 835.[3] Thus, even though Young's employment termination oc-curred *after* the effective date of the AWCA,[4] her claim for retaliatory discharge related back to the injury date giving rise to her workers' compensation claim. We held that Young's retaliatory discharge action was governed by the statute in effect on the date of her injury, 85 O.S. 2011 § 341.

¶4 Hopson, the plaintiff/appellant in the instant appeal, sustained work related injuries and sought workers' compensation benefits prior to the effective date of the AWCA. He was terminated after the effective date of the AWCA. As in *Young*, the employer urged that the AWCA governed the resolution of the retaliatory discharge claim as Hopson's discharge occurred *after* the AWCA became effective. We rejected this argument in Young, and made clear that the retaliatory discharge claim relates back to the date of the injury giving rise to the original workers' compensation claim. We hold that Hopson's retaliatory discharge claim is governed by 85 O.S. 2011 § 341, the statute in effect at the time of the injuries giving rise to his workers' compensation claim.

¶5 We further deny Appellee's motion to dismiss appeal. Appellee relied on *Buckley v. Kelly*, 1927 OK 191, 257 P. 1107, and urged that Hopson abandoned his appeal when he filed an action before the AWCA for retaliatory discharge after initiating this appeal. Appellee's reliance on *Buckley* is misplaced. After Buckley initiated his appeal, he filed an identical action in federal district court and then asked this Court to (1) strike his appeal from hearing and (2) requested his appeal remain pending awaiting the final termination of his federal court action. Buckley specifically asked this Court to delay our decision pending action by the federal court. Under such circumstances, we held that Buckley abandoned his appeal before this Court.

¶6 *Buckley* is inapposite to the facts of this instant appeal. Hopson has made clear that he is seeking resolution from this Court. The district court issued an order dismissing his action for retaliatory discharge ruling that the trial court lacked jurisdiction and his claims were covered by the retaliatory discharge statute under the AWCA and must be filed in that venue. Hopson filed this appeal as he believed his claims for retaliatory discharge were governed by 85 O.S. 2011 § 341, the statute in effect at the time of his injury. However, being mindful of the one year statute of limitations under the AWCA for retaliatory discharge, Hopson filed a claim in that venue to preserve any possible claim. Hopson has not sought a trial be-fore the Commission; he has remained active in his appeal and continued to request this Court to rule on his appeal. On October 12, 2017, he filed a pleading, Appellant's Advice of Ruling, asking to supplement the record and note the holding in *Young* that the district court has jurisdiction over this claim and not the AWCA.

¶7 We find that the district court erred in granting the motion to dismiss, and that Hopson has standing to pursue his retaliatory discharge claim.

¶8 IT IS THEREFORE ORDERED that the district court's order of dismissal is vacated, and the cause remanded to the district court for further proceedings.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 23rd day of April, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

1. 85A O.S. §§ 1-125.
2. 85A O.S. Supp. 2013 § 7.
3. We specifically noted that the language in 85A, section 7, the retaliatory discharge statute in the AWCA, referring to retaliatory discharge actions that arise under "this act," "unambiguously refers to the Administrative Workers' Compensation Act, and is judicially construed as an expression of legislative intent to accomplish that result which we are not empowered to rewrite." *Young*, 2017 OK 68, ¶ 10, 404 P.3d 835.
4. 85A O.S. §§ 1-125.

2018 OK 34

INDEPENDENT SCHOOL DISTRICT NO. 54 of LINCOLN COUNTY, OKLAHOMA a/k/a STROUD PUBLIC SCHOOLS, Plaintiff/Appellant, v. INDEPENDENT SCHOOL DISTRICT NO. 67 of PAYNE COUNTY, OKLAHOMA a/k/a CUSHING PUBLIC SCHOOLS; INDEPENDENT SCHOOL DISTRICT NO. 4 of LINCOLN COUNTY, OKLAHOMA, a/k/a WELLSTON PUBLIC SCHOOLS, Defendants/Appellees, and KATHY SHERMAN, in her capacity as

LINCOLN COUNTY TREASURER, Defendant.

No. 115,550. April 24, 2018

ON APPEAL FROM THE DISTRICT COURT IN LINCOLN COUNTY, OKLAHOMA, THE HONORABLE GEORGE W. BUTNER, DISTRICT JUDGE.

¶0 Ad valorem taxes were collected for property located in the Stroud Public School District, Plaintiff/Appellant. However, that property had been incorrectly identified as being in the Cushing and Wellston Public School Districts, Defendants/Appellees, and the taxes were distributed to those two districts. None of the errors were the fault of any of the school districts involved. Stroud sued to recover the tax proceeds from Cushing and Wellston. All three school districts moved for summary judgment and all appeal the district court's judgment.

REVERSED AND REMANDED WITH INSTRUCTIONS.

David A. Elder, Matthew Brockman, Michael A. Furlong, HARTZOG CONGER CASON & NEVILLE, Oklahoma City, Oklahoma, for Plaintiff/Appellant.

Kent B. Rainey, Staci L. Roberds, ROSENTSTEIN, FIST & RINGOLD, Tulsa, Oklahoma, for Defendants/Appellees.

Winchester, J.

¶1 The issue in the case before us involves the resolution of the distribution of ad valorem taxes from the 2006-2010 tax years that should have be apportioned to the Stroud Public Schools[1] (Stroud), but were improperly distributed to the Cushing and Wellston Public Schools (Cushing and Wellston).[2] Those taxes were levied on property located within the Stroud district, but erroneously reported within the Cushing and Wellston districts. The Oklahoma Tax Commission discovered the error and notified the parties. Stroud seeks a judgment requiring Cushing and Wellston to pay those improperly disbursed tax revenues to Stroud. All three school districts moved for summary judgment and all appeal the district court's judgment.

FACTS AND PROCEDURE

¶2 Within the 2006 through 2010 tax years, the Oklahoma Tax Commission and the Oklahoma State Board of Equalization issued certified assessments of certain public property physically located within the boundaries of the Stroud school district. Ad valorem taxes associated with these properties were distributed by the Lincoln County Treasurer to the Cushing and Wellston districts, instead of to Stroud. The error was discovered and subsequently corrected by the Lincoln County Board of Tax Roll Corrections during the 2010-2011 fiscal year. There is no disagreement among the three school districts that they are not responsible for the errors made in the distribution of the ad valorem taxes. The Stroud superintendent, Joe Van Tuyl, testified in his deposition concerning the defendant school districts, "[T]his is no fault of theirs that those assessments and allocations were wrong."[3] To recover the funds that should have been Stroud's, Stroud sued Cushing and Wellston school districts. Stroud filed its petition on April 22, 2013. The defendant school districts filed a motion for summary judgment in December of 2014. In the same month, the plaintiff responded with its own motion for summary judgment.

¶3 After the original judge in the case recused, the Chief Justice of the Supreme Court of Oklahoma on April 14, 2015, assigned Judge Butner to hear the case. After reviewing the case, including supplement briefs, and hearing motions by the parties, Judge Butner issued an eleven-page Journal Entry of Judgment, filed on October 31, 2016. Within that judgment the court reviewed Stroud's claims. The court reviewed the actual distribution of the taxes, and the State Aid[4] received by each of the school districts. The Court found that due to the additional State Aid, Stroud actually received 26 cents more than it otherwise would have if it had received the taxes from the erroneously apportioned taxable property. The Court concluded that Stroud did not suffer any monetary loss to its general fund as the result of the erroneous apportionment, and that no amount of restitution was due Stroud applicable to its general fund.

¶4 In addition, the court adopted the previous judge's March 23, 2015, order. It granted summary judgment in favor of Cushing on the claim by Stroud against Cushing's sinking fund; granted summary judgment in favor of Stroud against Cushing and Wellston for the subject ad valorem taxes paid into their building fund and general funds for the 2010-2011 fiscal year, but subject to an appropriate setoff relating to State Aid. Accordingly, Judge Butner

granted judgment against Cushing in the amount of $59,442.74, and against Wellston in the amount of $20,109.12. His Journal Entry of Judgment found that the defendants did not dispute that their building funds received these amounts.

¶5 All three school districts appealed. Cushing and Wellston assert in their Petition in Error that the trial court should have adopted the reasoning found in *Fall River Jt. Union High Sch. Dist. v. Shasta Union High Sch. Dist.*, 104 Cal. App. 444, 285 P. 1091 (1930). Stroud answers that *Fall River* has not been adopted in Oklahoma, and is contrary to the current law in this state.

¶6 Stroud raises other issues with an order originally entered by Judge Ashwood on January 15, 2015. Stroud alleges the judge engaged in *ex parte* communications after that judgment and subsequently entered orders affecting the substantive rights of the parties. Judge Ashwood then recused from the case without explanation. Judge Butner was assigned as judge and conducted a hearing with counsel. He pronounced a judgment that adopted Judge Ashwood's Court Minute of January 20, 2015, the Court Minute of February 20, 2015, and the Order of March 23, 2015. Those Court Minutes and the Order were less favorable to Stroud than Judge Ashwood's original judgment. However, given this Court's determination of the law that should govern this case, none of these issues are relevant to our resolution of this cause.

¶7 There are no fact questions to be decided. Only legal questions are before this Court.

DISCUSSION

¶8 Stroud describes the holding in *Fall River* as providing that after a political entity receives tax revenue due another, it is not required to pay restitution when both entities received and expended the amount for which they budgeted. This description does not adequately describe the holding.

¶9 *Fall River* states the issue before that court:

> "The question really at issue is whether money received by one district, from lands apparently but not legally within its exterior boundaries, levied and collected for its uses and purposes and devoted to its uses and purposes, can be recovered by a district within whose territory the lands actually lie, where no levy has been made or taxes collected for its uses and purposes, and where both districts involved obtained exactly the amount of moneys for which their budget called, and neither district obtained or had the use of money intended for the other."

Fall River, 104 Cal.App. at 446, 285 P. at 1092. The facts in that case reveal that the board of supervisors of the county of Shasta made an order to transfer to one school district real property from another school district. However, the transfer did not comply with the law and a judgment subsequently declared that transfer null and void. *Fall River,* 104 Cal.App. at 445, 285 P. at 1091. Ad valorem taxes had been collected and paid to the new school district. After the judgment invalidated the illegal transfer, the original school district sued to recover the ad valorem taxes it would have received. The plaintiff received a judgment in its favor for the amount of $8,293.84 together with interest from the date of the entry of judgment. The District Court of Appeal reversed with directions to sustain the defendant's demurrer to the plaintiff's complaint, without leave to amend.

¶10 The *Fall River* court observed that the complaint contained no allegation that the plaintiff failed to receive all the money necessary to maintain its school district. No allegation claimed the defendant school district received more money than was necessary to support its school district. *Fall River,* 104 Cal.App. at 445-446, 285 P. at 1091. The court reiterated that the complaint failed to show that the plaintiff suffered any deficit in its school funds, nor did the defendant obtain any surplus by reason of the levy and collection of taxes upon the properties. *Fall River,* 104 Cal.App. at 447, 285 P. at 1092. Since each district received the funds according to the estimate submitted, and the contested funds had been used for educational purposes, "the finances of the district ought not be disturbed by any judgment ordering a refund, and that to do so would be inequitable, as all parties herein acted in good faith." *Fall River,* 104 Cal.App. at 455, 285 P. at 1095.

¶11 The reasoning found in the *Fall River* case is recognized by the Missouri Supreme Court in *Pleasant View Reorganized School District No. 1 of Greene County, Missouri v. Springfield Reorganized School District No. 12 of Greene County, Missouri*, 341 S.W.2d 853 (Mo. 1961). In that case, school taxes raised by local taxation of land in one school district were paid in error over an

unstated number of years to and received by another school district. After learning about the error the plaintiff sued to recover the taxes that should have been paid to it. The circuit court dismissed the case and the Supreme Court of Missouri affirmed. In its opinion, that court discussed several cases in detail, including the *Fall River* case. *Pleasant View,* 341 S.W.2d at 859-860. The Missouri court quoted in length from a dissent in *School District No. 8, Shawnee Tp. Wyandotte County v. Board of Education of Kansas City,* 115 Kan. 806, 224 P. 892, 894, (1924), where the dissenting judges opined that because the award to that plaintiff was based on an error six years earlier, and because populations are subject to change, the award to the plaintiff would cause taxpayers to suffer "who were not benefited by the assessor's mistake, and taxpayers will be benefited who did not suffer." The dissenters continue, "The whole matter is stale, and the court's decision will create precisely the kind of disturbance which, as a matter of public policy, the Legislature undertook to prevent."

¶12 Stroud cites three Oklahoma cases that it claims supports its argument for requiring Cushing and Wellston to pay the improperly disbursed tax revenues to Stroud. In *Board of Commr's of Carter County v. Joint Sch. Dist. No. 34*, 1928 OK 709, 272 P. 468, tax money was collected by the county treasurer as taxes on real and personal property located in the plaintiff school district, and levied for the common school purposes therein. The county treasurer paid that money to other school districts. The school district sued the Board of Commissioners to recover the funds. The Court observed, "The assets of the county were in no way increased by the mistake of the county treasurer in apportioning the taxes to the wrong school district." The Court added the commissioners had nothing whatever to do with the apportionment of taxes collected by the county treasurer for common school purposes and the Court saw no reason why the county should be compelled to make restitution. *Carter County,* 1928 OK 709, ¶ 14, 272 P. at 469.

¶13 Stroud cites the next paragraph, *Carter County,* 1928 OK 709, ¶ 15, 272 P. at 469, in which the Court Commissioner[5] authoring the case speculates that the plaintiff should have sued the school district or districts that received its money or the county treasurer. From the text it appears no party was arguing that the school district or the county treasurer should be sued. Therefore, the Court's assessment is dicta, and the problem with dicta is that it is pronounced without an actual case in controversy. No party is making argument defending or opposing such a view. This speculation does not bind this Court nor any court of the state. Accordingly, it is not even persuasive support of Stroud's argument that where a school district has failed to receive its lawful share of tax revenues levied upon property within its district, it has a right to maintain a direct action against the school district wrongfully receiving those funds.

¶14 The second case cited by Stroud to support its viewpoint is *In re Assessment of St. Louis-San Francisco Ry. Co.*, 1926 OK 970, 251 P. 604, which was an appeal by the railway company where the State Board of Equalization assessed railway property that had been omitted from school district 27. However, the railway had been assessed and paid taxes to school districts 39 and 22, because the property was erroneously described as located within those two districts. The railway perpetrated no fraud, nor did that company benefit from the error in any way. The Supreme Court Commissioners reversed the order of the State Board of Equalization because the railway company had been taxed and paid the taxes. However, again the Court Commissioner who authored the opinion, included dicta that "We know of no reason why an accounting may not be had between these districts and the mistake adjusted." *In re Assessment of St. Louis-San Francisco Ry. Co.*, 1926 OK 970, ¶ 6, 251 P. 604, 606. This dicta does not support Stroud's argument that Oklahoma law is on point with the facts now before this Court.

¶15 Finally, in the third case, *Board of County Comm'rs v. School District No. 19*, 1926 OK 512, 248 P. 324, involved a dispute as to how to divide the ad valorem and gross production taxes between two schools in a segregated school system, and if those taxes had been legally divided. The trial court granted judgment in favor of the plaintiff school district. The case decided by a Supreme Court Commissioner, whose order was confirmed by the Supreme Court, held that money set apart for public school purposes under our Constitution could not be diverted to any other use, so that the money must be paid over to the school district from the county treasurer, who had refused to pay it over. The facts are not in any way similar to the case now before this Court, and is not authority for Stroud's viewpoint.

¶16 In its Brief in Chief, Stroud admits that a school district in Oklahoma typically receives greater State Aid in proportion to decreased ad valorem revenue, and that its State Aid would have decreased under the Oklahoma school funding formula if Stroud had received the misdirected tax revenues erroneously paid to Cushing and Wellston. Stroud also admits that Cushing and Wellston would most likely have received greater State Aid had the misdirected tax revenues been included in Stroud's Estimate of Needs submitted to the State Board of Education.[6] After detailing the dollar amounts received compared to what the school districts should have received, the trial court in its October 31, 2016, Journal Entry of Judgment found, and based on uncontroverted facts, concluded that Stroud received twenty-six cents more in State Aid than it otherwise would have due to the erroneous apportionment.[7] Accordingly, Stroud did not suffer any monetary loss to its general fund as a result of the erroneous apportionment.

¶17 Stroud received the taxes from the property identified as within its district; Cushing received the taxes from the property identified as within its district; and Wellston received the taxes from the property identified as within its district. Stroud received the same amount for its general funds that it would have received had the ad valorem taxes been properly allocated. Nevertheless, it demands additional funds from Cushing and Wellston that it would have received if the real property had been correctly identified. But if that amount is paid to Stroud, then Cushing and Wellston would have deficits in those districts that they would not have if the real property had been correctly identified. However, Stroud does not believe the other two school districts are entitled to a setoff if they pay Stroud the misallocated ad valorem taxes. All three school districts were victims of this error, but as it stands now, no district failed to receive the funds needed for their respective districts.

¶18 When a school district submits its Estimate of Needs for the year, which is based on projected tax revenues, and receives the funds it anticipated, that district is not entitled to subsequent repayment from another school district, which, due to no fault of its own, received funds that should have been paid to the first school district.

¶19 As explained in Cushing's and Wellston's motion for summary judgment, the rationale found in the *Fall River* case acknowledges and accepts that county and state officials will make mistakes in the taxing of property and the distribution of taxes.

CONCLUSION

¶20 The judgments against the Cushing and Wellston school districts in favor of the Stroud school district are reversed. Each party shall bear its own attorney fees. This cause is remanded for disposition consistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Combs, C.J., Winchester, Edmondson, Colbert, Reif, JJ. – Concur

Gurich, V.C.J., Wyrick, J. – Concur in Judgment

Kauger, J. – Concurs in Result

Darby, J. – not voting

Winchester, J.

1. Independent School District No. 54 of Lincoln County, Oklahoma a/k/a Stroud Public Schools, Plaintiff/Appellant.

2. Independent School District No. 67 of Payne County, Oklahoma a/k/a Cushing Public Schools; Independent School District No. 4 Of Lincoln County, Oklahoma, a/k/a Wellston Public Schools, Defendants/Appellees.

3. Deposition of Joe Van Tuyl, page 86, lines 19-21.

4. The trial court explained, "Under Oklahoma's state aid equalization formula, the amount of state aid is determined using three separate components: (a) Foundation Aid, (b) Transportation, and (c) Salary Incentive Aid. Of these three components, only two – Foundation Aid and Salary Incentive Aid – are impacted by the anticipated revenues of taxable property in a school district." October 31, 2016, Journal Entry of Judgment, page 4.

5. Beginning in 1911, the Legislature authorized the Supreme Court of Oklahoma to appoint Commissioners, possessing the qualifications required for justice of the Supreme Court. Subsequently, the Commissioners were appointed in different methods, including appointment by the governor with the consent of the Supreme Court. The Supreme Court Commissioner system ended in 1959. *Oklahoma Almanac* 2015-2016 857-858 (Oklahoma Department of Libraries, 55th ed. 2015).

6. Brief-in-Chief of Plaintiff/Appellant, page 23, footnote 6.

7. October 31, 2016, Journal Entry of Judgment, item 16, page 7.

THE SOVEREIGNTY SYMPOSIUM XXXI

June 6 - 7, 2018 | Skirvin Hotel | Oklahoma City, Oklahoma

Wednesday Morning

4.0 CLE/CJE credits / 0 Ethics included

7:30 - 4:30 Registration Honors Lounge

8:00 - 8:30 Complimentary Continental Breakfast

10:30 - 10:45 Morning Coffee / Tea Break

12:00 - 1:15 Lunch on your own

8:30 - 12:00 PANEL A: ECONOMIC DEVELOPMENT

(THIS PANEL CONTINUES FROM 3:00 - 5:30)

MODERATOR: JAMES C. COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation

OVERVIEW AND IMPACT OF TRIBAL BUSINESS

CHRIS BENGE, (*Cherokee*), Chief of Staff to Governor Mary Fallin, Oklahoma Secretary of Native American Affairs

BILL G. LANCE, JR. Secretary of Commerce, Chickasaw Nation Intertribal Trade and Investment Organization

DAVID NIMMO, Chief Executive Officer/President, Chickasaw Nation Industries

SCOTT FREENY, (Choctaw), Senior Legal Director, Choctaw Nation Division of Commerce

KYLE DEAN, Assistant Professor of Economics, Director of Center for Native American & Urban Studies, Oklahoma City University

INTERNATIONAL INTER-TRIBAL TRADE

CO-MODERATOR: WAYNE GARNONS-WILLIAMS, Senior Lawyer & Principal Director, Garwill Law, Canada, Chair, International Inter-Tribal Trade and Investment Organization

MONIKA SURMA, Senior Trade Policy Advisor -- Trade Negotiations -- North America Division -- Global Affairs Canada

VASKEN KHABAYAN, Acting Consul General, Office of the Canadian Consul General, Dallas

AMY GOUDAR, Foreign Policy and Diplomacy Service Officer, Global Affairs Canada, Dallas

JONNA KAUGER KIRSCHNER, Senior Vice President, Chickasaw Nation Industries

The Sovereignty Symposium was established to provide a forum in which ideas concerning common legal issues could be exchanged in a scholarly, non-adversarial environment. The Supreme Court espouses no view on any of the issues, and the positions taken by the participants are not endorsed by the Supreme Court.

Photo credit: Eric Tippeconnic Briefcase Warrior, Joseph French Photography

8:30 - 12:00 PANEL B: VISUAL AND VERBAL IMAGERY: SIGNS, SYMBOLS AND SOUNDS

(THIS PANEL CONTINUES FROM 3:00 - 5:30)

MODERATORS: WINSTON SCAMBLER, Student of Native American Art

ERIC TIPPECONNIC, (*Comanche*), Historian, Artist, and Professor, California State University, Fullerton

HARVY PRATT, (*Cheyenne*) Artist and Finalist for the Design of the National Native American Veterans' Memorial, National Museum of the American Indian

KELLY HANEY, (*Seminole*), Artist, Former Oklahoma State Senator, Former Chief of the Seminole Nation, Finalist for the Design of the National Museum of the American Indian

DANIEL SASUWEH JONES (*Ponca*), Artist and Finalist for the Design of the National Museum of the American Indian

GORDON YELLOWMAN, (*Cheyenne*), Peace Chief, Assitant Executive Director of Education, Cheyenne and Arapaho Tribes

PATRICK RILEY, Artist, Art Educator and Mask Maker

NATHAN HART, *(Cheyenne),* Economic Development Director, Cheyenne and Arapaho Tribes, Artist

KENNETH JOHNSON, *(Muscogee/Seminole),* Contemporary Jewelry Designer and Metalsmith

8:30 - 12:00 PANEL C: LAND, WIND AND WATER

(THIS PANEL CONTINUES FROM 3:00 - 5:30)

MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court

STEPHEN H. GREETHAM, Chief General Counsel, Department of Commerce and Special Counsel on Water, Chickasaw Nation

MICHAEL BURRAGE, Whitten Burrage Law Firm

SARA HILL, Secretary of Natural Resources for the Cherokee Nation, Senior Assistant Attorney General, Cherokee Nation

JULIE CUNNINGHAM, Executive Director, Oklahoma Water Resources Board

8:30 - 12:00 PANEL D: TRUTH AND RECONCILIATION: IMPLICATIONS OF ASSIMILATION

MODERATOR: NOMA GURICH, Vice Chief Justice, Oklahoma Supreme Court

LINDSAY ROBERTSON, Faculty Director, Center for The Study of American Indian Law and Policy, Chickasaw Nation Endowed Chair in Native American Law, Professor, University of Oklahoma College of Law

JAY HANNAH, (*Cherokee*), Executive Vice-President of Financial Services, Bancfirst

JOAN HOWLAND, Roger F. Noreen Professor of Law, Associate Dean for Information And Technology, University of Minnesota

JESSICA Y. STERN, Associate Professor of History, California State University, Fullerton

GORDON YELLOWMAN, (*Cheyenne*), Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes

KIRKE KICKINGBIRD, (*Kiowa*), Hobbs, Straus, Dean and Walker

ROBERT HAYES, Methodist Bishop of Oklahoma, Retired

Wednesday Afternoon

4 CLE/CJE credits / 0 Ethics included

7:30 - 4:30 Registration Honors Lounge

2:45 - 3:00 Afternoon Coffee / Tea Break

1:15 - 2:45 CAMP CALL: **GORDON YELLOWMAN**, *(Cheyenne)*, Peace Chief, Cheyenne and Arapaho Tribes

OPENING CEREMONY

MASTER OF CEREMONIES: **STEVEN W. TAYLOR**, Justice, Oklahoma Supreme Court (Retired)

PRESENTATION OF FLAGS

HONOR GUARDS: KIOWA BLACK LEGGINGS SOCIETY

SINGERS: **SOUTHERN NATION**

INVOCATION: **ROBERT HAYES**, Methodist Bishop of Oklahoma, Retired

WELCOME: DAVID HOLT, (*Osage*), Mayor of Oklahoma City

WELCOME: **KIMBERLY HAYS**, President, Oklahoma Bar Association

WELCOME: DOUGLAS COMBS, (*Muscogee(Creek)*), Chief Justice, Oklahoma Supreme Court

INTRODUCTION OF KEYNOTE SPEAKER: STEVEN TAYLOR, Justice Oklahoma Supreme Court (Retired)

KEYNOTE SPEAKER: LT. GENERAL LEE K. LEVY II, Commander, Air Force Sustainment Center, Air Force Material Command, Tinker Air Force Base

PRESENTATION OF AWARDS, YVONNE KAUGER, Justice, Oklahoma Supreme Court

HONOR AND MEMORIAL SONGS: SOUTHERN NATION

CLOSING PRAYER: KRIS LADUSAU, Reverend, Dharma Center of Oklahoma

Grand Ballroom D-E-F

3:00 - 5:30 PANEL A: ECONOMIC DEVELOPMENT

(A CONTINUATION OF THE MORNING PANEL)

MODERATOR: JAMES C. COLLARD, Director of Planning & Economic Development, Citizen Potawatomi Nation

DEBBIE BLANKE, Vice Chancellor for Academic Affairs, Oklahoma State Regents for Higher Education
MARY BLANKENSHIP POINTER, President, Sister Cities OKC, Inc.
JIM BRATTON, Assistant Vice President of Economic Development, Executive Director, Office of Technology Development, University of Oklahoma
RICO BUCHLI, Honorary Consul of Switzerland in Oklahoma
DEBY SNODGRASS, Oklahoma Secretary of Commerce
AMBER SHARPLES, Executive Director, Oklahoma Arts Council

Crystal Room

3:00 - 6:00 PANEL B: VISUAL AND VERBAL IMAGERY: SIGNS, SYMBOLS AND SOUNDS

(A CONTINUATION OF THE MORNING PANEL)

CO-MODERATORS: WINSTON SCAMBLER, Student of Native American Art
ERIC TIPPECONNIC, (*Comanche*), Historian, Artist, and Professor, California State University, Fullerton

JAMES PEPPER HENRY, Director, American Indian Cultural Center
JEROD IMPICHCHAACHAAHA' TATE, (*Chickasaw*), Artist, Composer And Musician
BRENT GREENWOOD, (*Ponca/Chickasaw*) Artist and Musician
TIMOTHY TATE NEVAQUAYA, (*Comanche*), Artist and Musician
MARK PARKER, Dean, Schools of Music & Theatre, Oklahoma City University
HOLLY DAVIS, Principal, Cherokee, Imersion School
HOWARD PADEN, Cherokee Language Master Apprentice Program
JASON MURRAY, (*Chickasaw*), Independent Scholar & Professor, Formerly Of The University Of South Dakota
JOSHUA HINSON, (*Chickasaw*), Chickasaw Language Revitalization Program
GEOFFREY STANDING BEAR, Chief, Osage Nation

Grand Ballroom A-B
Grand Ballroom C

3:00 - 5:30 PANEL C: LAND, WIND AND WATER

(A CONTINUATION OF THE MORNING PANEL)

MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court

CASEY ROSS, University General Counsel, Clinical Professor, Native American Legal Resource Center, Oklahoma City University
LAUREN KING, (*Muscogee (Creek*)), Attorney -- Foster Pepper PLLC, Appellate Judge -- Northwest Intertribal Court System
DREW KERSHEN, Earl Sneed Centennial Professor of Law Emeritus, University of Oklahoma, College of Law
KEN BELLMARD, (*Kaw*), Attorney

Thursday Morning

4.0 CLE/CJE credits / 1 Ethics included
7:30 Registration Honors Lounge
8:00 - 8:30 Complimentary Continental Breakfast
10:30 - 10:45 Morning Coffee / Tea Break
12:00 - 1:15 Lunch on your own

8:30 - 12:00 PANEL A: ECONOMIC DEVELOPMENT -- SUPPORTING INFRASTRUCTURE

MODERATOR: JAMES C. COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation

MIKE PATTERSON, Oklahoma Department of Transportation,
TIM GATZ, Executive Director, Oklahoma Turnpike Authority
DAN SULLIVAN, President, Grand River Dam Authority
JANIE SIMMS HIPP, Director, Indigenous Food and Agriculture Initiative, Robert A. Leflar Law Center, University of Arkansas
NATHAN HART, (*Cheyenne*), Economic Development Director, Cheyenne and Arapaho Tribes, Artist
JOY HOFMEISTER, Oklahoma Superindent of Public Instruction
CHAD DONOLEY, Vice-President, AOK Railroad
KELLI MOSTELLER, Director, Citizen Potawatomi Nation Cultural Heritage Center

8:30 - 11:00 PANEL B: JUVENILE LAW AND CHILDREN'S ISSUES

(THIS PANEL CONTINUES FROM 1:30 - 5:00)

C. STEVEN HAGER, Director of Litigation, Oklahoma Indian Legal Services
ANGEL R. SMITH, Attorney
MIKE WARREN, Associate District Judge, Harmon County
ELIZABETH BROWN, (*Cherokee*), Associate District Judge, Adair County, Oklahoma
STEPHANIE HUDSON, (*Kiowa*), Attorney, and Executive Director, Oklahoma Indian Legal Services
JACINTHA WEBSTER, Attorney, Oklahoma Indian Legal Services
DEBORAH SHROPSHIRE, Oklahoma Department of Human Services, Deputy Director, Child Welfare Services Tribal Foster Care
CARMIN TECUMSEH-WILLIAMS, (*Muscogee (Creek)*), Tribal Affairs Liaison for the Oklahoma Department of Human Services

8:30 - 9:30 PANEL C: ETHICS ADDRESS

JOHN REIF, Justice, Oklahoma Supreme Court

Grand Ballroom A& B

8:30 - 11:00 PANEL D: CRIMINAL LAW

MODERATOR: DANA KUEHN. Judge, Oklahoma Court of Criminal Appeals
CO-MODERATOR: ARVO MIKKANEN, (*Kiowa/Comanche*), Assistant United States Attorney and Tribal Liaison, Western District of Oklahoma

Thursday Afternoon
4.5 CLE/CJE credits / 0 Ethics included
3:30 - 3:45 Afternoon Coffee / Tea Break

12:00 - 1:30 LUNCH FOR THE STATE, FEDERAL, TRIBAL JUDICIARY AND THE SOVEREIGNTY SYMPOSIUM FACULTY

1:30 - 5:30 PANEL A: THE CONCERNS OF THE JUDICIARY - A FOCUS ON MUTUAL CONCERNS OF THE STATE, FEDERAL, AND TRIBAL BENCH

TRICIA TINGLE, *(Choctaw),* Associate Director - Tribal Justice, Office of Justice Services, Bureau of Indian Affiars
JARI ASKINS, Administrative Director of the Courts, Former Lt. Governor of Oklahoma, Former District Court Judge
WILLIAM P. BOWDEN, Major General (Retired), United States Air Force
TOM WALKER, Judge, Court of Indian Offenses, Anadarko

1:30 - 5:30 PANEL B: JUVENILE LAW

(A CONTINUATION OF THE MORNING PANEL)

PHIL LUJAN, (*Kiowa/Taos Pueblo*), Holistic Health for Tribal Youth, Seminole Nation
JENNIFER KIRBY, Director, Youth Services & Special Projects and Interim Director, Family Assistance, Cherokee Nation Human Services
BRANDON ARMSTRONG, Senior Probation Officer Cherokee Nation
KEVIN HAMIL, Director of Reintegration, Choctaw Nation
ALISHA EDELEN,Assistant Director of Juvenile Services, Choctaw Nation
AMBER LOFTIS, Juvenile Services Coordinator, Choctaw Nation
DOLORES SUBIA BIGFOOT, Director, Tribal Youth and Training and Technical Assistance Center
JANE SILOVSKY, Treatment for Children with Sexual Behavior Problems, University of Oklahoma Child Study Center
TODD CRAWFORD, Executive Officer, Aalhakoffichi' Adolescent Transitional Living Facility, Chickasaw Nation
JAKE ROBERTS, Project Eagle Director, Ponca Tribe of Oklahoma
JANELLE BRETTEN, Senior Project Researcher and Planner, Office of Juvenile Affairs
BRIAN HENDRIX, Deputy Assistant of Native American Affairs, Oklahoma Secretary of State
KIMEE WIND-HUMMINGBIRD, Director, Children & Family Services Administration
SHELLY HARRISON, Tribal Prosecutor, Muscogee (Creek) Nation
DEBRA GEE, Executive Officer and General Counsel, Chickasaw Nation (Juvenile Justice Subcommittee of the Inter-tribal Council of the Five Civilized Tribes)

1:30 - 5:30 PANEL C: GAMING: RECOGNITION OF THE 30TH ANNIVERSARY OF THE INDIAN GAMING REGULATORY ACT

CO-MODERATORS: MATTHEW MORGAN, (*Chickasaw*), Director of Gaming Affairs, Division of Commerce, Chickasaw Nation
NANCY GREEN, *(Choctaw)*, Green Law Firm, Ada, Oklahoma

ERNIE STEVENS, Jr. *(Oneida)*, Chairman, National Indian Gaming Association
JONODEV CHAUDHURI, *(Muscogee (Creek))*, Chairman, National Indian Gaming Commission
KATHRYN ISOM-CLAUSE, (*Taos Pueblo*), Vice Chair, National Indian Gaming Commission
WILEY HARWELL, Executive Director, Oklahoma Association for Problem and Compusive Gambling
G. DEAN LUTHEY, Jr., Gable Gotwals
MICHAEL MCBRIDE, **III**, Crowe and Dunlevy
ELIZABETH HOMER, *(Osage)*, Homer Law Chartered
WILLIAM NORMAN, (*Muscogee (Creek*)) Hobbs, Strauss, Dean & Walker

NOTICE

State, tribal and federal judge training will be June 7, 10:00 a.m. – 5:00 p.m. daily, at the Skirvin Hotel. Topics to be covered include violence against women, drug courts and criminal diversion programs. For information contact Julie Rorie at 405-556-9340.

A lunch for state, federal and tribal judges will be held Thursday, June 7, at noon at the Skirvin Hotel.

The Sovereignty Symposium XXXI

June 6 - 7, 2018
Skirvin Hotel
Oklahoma City, Oklahoma

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City: _____ State _____ Zip Code _____

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Tribal affiliation if applicable: _____

Bar Association Member: Bar # _____ State _____

16.5 hours of CLE credit for lawyers will be awarded, including 1.0 hours of ethics.

# of Persons Registration Fee Amount Enclosed

$275.00 ($300.00 if postmarked after May 22, 2018) $175.00 June 7, 2018 only ($200.00 if postmarked after May 22, 2018)

Total Amount

We ask that you register online at www.thesovereigntysymposium.com. This site also provides hotel registration information and a detailed agenda. For hotel registration please contact the Skirvin-Hilton Hotel at 1-405-272-3040. If you wish to register by paper, please mail this form to:

THE SOVEREIGNTY SYMPOSIUM, INC. The Oklahoma Judicial Center, Suite 1 2100 North Lincoln Boulevard Oklahoma City, Oklahoma 73105-4914 www.thesovereigntysymposium.com

Presented By THE OKLAHOMA SUPREME COURT and THE SOVEREIGNTY SYMPOSIUM

Court of Criminal Appeals Opinions

2018 OK CR 9

AUSTIN LEE KIRKWOOD, SR., Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-481. April 12, 2018

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Austin Lee Kirkwood, Sr., was tried by a jury and convicted in Tulsa County District Court, Case No. CF-2015-1911, for the crime of Child Abuse by Injury in violation of 21 O.S.Supp.2014, § 843.5(A). The jury recommended a sentence of twelve (12) years imprisonment. The Honorable Kelly Greenough, District Judge, sentenced Kirkwood in accordance with the jury's verdict.[1] Kirkwood was also ordered to pay various costs and fees. Kirkwood now appeals, raising two (2) propositions of error before this Court:

I. THE ADMISSION OF IMPROPER CHARACTER EVIDENCE AND EVIDENCE OF "BAD ACTS" DEPRIVED MR. KIRKWOOD OF THE RIGHT TO A FAIR TRIAL; and

II. ALTERNATIVELY, THE TRIAL COURT'S DECISION TO ADMIT THE EVIDENCE DISCUSSED IN PROPOSITION I FOR ANY REASON RELATED TO *BURKS* WITHOUT REQUIRING THE STATE TO SPECIFY WHICH EXCEPTION THAT EVIDENCE APPLIED TO WAS A MISAPPLICATION OF THE LAW.

¶2 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.

¶3 Appellant contends that the trial court abused its discretion by allowing evidence of prior bad acts to be admitted at trial. Appellant's claim primarily centers on the introduction of evidence relating to a violent domestic incident that occurred between Appellant and the victim's mother in September of 2015 – approximately eight months after the charged offense.[2] "This Court reviews a trial court's decision to allow introduction of evidence of other crimes for an abuse of discretion." *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. "An abuse of discretion has been 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.

¶4 On March 9, 2016, the State provided written notice of its intention to offer evidence of other crimes pursuant to 12 O.S.2011, § 2404(B) and related case law. Therein, the State sought to introduce, *inter alia*, evidence about a domestic altercation between Appellant and Ledbetter that occurred in September of 2015. During this clash, Appellant's violent behavior included choking Ledbetter, punching her multiple times in the head, dragging her by her hair, and stomping on her. An *in camera* hearing was conducted on April 5, 2016 – the day before Appellant's trial commenced. During the hearing, the prosecutor argued the evidence was being offered "to show a lack of accident or mistake" in response to Appellant's defense "that this was all an accident, this wasn't forceful". At the conclusion of the hearing, the trial court granted the State's request to present this evidence. The trial court determined this evidence was relevant and admissible to show lack of accident or mistake.[3]

¶5 Evidence of other crimes may be admissible to establish specific things, including absence of mistake or accident – the purpose for which the evidence was admitted in this case. 12 O.S.2011, § 2404(B); *Marshall v. State*, 2010 OK CR 8, ¶ 38, 232 P.3d 467, 477; *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. Evidence of other crimes must be (a) probative of a disputed issue of the charged crime; (b) there must be a visible connection between the crimes; (c) the evidence must be necessary to support the State's burden of proof; (d) proof of the evidence must be clear and convincing; (e) the probative value of the evidence must outweigh its prejudicial effect; and (f) the trial court must instruct jurors on the limited use of the testimony at the time it is given and during final instructions. *Marshall*, 2010 OK CR 8, ¶ 38, 232 P.3d at 477.

¶6 We evaluate the challenged other crimes evidence in the current case under these requirements. At trial, the challenged evidence

was chiefly introduced through the testimony of Brittany Ledbetter, the mother of the infant victim, A.J. The trial court instructed the jurors on the limited use of this testimony at the time the testimony was given and during the court's final charge. Notably, even though Appellant challenged this evidence during the pre-trial hearing on its admissibility, Appellant failed to timely or specifically renew his objection to this evidence at trial. Appellant has thus waived all but plain error of this claim. *Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268. "Under the plain error test, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights." *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. 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. *Id.; Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511. Appellant fails to show actual or obvious error.

¶7 The principal issue in this case was whether Appellant accidentally hurt A.J., or if he willfully or maliciously injured A.J. as the State contended. 21 O.S.Supp.2014, § 843.5(A); OUJI-CR (2d) 4-35A (Supp. 2012); *Cf. Fairchild v. State*, 1999 OK CR 49, ¶ 47, 998 P.2d 611, 622 (stating that child abuse murder is a general intent crime requiring, at a minimum, that the State prove the defendant "willfully" injured or willfully used unreasonable force against a minor child). The challenged evidence was probative of this disputed issue and was necessary to support the State's burden of proof, i.e., that Appellant acted willfully or willfully used unreasonable force when he injured A.J. The evidence demonstrated that Appellant had purposefully been physically aggressive and violent with another member of his household – a loved one – and countered Appellant's claim of accident or mistake.[4]

¶8 Moreover, contrary to Appellant's assertion on appeal,[5] we find the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice. "When balancing the relevancy of evidence against its prejudicial effect, the trial court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 367. That Appellant caused A.J.'s injuries was for the most part uncontroverted. Whether Appellant accidentally injured A.J. or "willfully and maliciously" injured A.J. was the pivotal issue. The challenged evidence was relevant to counter Appellant's claim of accidental or mistaken injury and was properly admitted pursuant to 12 O.S.2011, § 2404(B) for this purpose, i.e., to discredit Appellant's defense as opposed to proving action in conformity with his past character. *See Cole v. State*, 2007 OK CR 27, ¶ 23 n.5, 164 P.3d 1089, 1102 n.5 (evidence of prior crimes was admitted "more as a matter of discrediting a defense than proving action in conformity with past character.").

¶9 Thus, under the circumstances presented in this case, the probative value of the challenged evidence clearly outweighed its prejudicial effect and was necessary to support the State's burden of proof. Appellant has failed to demonstrate the trial court abused its discretion, i.e., took "an unreasonable or arbitrary action … without proper consideration of the facts and law pertaining to the matter at issue." *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. And, for the reasons discussed above, admission of the challenged evidence "did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right." *Welch*, 2000 OK CR 8, ¶ 10, 2 P.3d at 366. Appellant's first proposition of error is denied.

II.

¶10 Appellant argues error occurred when both the State and trial court failed to specify the exception under which the proffered other crimes evidence was admissible. As noted in Proposition I, Appellant failed to timely object to the admission of the challenged evidence at trial. Moreover, the record provided on appeal does not show that Appellant objected to the State's *Burk's*[6] notice or to the trial court's limiting instructions on this ground. Appellant has therefore waived all but plain error review of this claim. *Lowery*, 2008 OK CR 26, ¶ 9, 192 P.3d at 1268; *Welch*, 2000 OK CR 8, ¶ 9, 2 P.3d at 365. No such error occurred.

¶11 In Welch, 2000 OK CR 8, ¶ 9, 2 P.3d at 366, this Court reminded both trial judges and prosecutors of "the importance of delineating the exception and purpose for which other crimes evidence is being offered." The Court instructed that "[s]pecific rulings ensure fairness to the accused as well as facilitate expedient review of claims contesting admission of other crimes evidence." *Id.* The record in the present case shows Appellant was adequately

apprised of the State's intent to introduce the other crimes evidence specifically to counter Appellant's claim of accident or mistake. Moreover, given the evidence presented against Appellant coupled with his own trial testimony, we find the trial court's limiting instruction does not amount to plain error. *Id*. Appellant's final proposition is denied.

DECISION

¶12 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 TULSA COUNTY
THE HONORABLE KELLY GREENOUGH,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Steven Vincent, Attorney at Law, 403 S. Cheyenne Ave., Tulsa, OK 74203, Counsel for Defendant

Sarah McAmis, Tanya Wilson, Assistant District Attorneys, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Neilson Lea, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Oklahoma Attorney General, Jennifer B. Welch, 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.:CONCUR IN RESULTS
KUEHN, J.: CONCUR
ROWLAND, J.:CONCUR

LEWIS, V.P.J., CONCURS IN RESULTS:

¶1 I agree that the result reached by the majority in this case is correct. I disagree, however, that the correct analysis is used to reach that result. Section 2404 of the Evidence Code does not limit evidence of other crimes, wrongs, or acts to those incidents which occur prior to the crime for which a person is charged. *See Welch v. State*, 2000 OK CR 8, ¶¶ 13-15, 2 P.3d 356, 367 (holding post crime acts were admissible to show that an appellant's mode of operation was so unusual and distinctive that the acts constituted a signature).

¶2 In the present case, post crime evidence is used to show that Appellant's actions against his seven week old child were not accidental. In doing so, the State utilizes evidence that he was intentionally violent with the mother of the child some eight months after the child was taken into protective custody. No contemporaneous objection was made to this evidence, so this Court can only review for plain error. *See Hancock v. Stat*e, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813 (holding that contemporaneous objections must be made at the time the alleged error is being committed). Here, the Opinion concludes that there is no plain error because no actual or obvious error occurred in the introduction of the evidence.

¶3 Exceptions found in § 2404B are to be used with caution. *Galindo v. State*, 1978 OK CR 4, ¶ 4, 573 P.2d 1217, 1218. This caution is necessary to avoid problems of painting a defendant with the broad brush of propensity. Here, the State was clearly attempting to show that Appellant had a propensity toward violence. Admittedly, Appellant injured the child and he claimed that the injuries were not malicious but were caused by his inexperience with infants.

¶4 To be admissible, "there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof . . . [and] the probative value of the evidence must outweigh the prejudice to the accused . . . . When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged . . . the evidence should be suppressed." *Marshall v. State*, 2010 OK CR 8, ¶ 38, 232 P.3d 467, 477. Had this other crime occurred against a child within a reasonable time period, I might concur with its admission because there would be some connection between the two crimes. *See Cole v. State*, 2007 OK CR 27, ¶ 25, 164 P.3d 1089, 1096. In this case, however, I would hold that the separate crime has no logical connection to the crime charged and that the admission of this "other crimes evidence" constituted error. This constituted improper evidence of Appellant's character or trait of character to show action in conformity therewith under § 2404.

¶5 Naturally, the finding of error does not end the inquiry under the plain error review. An appellant must show that the error affected his substantial rights, meaning that the error

affected the outcome of the proceeding. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. I would find that the introduction of this other crimes evidence did not affect the outcome of this proceeding. Evidence of the crime was overwhelming. The judgment and the sentence imposed were not influenced by the introduction of the other crimes evidence, thus I would concur in the result reached by the Court in affirming the Judgment and Sentence, but would do so under a different analysis.

1. Under 21 O.S.Supp.2014, § 13.1, Kirkwood must serve 85% of the sentence imposed before he is eligible for parole.

2. Appellant additionally references the following evidence introduced through Ledbetter – that Ledbetter became pregnant by Appellant six months after their relationship began; that the couple moved in together after less than one year; that the couple broke up multiple times; that Appellant had been sexually unfaithful; and that Ledbetter sought a protective order against Appellant following the September 2015 domestic incident. Appellant asserts in passing this evidence was not proffered for any proper purpose, but was merely introduced to portray him as a bad person in the eyes of the jury. Appellant's claim relating to this evidence is so inadequately developed on appeal as to be waived from appellate review. Rule 3.5(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

3. The trial court initially made a general finding that the evidence was admissible pursuant to 12 O.S.2011, § 2404(B), ruling "I will grant your request as to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." However, when subsequently pressed by defense counsel for a more specific ruling, the trial court clarified its ruling stating the evidence was "most appropriate" to show "absence of mistake or accident". The court further explained, "[T]he law allows the use of other crimes, wrongs, or acts for any of those purposes. So I will allow it for any of those purposes, not to show an act – it's not admissible to prove the character of a person in order to show action and conformity."

4. This fact refutes Judge Lewis' complaint that there is no visible connection between the charged offense and this incident of domestic abuse against the victim's mother. Judge Lewis discounts the familial dynamics in which both incidents arose. The familial relationship itself tempers the eight month separation. This is not a case where, as Judge Lewis contends, the State was clearly attempting to show that Appellant had a propensity toward violence. Rather, the evidence was merely offered up for the limited purpose of showing absence of mistake or accident.

5. Appellant directs this Court's attention to several specific instances in the record where the State posed questions regarding the September 2015 domestic dispute. Appellant argues the prosecutor's questioning on these occasions and the resulting testimony demonstrate the State's "true intent" for introducing the challenged evidence was to show Appellant is both a "bad person and bad father."

6. *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, overruled in part on other grounds, *Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

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

2 **OBA General Practice/Solo and Small Firm Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Ashely B. Forrester 405-974-1625

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

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

17 **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

18 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

OBA Lawyers Helping Lawyers Assistance Program Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

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

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

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

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

28 **OBA Closed** – Memorial Day

June

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

2018 OK CIV APP 26

ASSET ACCEPTANCE LLC, Plaintiff/ Appellee, vs. HUNG T. PHAM and HOA V. TO, Defendants/Appellants.

Case No. 113,823. July 7, 2016

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE STEVE STICE, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Tracy Cotts Reed, Keith A. Daniels, LOVE, BEAL & NIXON, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant

Daniel J. Gamino, DANIEL J. GAMINO & ASSOCIATES, P.C., Oklahoma City, Oklahoma, for Defendants/Appellants

JANE P. WISEMAN, PRESIDING JUDGE:

¶1 Defendants Hung T. Pham and Hoa V. To appeal the trial court's denial of their petition to vacate default judgment. After review, we find the trial court erred when it refused to vacate the default judgment. Accordingly, we reverse the decision of the trial court and remand for further proceedings.[1]

FACTS AND PROCEDURAL HISTORY

¶2 This appeal arises from a collection action. In April 2009, Defendants purchased a home entertainment center from Hoffmans Furniture in Moore, Oklahoma, using a Wells Fargo Financial National Bank/Marquis Furniture, Inc., credit card account.[2] The total cost of the entertainment center, including the delivery fee, was $2,999.98. Defendants made their "last payment" to Wells Fargo Financial National Bank (Wells Fargo) for the entertainment center in April 2010 when the payoff was $1,894.98. Defendants, however, paid only $1,649.98, intentionally deducting $245 from the payoff for the cost of repairing damages allegedly caused by the delivery person and for loss of use. The remaining balance on the account was later assigned to Plaintiff Asset Acceptance LLC.[3]

¶3 Asset Acceptance LLC filed a petition for indebtedness against Defendants on January 27, 2012, alleging that Defendants had defaulted on their Wells Fargo Financial National Bank/Marquis Furniture, Inc., credit card account and owed $1,325.47, plus interest, court costs, and a reasonable attorney fee. It appears Defendants were served with the petition for indebtedness and a summons on March 1, 2012.[4] Each summons contained the following language:

> You have been sued by the above-named plaintiff, and you are directed to file a written answer to the attached petition in the office of the court clerk of CLEVELAND County[,] located at, District Court of Cleveland County 200 South Peters Avenue, Norman, OK 73069-6070, within thirty-five (35) days after service of this summons upon you exclusive of the day of service. Within the same time, a copy of your Answer must be delivered or mailed to the attorney for the Plaintiff. Failure to respond, in writing, within thirty-five (35) days, will result in default judgment being entered against you.
>
> **No request will be made to the Court for a Judgment in this case until the expiration of 35 days after your receipt of this Petition and Summons. If you dispute the debt and/or request the name and address of the original creditor in writing within the 35-day period that begins with the receipt of the Petition and Summons, all collection efforts, including our proceeding with this lawsuit, will cease until we respond as required by law.**

(Emphasis in original.) Defendants did not enter an appearance or file any answer, motion, pleading or written response in the case. However, on March 30, 2012, they sent Plaintiff via certified mail/return receipt requested a letter disputing the debt and enclosing prior relevant correspondence with Wells Fargo. Plaintiff's counsel's response letter dated April 10, 2012, provided the name of the current creditor, the name and address of the original creditor, Defendants' account number, the date the account was placed with Plaintiff's counsel for collection, and the principal balance claimed to be owed. The April 10 letter in closing stated: "This information is provided in response to your request for debt validation. We will proceed with this matter. If you would like to discuss settlement options, please advise." Defendants responded by letter dated May 1, 2012, empha-

sizing that the debt was still disputed and expressing concern regarding the figures provided by Plaintiff's counsel. Plaintiff did not respond to this letter, and communication between the parties then apparently ceased.

¶4 The trial court granted default judgment by journal entry of judgment filed October 29, 2012. In its separate certificate of mailing, Plaintiff stated it sent a copy of the judgment to Defendants by first class U.S. mail, postage prepaid, on November 8, 2012.

¶5 In mid-January 2014, Plaintiff began garnishing Defendant Pham's wages to satisfy the default judgment. Pham filed a claim for exemption and a request for hearing in connection with the garnishment, contending that his wages were exempt from garnishment because the debt had already been paid. At the claim for exemption hearing, the trial court took the matter under advisement and stayed the garnishment. No further action was taken until July 2014, when the trial court filed an order setting a second claim for exemption hearing on August 20, 2014.

¶6 Following the hearing, Defendants, on August 28, 2014, filed a petition to vacate the default judgment pursuant to 12 O.S. § 1031(4), (7), and (9). Defendants also on that day filed an answer and counterclaim, in which they denied Plaintiff's claims, asserted affirmative defenses, and alleged that Plaintiff was liable under the Oklahoma Consumer Protection Act and under the Fair Debt Collection Practices Act.[5]

¶7 In response, Plaintiff filed a motion to dismiss the petition to vacate and a motion to strike the answer and counterclaim. Attached to the motion to dismiss as an exhibit was a copy of the certificate of mailing filed in the case on November 9, 2012, showing Plaintiff mailed a copy of the judgment to each Defendant on November 8, 2012. Plaintiff argued that dismissal was proper because: (1) Defendants failed to have summons issued and served in conjunction with the petition to vacate as required by 12 O.S. § 1033; (2) Defendants' proceeding to vacate under 12 O.S. § 1031(9) was barred by the applicable one-year statute of limitations; (3) Defendants' petition failed "to provide facts to support an allegation of fraud in obtaining judgment" as required by 12 O.S. § 1031(4); and (4) Defendants had not "shown any 'unavoidable casualty or misfortune, preventing the party from prosecuting or defending' their interests, in conformity with 12 O.S. § 1031(7)." Plaintiff moved to strike Defendants' answer and counterclaim because such a filing '"after the time permitted by the Oklahoma Pleading Code and without leave of court is a nullity, having no procedural effect.'" *Durant Civic Foundation v. The Grand Lodge of Oklahoma of the Independent Order of Odd Fellows*, 2008 OK CIV APP 54, ¶ 8, 191 P.3d 612.

¶8 Defendants filed an objection to the motion to dismiss maintaining they had complied with the requirements of 12 O.S.2011 § 1033 and attaching original returns of summons as proof.[6] They also contended that the default judgment should be vacated pursuant to 12 O.S.2011 § 1031(4) and (7) because Plaintiff's counsel did not disclose "to the Court any of the contemporaneous correspondence received from the Defendants" or "advise[ ] Defendants of the setting for default judgment or provide[ ] Defendants with any advance notice thereof."

¶9 The trial court subsequently heard oral arguments. By order filed November 12, 2014, the trial court granted Defendants thirty days to brief the issues raised and Plaintiff the option to respond within 15 days thereafter. Defendants complied on December 9, 2014, arguing that the trial court should vacate the default judgment because "opposing counsel obtained the default judgment by failing to inform the Court of [Defendant] Pham's [correspondence with] opposing counsel" in violation of Rule 3.3 of the Rules of Professional Conduct. Plaintiff filed a brief in response to Defendants' petition to vacate on December 18, 2014, asserting that "judgment was entered properly . . . and no basis exist[ed] for vacating that judgment."

¶10 The trial court entered its order on March 16, 2015, denying Defendants' petition to vacate the default judgment. The court emphasized, "That the Defendants have not shown any grounds under 12 O.S.2011, § 1031 whereby [the] Court should and can vacate this judgment." The court further specifically found no fraud on the part of Plaintiff.

¶11 Defendants appeal the trial court's March 16, 2015, ruling.

STANDARD OF REVIEW

¶12 We generally review a trial court's decision to vacate or refuse to vacate a judgment under an abuse of discretion standard. *Farm Credit Bank of Wichita v. Trent*, 1997 OK 70, ¶ 21,

943 P.2d 588. However, in *Schweigert v. Schweigert,* 2015 OK 20, ¶ 7, 348 P.3d 696, the Supreme Court instructed:

> Although this Court reviews a district court's denial of a motion to vacate for abuse of discretion, the order denying a motion to vacate, like a motion for a new trial, will be reversed if the district court erred with respect to an unmixed question of law. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶ 5, 46 P.3d 698, 701. The district court's construction and application of Rule 10 to the undisputed facts before it presents a pure question of law subject to *de novo* review. *Id*.

And, when the trial court's decision to vacate or refuse to vacate involves a default judgment, we also consider the following:

> (1) default judgments are [dis]favored; (2) vacation of a default judgment is different from vacation of a judgment where the parties have had . . . an opportunity to be heard on the merits; (3) judicial discretion to vacate a default judgment should always be exercised so as to promote the ends of justice; (4) a much stronger showing of abuse of discretion must be made where a judgment has been set aside than where it has not.

Horowitz v. Alliance Home Health, Inc., 2001 OK 45, ¶ 9, 32 P.3d 825 (quoting *Ferguson Enters. Inc. v. Webb Enters. Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480).

ANALYSIS

¶13 We conclude it was error not to vacate the default judgment because no default judgment should have been granted when Plaintiff failed to inform Defendants of the motion for default judgment. In denying Defendants' petition to vacate the judgment, the trial court cited Oklahoma District Court Rule 10, finding that although Defendants disputed the debt, they had not filed an answer and were therefore not entitled to notice of the hearing on the motion for default judgment. The court concluded Defendants had not shown any grounds authorizing the vacating of the judgment pursuant to 12 O.S.2011 § 1031. We conclude the trial court erred in its analysis of Rule 10.

¶14 Rule 10 provided in relevant part at the time of this default judgment:

> In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days' notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown. If the addresses of both the party and his attorney are unknown, the motion for default judgment may be heard and a default judgment rendered after the motion has been regularly set on the motion and demurrer docket. It shall be noted on the motion whether notice was given to the attorney of the party in default, to the party in default, or because their addresses are unknown, to neither.
>
> Notice of taking default is not required where the defaulting party has not made an appearance. . . .

Oklahoma District Court Rule 10, 12 O.S.2011, ch. 2, app.

¶15 Plaintiff used the statutory summons form but modified it to include the following language: "If you dispute the debt . . . in writing within the 35-day period . . . all collection efforts, including our proceeding with this lawsuit, will cease until we respond as required by law." Defendants disputed the debt in their March 30, 2012, correspondence to Plaintiff's counsel claiming they had borrowed $2,999.98 to purchase an entertainment center. That cost included a fee charged by the seller for delivery and installation. The letter stated that they had paid all but $245 of the amount borrowed and that the difference was withheld to cover the cost of the damage to the entertainment center when it was delivered and installed by the seller's agents and the loss of use. Defendants had consistently and on several prior occasions explained the basis for their dispute to the seller and the original lender. Copies of correspondence documenting Defendants' communications with the seller and lender were attached to Defendants' letter.

¶16 On April 10, 2012, Plaintiff's counsel responded claiming Defendants still owed $1,325.47. That letter concluded: "If you would like to discuss settlement options, please advise." Defendants responded by letter dated May 1, 2012, again disputing the debt. Attached to this letter was the lender's statement show-

ing a payoff amount on the loan of $1,894.98, a copy of Defendants' check for $1,649.98 of this amount, a copy of Defendants' bank account showing that the lender had cashed that check, and a second explanation of the reason Defendants had not paid the disputed $245. Defendants' letter concludes: "What more do you require to show that we are correct and your figures are wrong?" Plaintiff's counsel did not respond. Instead, without notice to Defendants, Plaintiff obtained a default judgment for $1,898.96.

¶17 In *Schweigert,* the Supreme Court examined the notice required under Rule 10. The Court held:

> Rule 10's requirement for filing a motion and giving notice is applicable any time a party appears before a court, whether by filing a document or physically participating in a hearing. Rule 10 provides not only that a motion must be filed and notice given to a party who has appeared, but that the motion must be filed even if no notice was required. Rule 10 expressly provides:
>
> > If the addresses of both the party and his attorney are unknown, the **motion** for default judgment may be heard and a default judgment rendered after the **motion** has been regularly set on the motion and demurrer docket. It shall be noted on the **motion** whether notice was given to the attorney of the party in default, to the party in default or because their addresses are unknown to neither.
>
> (Emphasis added.) *This language mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore*. Mother's failure was an irregularity in the proceedings that left the district court without means of determining whether she was required to give notice, and, if so, whether the notice conformed to due process prerequisites of entering judgment.

Schweigert v. Schweigert, 2015 OK 20, ¶ 15, 348 P.3d 696 (emphasis added).

¶18 Defendants here contested the debt and were in communication with the attorneys about the debt before Plaintiff sought a default judgment. It is clear that Plaintiff knew how to contact Defendants and give them notice of the motion for default judgment. Defendants twice contested the debt and were in ongoing communication with Plaintiff regarding the debt before Plaintiff sought default judgment. There is no indication that a hearing was held in this matter.

¶19 In *Schweigert*, the Supreme Court examined the plain text of Rule 10 and concluded that a motion for default judgment "must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore." *Id.* The record does not show Plaintiff filed such motion, or that the matter was set for hearing. We conclude the trial court incorrectly interpreted Rule 10 as not requiring a motion or notice of hearing in this case.

¶20 We further conclude that Plaintiff's use of a modified summons altered Plaintiff's responsibilities to notify Defendants when Plaintiff moved for a default judgment. In its modified summons, Plaintiff added language notifying Defendants that, if they disputed the debt in writing, it would cease "all collection efforts, including our proceeding with this lawsuit" until Plaintiff responded to Defendants' communication. And Plaintiff voluntarily assumed the obligation to "respond as required by law" to Defendants before proceeding further. We cannot disregard the application of the Rules of Professional Conduct in this case. 5 O.S.2011, ch. 1, app. 3-A. Rule 4.1, Rules of Professional Conduct, 5 O.S.2011, ch. 1, app. 3-A, requires that the statement Plaintiff added to the summons be true, and imposes that requirement on the attorney issuing that summons. Rule 4.1 imposes a duty on counsel to disclose material facts to third parties like Defendants. In light of Plaintiff's representation to Defendants that it would cease all collection efforts and prosecution of this case if Defendants disputed the debt, in light of Plaintiff's counsel's April 10, 2012, offer to engage in settlement negotiations – to which Defendants responded by asking to be shown why their "figures" were wrong – and in light of Plaintiff's counsel's failure to respond to Defendants' last letter with its attachments before pursuing the litigation, the decision to proceed with the lawsuit and to take a default judgment was a material fact that Plaintiff and its counsel should have disclosed to Defendants in advance of any action by the trial court.

> It is the policy of the law to afford every party to an action a fair opportunity to

> present his side of a cause, and, while it is true the courts must require diligence on the part of litigants in being present when cases in which they are interested are being proceeded with, nevertheless, if . . . an officer of the court by their conduct have misled parties as to the time cases will be tried, the absence of such parties will be excused.

Oklahoma City v. Castleberry, 1966 OK 68, ¶ 0, 413 P.2d 556 (syl. no. 1 by the Court).

¶21 "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Rule 3.3(d), Rules of Professional Conduct, 5 O.S.2011, ch. 1, app. 3-A. Before being asked to enter a default judgment in this case, the trial court should have been informed of the material facts and circumstances, including: (1) Defendants were not served with or notified of any hearing on the default judgment, despite having disputed the debt and having communicated directly on many occasions with Plaintiff and Plaintiff's counsel about that dispute since April 2010; (2) Plaintiff's counsel's offer to discuss settlement options with Defendants, when they were unrepresented parties, could reasonably be understood by Defendants to call for some response to their May 1, 2012, letter, and that Plaintiff's offer would be met or withdrawn before Plaintiff reinstituted prosecution of the case; (3) Defendants' documents showed that they owed, at most, only $245 plus interest; and (4) some explanation of how that $245 had become the $1,325.47 sued for in Plaintiff's petition. The record in this case does not show that the trial court was informed of any of these facts and circumstances before granting default judgment.

¶22 Defendants filed their petition to vacate the default judgment pursuant to 12 O.S.2011 § 1031(4), (7), and (9). Pursuant to subsection 4, a "district court shall have power to vacate or modify its own judgments or orders" on the grounds of "fraud, practiced by the successful party in obtaining a judgment or order." Subsection 7 allows for vacation or modification "[f]or unavoidable casualty or misfortune, preventing the party from prosecuting or defending," while subsection 9 allows for vacation or modification "[f]or taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment." Defendants, however, also asserted in their objection to Plaintiff's motion to dismiss their petition to vacate that (1) "Plaintiff went to court and obtained default judgment against the Defendants with no disclosure to the Court of any contemporaneous correspondence received from the Defendants," and (2) there is no "record that Plaintiff['s] legal counsel advised Defendants of the setting for default judgment or provided Defendants with any advance notice thereof."

¶23 In *Schweigert*, 2015 OK 20, ¶ 7, the Supreme Court instructed that when a father asserted a mother failed to file a motion for default judgment and therefore failed to give him proper notice pursuant to Rule 10, he was asserting a claim for irregularity in the proceedings. Defendants here made a similar assertion. Title 12 O.S.2011 § 1031(3) allows a district court to vacate its judgment "[f]or mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order." Pursuant to 12 O.S.2011 § 1038, proceedings to vacate a judgment pursuant to § 1031(3) must be brought within 3 years of the filing of the judgment. Defendants met this requirement.

¶24 The applicable law is well-established. Default judgments are disfavored and the decision to vacate a default judgment should be exercised to promote justice. *Ferguson Enters., Inc. v. H. Webb Enters., Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480. We conclude this default judgment cannot stand and it was error for the trial court to refuse to vacate the judgment.

CONCLUSION

¶25 The decision of the trial court is reversed, the default judgment is vacated, and the case is remanded for further proceedings.

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

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

JANE P. WISEMAN, PRESIDING JUDGE:

1. We deny Defendants' Motion to Strike Plaintiff's Entry of Appearance and Answer Brief.

2. Marquis Furniture, Inc., does business as Hoffmans Furniture.

3. It is unclear exactly when Wells Fargo Financial National Bank assigned the debt to Asset Acceptance LLC. Because Defendants made their last payment directly to Wells Fargo Financial National Bank on or about April 8, 2010, we assume that it was after that time.

4. Defendants were properly served; in compliance with 12 O.S. 2011 § 2004(C)(1)(c)(1), the process server left copies of each Defendant's summons and petition at Defendants' residence in Cleveland County, Oklahoma, with their daughter who was over the age of 15 and a resident of the home. While both Defendants' petitions and sum-

monses were left at the same residence with the same person, the returns of summons contain different dates of service. For example, Defendant Pham's summons shows a service date of March 1, 2012, and Defendant To's summons erroneously contains two different service dates: March 1, 2012, and March 5, 2012. The March 5 date appears to be a typographical error, it being the date the process server signed the return. Regardless of this discrepancy, Defendants do not dispute the fact that they were served.

5. In their counterclaim, Defendants specifically contended "[t]hat the acts and omissions of Plaintiff [ ] [were] contrary to Oklahoma law, 15 O.S.2011 § 753 (11), (20), (26)" and "in violation of the 15 USC §1692 et seq." Notably, 15 O.S.2011 § 753 concerns unlawful practices under the Oklahoma Consumer Protection Act. Similarly, the Fair Debt Collection Practices Act was codified as 15 U.S.C. §§ 1692-1692 p. This counterclaim is not at issue in this appeal.

6. Defendants did not separately file the returns of summons with the trial court before filing the objection. But Defendants did serve Plaintiff, as well as its counsel, with a summons and petition via certified mail/return receipt requested on September 2, 2014. 2018 OK CIV APP 27

JOAN ELLEN MOREHEAD, individually and as Personal Representative of the Estate of Henry Andrew Morehead, deceased, and on behalf of all others similarly situated; BETTY RUTH LOVE, individually and as successor in interest to the Estate of Claud H. Love, deceased; and RUTH MAYNARD as Guardian of George O. Taylor, Plaintiffs/Appellees, vs. STATE OF OKLAHOMA, ex rel. OKLAHOMA HEALTH CARE AUTHORITY, Defendant/Third-Party Plaintiff/Appellant, and R. KENNETH KING, ESQ., an individual; SOUTHWEST PROPERTY INVESTMENTS, LLC, an Oklahoma Limited Liability Company; BLUE HORIZON PROPERTIES, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #1, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #2, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #3, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #4, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #5, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #6, LLC, an Oklahoma Limited Liability Company; SOUTHWEST PROPERTY HOLDINGS #7, LLC, an Oklahoma Limited Liability Company; XYZ CORP. 1; XYZ CORP. 2; XYZ CORP. 3; XYZ CORP. 4; XYZ CORP. 5; XYZ CORP. 6; JOHN DOE 1; JOHN DOE 2; JANE DOE 1; JANE DOE 2, Defendants, STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Third-Party Defendant.

Case No. 115,711. November 17, 2017

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE THAD BALKMAN, JUDGE

REVERSED AND REMANDED

Philip W. Redwine, Douglas B. Cubberley, LAW OFFICES OF REDWINE & CUBBERLEY, Norman, Oklahoma, and

Robert N. Naifeh, Jr., DERRYBERRY & NAIFEH, LLP, Oklahoma City, Oklahoma, for Plaintiffs/Appellees,

Nicole M. Nantois, Susan L. Eads, OKLAHOMA HEALTH CARE AUTHORITY, Oklahoma City, Oklahoma, for Defendant/Third-Party Plaintiff/Appellant State of Oklahoma, ex rel. Oklahoma Health Care Authority,

John J. Dewey, Travis Smith, OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Oklahoma City, Oklahoma, for Third-Party Defendant.

Kenneth L. Buettner, Chief Judge:

¶1 Defendant/Third-Party Plaintiff/Appellant State of Oklahoma, ex rel. Oklahoma Health Care Authority (the OHCA) appeals from the trial court's order granting Plaintiffs/Appellees Joan Ellen Morehead, individually and as Personal Representative of the Estate of Henry Andrew Morehead, deceased, and on behalf of all others similarly situated; Betty Ruth Love, individually and as successor in interest to the Estate of Claud H. Love, deceased; and Ruth Maynard's, as Guardian of George O. Taylor, (collectively, Plaintiffs) motion for class certification. After *de novo* review, we hold Plaintiffs have failed to demonstrate numerosity for the subclass of all Medicaid recipients who received compensated inpatient nursing home care funded by Medicaid and whose homestead property have been subjected to liens filed by the OHCA, which liens were sold and assigned by the OHCA to third parties, including the representatives, heirs, and devisees, of any such individual (Subclass C). We also hold Plaintiffs have failed to demonstrate they will fairly and adequately protect the interests of the class of Medicaid recipients who received medical assistance for inpatient nursing home care upon whose homestead a Medicaid lien was filed by the OHCA, includ-

ing their heirs, devisees, and representatives (Subclasses A, B, and C). We reverse the trial court's order granting Plaintiffs' motion for class certification and remand for further proceedings. REVERSED and REMANDED.

¶2 Plaintiffs filed this class action June 22, 2007. Plaintiffs claim the OHCA violated 63 O.S.Supp.1996 § 5051.3 in administering its Medicaid lien program. Medicaid, *inter alia,* provides inpatient nursing home care to Oklahomans. Individuals who apply for nursing home care under Medicaid must meet certain income and resource limitations to be eligible to receive payments of medical assistance. A homestead is an asset and considered a resource, absent certain exceptions not relevant here. After entering a nursing home funded by Medicaid, an individual has up to one year to dispose of their homestead.[1] The federal government requires states to recoup the cost of inpatient nursing home care by filing claims in the estates of deceased patients or placing pre-death liens on their homesteads. Oklahoma law enables the OHCA to file and enforce pre-death liens against the homesteads of patients who cannot reasonably be expected to be discharged and returned home. *See* 63 O.S. § 5051.3(A).

¶3 Plaintiffs claim Medicaid liens were filed and calculated in violation of 63 O.S. § 5051.3. Section 5051.3 provides, in pertinent part:

> A. Pursuant to the provisions of this section, the Oklahoma Health Care Authority is authorized to file and enforce a lien against the homestead of a recipient for payments of medical assistance made by the Authority to the recipient who is an inpatient of a nursing home if the Authority, upon competent medical testimony, determines the recipient cannot reasonably be expected to be discharged and returned home. *A one-year period of compensated inpatient care at a nursing home or nursing homes shall constitute a determination by the Authority that the recipient cannot reasonably be expected to be discharged and returned home.*
>
> B. Upon certification for Title XIX of the federal Social Security Act payments for nursing home care, *the Authority shall provide written notice to the recipient that:*
>
> 1. A one-year period of compensated inpatient care at a nursing home or nursing homes shall constitute a determination by the Authority that the recipient cannot reasonably be expected to be discharged and returned home;
>
> 2. A lien will be filed against the homestead of the recipient pursuant to the provisions of this section and that the amount of the lien shall be for the amount of assistance paid by the Authority after the expiration of one (1) year from the date the recipient became eligible for compensated inpatient care at a nursing home or nursing homes until the time of the filing of the lien and for any amount paid thereafter for such medical assistance to the recipient; and
>
> 3. The recipient is entitled to a hearing with the Authority prior to the filing of the lien pursuant to this section.
>
> The notice shall also contain an explanation of the lien and the effect the lien will have on the ownership of the homestead of the recipient and any other person residing in the homestead. The notice shall be signed by the recipient or the legal guardian of the recipient acknowledging that the recipient or the legal guardian of the recipient understands the notice and the effect that the payment of medical assistance on the recipient's behalf will have upon the homestead of the recipient.
>
> C. *The lien filed pursuant to subsection E of this section shall be for the amount of assistance paid beginning one (1) year after the recipient has received inpatient care from a nursing home or nursing homes and has received payment of medical assistance by the Authority until the time of the filing of the lien and for any amount paid thereafter for the medical assistance to the recipient.*

63 O.S.Supp.1996 § 5051.3(A)-(C) (emphasis added). Specifically, Plaintiffs claim liens were placed on the homesteads of Medicaid recipients who received less than one year of compensated care in violation of § 5051.3(A). Plaintiffs argue other liens were placed on the homesteads of Medicaid recipients who received more than one year of compensated care, but the lien amounts were calculated to include the costs of the first year of compensated care in violation of § 5051.3(C).[2] Plaintiffs also contend the OHCA failed to provide notice pursuant to § 5051.3(B) and that, since 2004, the OHCA sold and assigned the liens to third parties pursuant to an informal policy without any statutory authority and in violation of the Administrative Procedures Act.

¶4 The lawsuit moved forward sporadically with long periods of inactivity. Plaintiffs filed a Motion for Class Certification November 4, 2013. The trial court dismissed the case for lack of venue May 20, 2014. Plaintiffs appealed. The Court of Civil Appeals, in Case No. 112,946, reversed the trial court's decision and remanded the matter for further proceedings.[3] The trial court had a hearing on Plaintiffs' Motion for Class Certification September 27, 2016. On December 20, 2016, the trial court entered an order granting Plaintiffs' Motion for Class Certification. The trial court certified a class of Medicaid recipients who received medical assistance for inpatient nursing home care upon whose homestead a Medicaid lien was filed by the OHCA, including their heirs, devisees, and representatives. The trial court also certified three subclasses:

A. All Medicaid recipients who received less than twelve (12) months of compensated inpatient nursing home care funded by Medicaid and whose homestead property have been subjected to liens filed by the OHCA, including the representatives, heirs, or devisees, of any such individual ("Subclass A");

B. All Medicaid recipients who received more than twelve (12) months of compensated inpatient nursing home care funded by Medicaid and whose homestead property have been subjected to liens for the first twelve months of compensated care filed by the OHCA, including the representatives, heirs, or devisees, of any such individual ("Subclass B");

C. All Medicaid recipients who received compensated inpatient nursing home care funded by Medicaid and whose homestead property have been subjected to liens filed by the OHCA, which liens were sold and assigned by the OHCA to third parties, including the representatives, heirs, or devisees, of any such individual ("Subclass C").

The trial court also appointed Plaintiffs as class representatives and appointed class counsel. The OHCA appeals.

¶5 Class certification is reviewed *de novo. See* 12 O.S.Supp.2013 § 2023(C)(2). Under the *de novo* standard of review, we "review the record and apply the same standard as the trial court in determining whether the action will be maintained as a class action." *Panola Indep. Sch. Dist. No. 4 v. Unit Petroleum Co.*, 2012 OK CIV APP 94, ¶ 10, 287 P.3d 1033.

¶6 Class action lawsuits are governed by 12 O.S. § 2023, which provides, in pertinent part:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.
>
> B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied, if the petition in the class action contains factual allegations sufficient to demonstrate a plausible claim for relief and:
>
> . . .
>
> 2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> . . .

12 O.S.Supp.2013 §§ 2023(A)-(B). The Oklahoma Supreme Court has summarized that:

> A class may be certified when it satisfies the four requirements of section 2023(A) and one of the requirements of section 2023(B). Subsections 1 through 4 of § 2023 (A), respectively, require: 1) numerosity of class members; 2) commonality of questions of law or fact; 3) typicality of claims or defenses of the class representatives with the class; and 4) adequacy of representative parties to protect class interests. Subsections 1 through 3 of § 2023(B) require either: 1) a risk of inconsistent adjudications by separate actions or substantial impairment of non-parties to protect their interests; 2) appropriateness of final injunctive or declaratory relief; or 3) predomi-

nance of common questions of law or fact to class members and superiority of class action adjudication. The party seeking certification has the burden of establishing each of the requisite elements.

Cactus Petroleum Corp. v. Chesapeake Operating, Inc., 2009 OK 67, ¶ 10, 222 P.3d 12 (citations and quotations omitted). Here, Plaintiffs sought class certification under § 2023(A) and (B)(2).

¶7 The OHCA argues the Plaintiffs failed to establish the four prerequisites to a class action set forth in § 2023(A). The trial court may, as it did here, divide the class into subclasses. *See id* § 2023(C)(6). Each subclass is treated as a class. *Id.*

NUMEROSITY, 12 O.S. § 2023(A)(1)

¶8 Numerosity requires "[t]he class is so numerous that joinder of all members is impracticable." § 2023(A)(1). Plaintiffs assert the class consists of every Medicaid recipient, their heirs, devisees and representatives whose stay in a nursing home or long-care facility caused the OHCA to file a lien on their homestead. As of the filing of the action in 2007, Plaintiffs estimated there were 725 putative class members based on the list of Medicaid liens prepared by the OHCA. The Medicaid lien program director testified that all liens were calculated from the first day of compensated care. In Oklahoma, the numerosity test is satisfied by numbers alone when the size of the class is in the hundreds. *See Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶ 17, 969 P.2d 337. We hold Plaintiffs have satisfied the numerosity requirement of 12 O.S. 2023(A)(1) for Subclass A and Subclass B.

¶9 As for Subclass C, Plaintiffs contend of the 725 liens, 88 of the liens were unlawfully sold and assigned to third parties. However, it is undisputed that 71 of the 88 have been judicially foreclosed resulting in a journal entry of judgment, 14 have been settled with heirs and released, including the lien against Plaintiff Love's property, and one has been voided by the OHCA for reasons not relevant here. Only the two liens against the Morehead and Taylor homesteads remain. The two identified subclass members are the plaintiffs in this lawsuit. Plaintiffs have not produced any other evidence of liens sold or assigned by the OHCA to third parties or evidence of other members of Subclass C. Therefore, it cannot be said the class is so numerous that joinder of all members would be impractical. We hold Plaintiffs have failed to satisfy the numerosity requirements of 12 O.S. § 2023(A)(1) for Subclass C, and the part of the order certifying Subclass C is reversed.

COMMONALITY, 12 O.S. § 2023(A)(2)

¶10 Second, there must be questions of law or fact common to the class. See 12 O.S. § 2023(A)(2). The central issue of whether the OHCA violated 63 O.S. § 5051.3 presents questions of law common to the claims of all class members. "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶ 21, 81 P.3d 618. Here, the OHCA's policies and practices of filing and calculating Medicaid liens, which Plaintiffs allege violate Oklahoma law, are the same or similar for each class member. The Oklahoma Supreme Court has also noted that where a lawsuit challenges a practice or policy affecting all putative class members, individual factual differences among the individual litigants will not preclude a finding of commonality. *See id*.

¶11 The common questions of law for Subclass A are: (1) whether 63 O.S. § 5051.3(A) prohibits the OHCA from filing a lien against the homestead of a Medicaid recipient who has received less than twelve (12) months of inpatient nursing home care and who the OHCA has not otherwise determined cannot reasonably be expected to be discharged and returned home; (2) whether 63 O.S. § 5051.3(C) prohibits the OHCA from filing a lien on a Medicaid recipient's property for the amount of benefits received during the first twelve (12) months of benefits following the date the recipient became eligible for compensated inpatient nursing home care; and (3) whether the OHCA failed to provide notice that complied with 63 O.S. § 5051.3(B). The common questions of law for Subclass B are: (1) whether 63 O.S. § 5051.3(C) prohibits the OHCA from filing a lien on a Medicaid recipient's property for the amount of benefits received during the first twelve (12) months of benefits following the date the recipient became eligible for compensated inpatient nursing home care; and (2) whether the OHCA failed to provide notice that complied with 63 O.S. § 5051.3(B). We hold Plaintiffs have satisfied the commonality requirement of 12 O.S. § 2023(A)(2) for Subclass A and Subclass B.

TYPICALITY, 12 O.S. § 2023(A)(3)

¶12 Third, the claims of the representative parties must be typical of the claims of the class. *See* 12 O.S. § 2023(A)(3). The OHCA argues the circumstances of each lien will need to be individually analyzed for the timing of the lien placement and the value of the lien, which makes class certification inappropriate.

¶13 The Oklahoma Supreme Court has held, that like commonality, "[t]ypicality does not require that all of the class members have identical claims. If the claims arise from a similar course of conduct by the defendant and share the same legal theory, factual differences in the claims of the class members will not defeat typicality." *Cactus Petroleum Corp. v. Chesapeake Operating, Inc.*, 2009 OK 67, ¶ 11, 222 P.3d 12. Here, the claims arise from a similar course of conduct and all subclass members seek declaratory relief and damages under the same legal theories of liability. Plaintiff Morehead's claims are typical of those in Subclass A. Morehead had not received one year of compensated care when the OHCA filed the lien. He seeks a declaratory judgment that the OHCA violated § 5051.3(A), that notice did not comply with § 5051.3(B), and that the lien filed against the homestead is void. Plaintiffs Love and Maynard's claims are typical of those in Subclass B. The liens were filed after Love and Taylor received one year of compensated care. The lien amounts included the cost of the first year of compensated care.[4] They seek declaratory judgments that the OHCA violated § 5051.3(C), that notice did not comply with § 5051.3(B), and that the liens miscalculated to include the first 12 months of costs are void and should be recalculated. Plaintiffs Love and Maynard also seek damages as a result of the miscalculation. We hold Plaintiffs have satisfied the typicality requirement of 12 O.S. § 2023(A)(3) for Subclass A and Subclass B.

ADEQUACY OF REPRESENTATION, 12 O.S. § 2023(A)(4)

¶14 The fourth prerequisite for class certification is that "[t]he representative parties will fairly and adequately protect the interests of the class." See 12 O.S. § 2023(A)(4). According to the Oklahoma Supreme Court, "[t]his requirement is met when the record demonstrates that the class representatives' interests do not conflict with those of the class and that the class representatives will fully and effectively represent the interests of the class." *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶ 28, 81 P.3d 618. Division II of the Court of Civil Appeals has explained that "[s]atisfaction of the adequate representation element depends on two factors: '(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *Martin v. Hanover Direct, Inc.*, 2006 OK CIV APP 33, ¶ 18, 135 P.3d 251 (quoting *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 21 (E.D. Pa. 1975)).[5]

¶15 The OHCA has not identified any conflict between the interests of the representative for Subclass A and members of the subclass, nor has the OHCA identified any conflict between the interests of the representatives for Subclass B and members of the subclass. Rather, the OHCA contends Plaintiffs will not adequately represent the class, because they have a substantial lack of knowledge about the status of the proceedings and details of the claims and Plaintiffs' counsel is not qualified, as evidenced by the six and one-half years delay in filing the motion for class certification.

¶16 To demonstrate Plaintiffs' lack of knowledge of the claims, the OHCA points to their deposition testimony. Plaintiff Morehead testified that she did not understand a class action concerned more than her family's claims. Plaintiff Maynard testified that she did not know what a class action was or that she was a plaintiff in a class action. On the other hand, Plaintiff Love's deposition reveals she had an understanding of her claims and that she was representing others, as well. Plaintiffs respond that their knowledge of the case is of little importance to whether they will adequately represent the interests of the class and that, as long as they know something about the case, it should be certified.

¶17 As for the qualifications of Plaintiffs' counsel, the OHCA argues that not vigorously prosecuting the action on behalf of the class by, unexplainably, not filing a motion for class certification for six and one-half years demonstrates that Plaintiffs and their counsel will not fairly and adequately protect the interests of the class. Furthermore, the OHCA argues that, pursuant to 12 O.S. § 2023(F),[6] the trial court is required to undertake a specific inquiry prior to appointing class counsel, and that the trial court failed to make such inquiry. Plaintiffs respond that the OHCA failed to challenge counsel's qualifications before the trial court

and, therefore, the issue has been waived on appeal. While Plaintiffs acknowledge that a proper class representative "will pursue a resolution of the controversy with the requisite vigor and in the interest of the class," *Peil v. Nat'l Semiconductor Corp*., 86 F.R.D. 357, 366 (E.D. Pa. 1980), that adequacy of counsel is part of the court's analyses under § 2023(A)(4) and § 2023(F), and that the trial court's order is subject to *de novo* review, they do not respond to the OHCA's arguments or offer a reason or excuse for the six and one-half years delay.

¶18 Additionally, the OHCA argues the trial court failed to certify as soon as practicable, as required by 12 O.S. § 2023(C)(1). The OHCA contends that nearly a decade passed before the trial court granted Plaintiffs' belated motion for certification and, as a result, the OHCA has been prejudiced. The OHCA argues this will create obstacles for class discovery. The putative class members are elderly, vulnerable, and commonly have memory problems. Many putative class members have died. Furthermore, there have been significant staff changes in the OHCA and Third-Party Defendant Oklahoma Department of Human Services, the state agency that determines Medicaid eligibility. The OHCA has continued to file liens while this case languished, which has created considerably more potential class members. The OHCA argues the trial court order violates 12 O.S. § 2023(C)(1) and should be reversed. Plaintiffs argue the OHCA failed to raise this issue before the trial court and, therefore, it has been waived on appeal. Plaintiffs do not respond to the OHCA's legal arguments.

¶19 Title 12, § 2023(C)(1) provides, in pertinent part, that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Two fundamental policies are behind 12 O.S. § 2023(C)(1) and the federal equivalent, Fed. R. Civ. P. 23(C)(1):

> The first is that defendants are entitled to ascertain at the earliest practicable moment whether they will be facing a limited number of known, identifiable plaintiffs or whether they will instead be facing a much larger mass of generally unknown plaintiffs. Fundamental fairness, as well as the orderly administration of justice requires that defendants haled into court not remain indefinitely uncertain as to the bedrock litigation fact of the number of individuals or parties to whom they may ultimately be held liable for money damages. That is particularly true where, as here, the defendants were facing either thirty-nine named plaintiffs or a class of almost two hundred times the number of the original plaintiffs. Second, these rules foster the interests of judicial efficiency, as well as the interests of the parties, by encouraging courts to proceed to the merits of a controversy as soon as practicable. That, at bottom, is a matter of simple justice. As previously described, plaintiffs' three-year delay in moving for class certification indisputably thwarted these policies.

McCarthy v. Kleindienst, 741 F.2d 1406, 1411-12 (D.C. Cir. 1984).[7] Courts have noted that Rule 23(C)(1) of the Federal Rules of Civil Procedure does not impose upon a plaintiff the additional burden of ensuring that the district court adheres to the rule. *See Senter v. General Motors Corp*., 532 F.2d 511, 520-21 (6th Cir. 1976). Rather, "the trial court is obligated to take up class action status whether requested to do so or not by a party or parties where it is an element of the case." *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 274 (10th Cir. 1977); *see Trevizo v. Adams*, 455 F.3d 1155, 1161 (10th Cir. 2006).

¶20 Section 2023(C)(1) does not create an independent basis for denying class certification. *See Trevizo*, 455 F.3d at 1161; *but see Sterling v. Envtl.. Control Bd. of City of New York,* 793 F.2d 52, 58 (2d Cir. 1986). However, the United States Supreme Court and federal courts have generally analyzed a party's delay in moving for class certification as part of the adequacy of representation requirement under Fed. R. Civ. P. 23(A)(4). *See East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 404-05 (1977); *Trevizo*, 455 F.3d at 1161, n.4; *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131 (1st Cir. 1985); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1411-12 (D.C. Cir. 1984); *McGowan v. Faulkner Concrete Pipe Co*., 659 F.2d 554, 558-59 (5th Cir. 1981); *Yapuna v. Global Horizons Manpower Inc*., 254 F.R.D. 407, 412 (E.D. Wash. 2008); *Dudo v. Schaffer*, 91 F.R.D. 128, 136 (E.D. Pa. 1981); *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 214-15 (N.D. Ill. 1980); *Lyon v. State of Ariz.*, 80 F.R.D. 665, 667 (D. Ariz. 1978); *Walker v. Columbia Univ*., 62 F.R.D. 63, 64-65 (S.D.N.Y. 1973). A significant delay in seeking class certification is a strong indication that plaintiffs are not fairly and adequately representing the interests of the absent class.[8] *See Lyon,* 80 F.R.D. at 667. The United States

Supreme Court observed that "the named plaintiffs' failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive." *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). We agree with these courts that the untimeliness or delay in filing a motion for class certification should be considered in the court's analysis of whether the plaintiff will fairly and adequately represent the interests of the class. The delay between filing the petition and moving for class certification bears separately on the questions whether the plaintiff will adequately protect the interests of the class, 12 O.S. § 2023(A)(4), and whether class counsel will adequately represent the interests of the class, 12 O.S. § 2023(F)(4).

¶21 Here, nearly six and one-half years passed between Plaintiffs filing their petition and filing a motion for class certification. Plaintiffs filed a motion for class certification only after being prompted by the trial court. On September 24, 2013, after one year of no activity in the case, the trial court issued notice of disposition docket. At the hearing October 24, 2013, the trial court allowed the case to stay open noting that Plaintiffs were to file a motion for class certification within ten days. Courts have dismissed class actions or denied class certification for failure to demonstrate that the plaintiffs will fairly and adequately represent the interests of the class, as required by Fed. R. Civ. P. 23(A)(4), based on much shorter delays in moving for class certification. *See, e.g., Andrews*, 780 F.2d at 129 (four years); *McCarthy*, 741 F.2d at 1411 (three years); *McGowan*, 659 F.2d at 558-59 (two years); *Dudo*, 91 F.R.D. at 136 (eleven and one-half months); *Folding Carton*, 88 F.R.D. at 214 (four years since filing complaint and two and one-half years since denial of first motion for class certification); *Lyon*, 80 F.R.D. at 667 (three years). The order certifying the class was not entered until December 20, 2016. For nearly a decade, the OHCA was uncertain as to whether it would be facing three named plaintiffs or a much larger class. When the petition was filed in 2007, the putative class had 725 members. Now, the parties estimate the class size has doubled. The delay has made the OHCA's task of collecting and producing evidence related to the broad class more difficult and prejudices their case. Furthermore, the delay undercuts the judicial efficiency class actions are designed to achieve. Based on the six and one-half years delay in moving for class certification and Plaintiffs Morehead and Maynard's lack of knowledge of their responsibilities as class representatives, we hold Plaintiffs have failed to satisfy the adequacy of representation requirement of 12 O.S. § 2023(A)(4) for Subclass A and Subclass B.[9] We also note the record does not reflect that the trial court made the necessary § 2023(F) inquiry prior to appointing class counsel. We reverse the trial court's order granting Plaintiffs' motion for class certification and remand for further proceedings.

12 O.S. § 2023(B)(2)

¶22 In addition to satisfying the four prerequisites for class certification under § 2023(A), a plaintiff must also satisfy one of the requirements of § 2023(B). The trial court found that § 2023(B)(2) applies. The OHCA argues Plaintiffs failed to demonstrate that class certification is appropriate under 12 O.S. § 2023(B)(2). Because we hold Plaintiffs' motion for class certification should be denied based on 12 O.S. § 2023(A)(4), we need not and will not decide whether class certification is appropriate under § 2023(B)(2).

¶23 REVERSED AND REMANDED.

MITCHELL, P.J., and SWINTON, J., concur.

Kenneth L. Buettner, Chief Judge:

1. This permits an individual to return to the homestead if he or she experiences improved health within one year of entering a nursing home.

2. The statute has since been amended to include the first 12 months of costs. *See* 63 O.S.Supp.2015 § 5051.3(C) (Amended by Laws 2017, SB 819, c. 255, § 1) (effective Nov. 1, 2017).

3. Mandate issued March 7, 2016.

4. The lien against the Love homestead allegedly includes $21,972.80 for the first year of compensated care. The lien against the Taylor homestead allegedly includes $33,838.00 for the first year of compensated care.

5. Federal courts have also considered counsel's qualifications, competency, and conflicts in determining whether the plaintiffs will adequately protect the interests of the class. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *see Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir.1975).

6. Title 12, § 2023(F) provides, in pertinent part:

> F. CLASS COUNSEL. 1. Unless a statute provides otherwise, a court that certifies a class shall appoint class counsel. In appointing class counsel after November 1, 2009, the court:
> a. shall consider:
> (1) the work counsel has done in identifying or investigating potential claims in the action,
> (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action,
> (3) counsel's knowledge of the applicable law, and
> (4) the resources that counsel will commit to representing the class,
> b. may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class,

c. may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees or nontaxable costs,
d. may include in the appointing order provisions about the award of attorney fees or nontaxable costs, and
e. may make further orders in connection with the appointment;
2. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under paragraphs 1 and 4 of this subsection. If more than one adequate applicant seeks appointment, the court shall appoint the applicant best able to represent the interests of the class.
3. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
4. Class counsel shall fairly and adequately represent the interests of the class.

12 O.S.Supp.2013 § 2023(F).

7. Because Oklahoma's class action scheme closely parallels that provided in the Federal Rules of Civil Procedure, we may look to federal authority for guidance regarding its rationale. *See KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 9, 9 P.3d 683.

8. "Federal courts are not reticent to deny class certification motions where class representatives and their counsel are not diligent. This is so even where local rules do not seek to manage class certification with deadlines for filing a certification motion." *Browning v. Angelfish Swim School, Inc.*, 1 So. 3d 355, 363-64 (Fla. Dist Ct. App. 2009) (Shepherd, J., concurring in part and dissenting in part). In an effort to implement the policy of Fed. R. Civ. P. 23(C)(1), several federal district courts have adopted local rules requiring plaintiffs in class actions to file a motion for class certification within 60 or 90 days of filing the complaint. Oklahoma district courts have not adopted such a rule.

9. Even if Plaintiffs satisfied the numerosity requirement for Subclass C, they failed to satisfy the adequacy of representation requirement.

2018 OK CIV APP 28

NATHAN TYLER SIMPSON, Appellant, vs. COMMISSIONER OF THE DEPARTMENT of PUBLIC SAFETY, STATE OF OKLAHOMA, Appellee.

Case No. 115,800. March 16, 2018

APPEAL FROM THE DISTRICT COURT OF TEXAS COUNTY, OKLAHOMA

HONORABLE JEFF CLARK, JUDGE

AFFIRMED

Christopher Liebman, Guymon, Oklahoma, for Appellant,

Heather Poole, Oklahoma City, Oklahoma, for Appellee.

Larry Joplin, Judge:

¶1 Appellant, Nathan Simpson, seeks review of the trial court's January 27, 2017 order sustaining the revocation of his driving privileges, the suspension of which had been requested by the Department of Public Safety, due to Appellant's November 10, 2015 conviction for felony drug possession while using a motor vehicle. After the initial guilty plea, Appellant negotiated a modification of his drug possession charge and by agreement the conviction was modified to "endeavoring to possess a controlled dangerous substance" (CDS), in violation of 63 O.S. Supp.2004 §2-405. In this appeal, Appellant asserts his conviction for "endeavoring to possess a CDS" removes the offense he was convicted of from the mandatory revocation categories created by 47 O.S. Supp.2013 §6-205(A)(6).

¶2 On August 31, 2014, Appellant was stopped while driving in Texas County, Oklahoma, which resulted in his being charged with possession of a controlled dangerous substance, methamphetamine, after former conviction of two or more felonies. On November 10, 2015, Appellant initially entered a plea to the crime of possession of a controlled dangerous substance. In October 2016, Appellant sought post-conviction relief, requesting the opportunity to vacate his previously entered plea. On November 28, 2016, Appellant and the district attorney's office agreed Appellant's original 2015 plea could be vacated; Appellant was allowed to plea to a modified charge of endeavoring to possess CDS, in violation of 63 O.S. Supp.2004 §2-405.

¶3 After Appellant entered his original plea in November 2015, he sought dismissal of the Department of Public Safety order of revocation, stripping him of his driving privileges. This appeal from the driver's license revocation was premised on Appellant's petition for appeal or modification of his original possession plea, as Appellant argued the modified plea of "endeavoring to possess" no longer required revocation of his license under 47 O.S. Supp.2013 §6-205. The trial court disagreed and entered the appealed from order, sustaining the driver's license revocation, on January 27, 2017.

¶4 A judicial determination whether ambiguity in the language of a statute exists is a question of law. "[C]onsistent with a court's construction of alleged ambiguity in a contract, a judicial determination of the presence of more than one reasonable construction of the statutory language, i.e., ambiguity, presents a question of law because the determination that a statutory construction is reasonable is based initially on a plain meaning of the words in the statute where no fact is disputed." *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶9, 326 P.3d 496, 501.

¶5 Appellant's first proposition of error asserts his conviction for "endeavoring" to possess a controlled dangerous substance is not an offense contained within the exhaustive

list of drug offenses in 47 O.S. Supp.2013 §6-205(A)(6):

> A. The Department of Public Safety shall revoke the driving privilege of any person, whether adult or juvenile, who, in any municipal, state or federal court within the United States, receives a deferred sentence, or a conviction, when such conviction has become final, or a deferred prosecution, for any of the following offenses:
>
> ...
>
> 6. A misdemeanor or felony conviction for unlawfully possessing, distributing, dispensing, manufacturing, trafficking, cultivating, selling, transferring, attempting or conspiring to possess, distribute, dispense, manufacture, traffic, sell, or transfer of a controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act while using a motor vehicle[.]

Appellant argues that endeavoring to possess CDS is covered under the Uniform Controlled Dangerous Substances Act, 63 O.S. Supp.2004 §2-405, and should be enumerated under subsection six of the revocation statute, 47 O.S. §6-2-5(A)(6) and since it is not specifically listed with respect to the provisions of the revocation statute, Appellant claims the offense is exempted.

¶6 This court will engage in an examination of statutory construction "[o]nly where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict[.]" *Cox v. State ex rel. Oklahoma Dep't of Human Serv.*, 2004 OK 17, ¶19, 87 P.3d 607, 615. Appellant insists that ambiguity exists in this case, because subsection six does not list his "endeavoring" offense in the list of the controlled substances offenses provided.

¶7 However, in examining the statute at issue in this case, 47 O.S. §6-205(A)(6), Appellant's assertions of ambiguity are not supported upon a reading of the text. Subsection six lists "unlawfully possessing" or "attempting or conspiring to possess" among the offenses that will result in mandatory revocation of driving privileges. "Endeavoring to possess a controlled dangerous substance" is subsumed within the offense of "unlawfully possessing" a controlled dangerous substance as well as in the definition of "attempting or conspiring" to possess a controlled dangerous substance.

¶8 In reading the statute's language for its "plain and ordinary meaning," Appellant is unable to explain how the ordinary meaning of "possessing" or "attempting or conspiring to possess" as the words are used in subsection six are at odds with the plain and ordinary meaning of "endeavoring" to possess a CDS. Appellant's plea to "endeavoring to possess" a controlled dangerous substance includes the words "to possess CDS," which puts it squarely in line with the listed offenses in subsection six. Further, the word "endeavor" means to try, attempt, or make a concerted effort in furtherance of a goal.[1] As a result, there is nothing about the word "endeavor" that serves to take this offense outside the terms of subsection six as Appellant contends. This ordinary definition of endeavor means that Appellant has pleaded guilty to acting in furtherance to possess a controlled dangerous substance or that he attempted to possess a controlled dangerous substance, both of which are included in the offenses listed in subsection six.

¶9 The hyper-technical or exact reading Appellant asks the court to engage in is not consistent with the court's directive to give the words of the statute their plain and ordinary meaning. The Oklahoma Supreme Court said:

> In order to avoid judicially imposing a different meaning from that the Legislature intended, courts will not place a strained construction on the plain words of a statute. General words in a statute must receive a general construction, unless restrained, explained, or amplified by particular words.

Stump v. Cheek, 2007 OK 97, ¶14, 179 P.3d 606, 613. Appellant's attempt to exclude his offense from those listed in subsection six by focusing on the absence of the word "endeavor" from subsection six is asking this court to place an unwarranted and strained construction upon the language contained in the statute. Appellant's offense is clearly one for unlawfully possessing or attempting to possess a controlled dangerous substance, which is the intended reach of subsection six. We do not find any relief is warranted on this proposition of error.

¶10 Appellant's second proposition of error alleges the language used in 47 O.S. Supp.2013 §6-205(A)(3) and §6-205(A)(6) require differing standards of proof. It appears this proposition of error is intended to address an argument made by Appellee, the Oklahoma Department of Public Safety (the Department). The Depart-

ment has argued that even if Appellant's "endeavoring to possess a CDS" conviction takes his offense outside those listed in §6-205(A)(6), Appellant could also have his license revoked under the terms of §6-205(A)(3).[2]

¶11 The record reveals the Department of Public Safety based its order of revocation on a violation of "felony drug possession while using a m.v." (motor vehicle) under §6-205(A)(6) and not under the more general felony terms listed in §6-205(A)(3). The record on appeal was presented with a narrative statement in lieu of a transcript, and the narrative statement does not indicate what standard of proof the trial court engaged in to reach its decision. Even so, the appellate court will not reverse the trial court's ruling if it is legally correct, whether the trial court's decision is based on faulty reasoning or not. *Matter of the Estate of Pope*, 1990 OK 125, 808 P.2d 640, 647. Further, the appellate court will not presume the trial court engaged in an erroneous application of the standard of proof; Appellant must affirmatively demonstrate the trial court erred. *Osage Nation v. Bd. of Comm'rs of Osage County*, 2017 OK 34, ¶25, 394 P.3d 1224, 1234. As a result, even if this court were to agree the standard of proof differed from subsection (A)(6) to subsection (A)(3), Appellant has not affirmatively shown any such error occurred in this proceeding. The trial court was faced with evaluating a mandatory revocation under §6-205(A)(6) and the court is presumed to have applied the correct standard of proof absent affirmative evidence to the contrary. We find no relief is warranted on this proposition of error.

¶12 Appellant's third proposition of error alleges his due process rights were violated because he received insufficient notice his conviction would result in the mandatory suspension of his driver's license. The Oklahoma Supreme Court "has determined that a person's claim to a driver's license is indeed a protected property interest entitled to application of due process standards." *Fernandez v. State*, 2016 OK CIV APP 82, ¶8, 389 P.3d 393, 395; *Pierce v. State ex rel. Dep't of Pub. Safety*, 2014 OK 37, ¶18, 327 P.3d 530, 533. "[T]he statute requires DPS to give a licensee both notice of the revocation and notice of the licensee's right to request an administrative hearing which affords a licensee the due process protections contemplated by the legislature." *Martinez v. Dep't of Pub. Safety*, 2010 OK CIV APP 11, ¶19, 229 P.3d 584, 588.

¶13 Appellant seems to argue he was blindsided to discover after his "no contest" plea to the drug possession charge that his driving privileges were in jeopardy. However, the statute (47 O.S. §6-205(A)(6)) uses plain and ordinary language to describe drug possession offenses and the effect a conviction for drug possession while using a motor vehicle will have on one's driving privileges. In addition, Appellant was notified in November 2015 by the Department of Public Safety that his driving privilege was revoked and he was at liberty to request a hearing to contest the revocation order. Further, Appellant was provided a hearing in December 2016 at which the court considered his petition for appeal or modification after the charge and conviction were modified to "endeavoring to possess" a controlled dangerous substance. At no point has Appellant been denied notice of the revocation of his driving privileges, nor has he been denied an opportunity to contest the revocation, including after the point at which he and the district attorney agreed to the modified plea. Appellant has failed to demonstrate how the notice provided to him was improper and has failed to show he was denied the opportunity for a hearing to contest the revocation. We find no relief is warranted on this proposition of error.

¶14 The January 27, 2017 order of the trial court, sustaining the revocation of Appellant's driver's license is AFFIRMED.

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

Larry Joplin, Judge:

1. The American Heritage Dictionary defines "endeavor" as a "conscientious or concerted effort toward a given end; an earnest attempt" or as a verb "to make an earnest attempt[.]" The American Heritage Dictionary 452 (2nd College Edition 1982).

2. 47 O.S. Supp.2013 §6-205(A)(3):

> A. The Department of Public Safety shall revoke the driving privilege of any person, whether adult or juvenile, who, in any municipal, state or federal court within the United States, receives a deferred sentence, or a conviction, when such conviction has become final, or a deferred prosecution, for any of the following offenses:
>
> ...
>
> 3. Any felony during the commission of which a motor vehicle is used[.]

2018 OK CIV APP 29
IN THE MATTER OF J.W.E., I.W.E., and J.W.E., Alleged Deprived Children, DAVA WHITE EAGLE, Appellant, vs. STATE OF OKLAHOMA, Appellee.
Case No. 115,927. March 15, 2018
APPEAL FROM THE DISTRICT COURT OF BLAINE COUNTY, OKLAHOMA

HONORABLE MARK A. MOORE,
TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

LaRena J. Casey, Watonga, Oklahoma, for Appellant

Mike Fields, DISTRICT FOUR DISTRICT ATTORNEY, Molly B. Neuman, ASSISTANT DISTRICT ATTORNEY, BLAINE COUNTY DISTRICT ATTORNEY'S OFFICE, Watonga, Oklahoma, for Appellee

Blayne T. Allsup, Kingfisher, Oklahoma, for the Minor Children

JANE P. WISEMAN, PRESIDING JUDGE:

¶1 Dava White Eagle (Mother) appeals a trial court order denying her motion for new trial and an order terminating her parental rights after jury verdict. The dispositive issue[1] before us is whether there was trial court error or abuse of discretion in denying the motion for new trial because the federal Indian Child Welfare Act (ICWA) applied to the proceedings at the time of trial. After review, we conclude it was error not to grant the motion for new trial when ICWA applied to the proceedings when the trial started. The decision is reversed and the case is remanded for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 A trial on the State of Oklahoma's petition to terminate Mother's parental right to JeWE, IWE and JoWE, was held on January 23, 24 and 25, 2017. After deliberation, the jury returned a verdict to terminate Mother's parental rights on the grounds of abandonment pursuant to 10A O.S. § 1-4-904(B)(2), failure to correct the conditions that led to the adjudication of the children as deprived pursuant to 10A O.S. § 1-4-904(B)(5), and failure to contribute to the support of the children pursuant to 10A O.S. § 1-4-904(B)(7). The jury found by clear and convincing evidence that Mother's parental rights should be terminated on each of these grounds.

¶3 At trial, Mother testified she was a member of the Cheyenne Arapaho Tribe. When asked whether JeWE, IWE and JoWE were members of an Indian tribe, she stated, "Not yet." She testified, "I've got an application for them to – they're in the process of being enrolled in the Choctaw Tribe." She explained that the children were not members of the Cheyenne Arapaho Tribe because of their blood quantum, indicating that the children must be one-quarter to qualify for membership in the Cheyenne Arapaho Tribe. She said the children were "in the process of being enrolled in the Choctaw Tribe." At trial, State asked Mother, "You know that the Choctaw Nation has also sent a letter that says they don't qualify. Do you understand that?" Mother replied, "No. . . . 'Cause I spoke with them recently and I talked with the Indian child welfare from the Choctaw Tribe and she said that they were in the process of being enrolled." Mother "didn't know where – at what point they were at; she just knew they were in the process." She stated that she is "becoming an established member because in order for [the children] to become members [she has] to be an established member." She stated that she did not switch tribes and she is still enrolled with the Cheyenne Arapaho Tribe. She explained that she "became an established member with the Choctaw Tribe," which "means that [she doesn't] receive any benefits from the Choctaw Tribe because [she is] still an enrolled member of the Cheyenne Tribe." She agreed that she can be an enrolled member of only one tribe. She is becoming an established member solely to get the children enrolled with the Choctaw Tribe and "[t]hey will receive the whole benefits of whatever the Choctaw Tribe provides for . . . their tribal members."

¶4 When later questioned about her efforts to enroll the children with the Choctaw Tribe, she stated that the process was taking so long because she was trying to get birth certificates and Social Security cards for the children. She thought she could get them on her own, but then found she could get them from DHS. As to the process of enrolling the children, she testified:

> Then I had to call up to genealogy at the Choctaw Nation and find out who was on the roll to get – to get my kids on, because it's through lineage. I found that it was my mom's – my great-grandpa was the one who was on the roll. So I had to tie my relationship to my great-grandpa. So I had to get birth certificates for my mom and my mom's dad, and death certificates for both of them, which that took some time getting.
>
> And I had to – first I had to find out my grandpa – my great-grandpa's roll number and find out if he was even on the roll.

> So I found all that out, got the birth certificate for my grandpa and death certificate for my grandpa and my mom. And then I had to get my birth certificate and then get birth certificates of my children and then the social security cards of everybody except for my mom and my grandpa. And then I had to mail all those in.

Mother agreed that it was "quite a process." She said it usually takes three months for the Choctaw Tribe to make a decision.

¶5 Scott Walters, employed by DHS as a child welfare specialist, was asked at trial: "Now, all through the time that this case has been pending mom has attempted to enroll her children in various Indian tribes but that has not been successful to this point; is that correct?" Walters replied, "That is correct." Walters stated, "We did receive a letter from the Cheyenne Arapaho Tribe as well as the Choctaw Tribe stating that the children were not eligible for enrollment." He testified that at the beginning of the case, DHS approached it as though the children were Indian children.

¶6 In its final order terminating Mother's parental rights filed January 31, 2017, the Court stated that it had previously found that JeWE, IWE and JoWE "are not members or eligible for membership with an Indian Nation/Tribe and are not Indian Children as defined by the State and Federal Indian Child Welfare Acts." It is the children's status as Indian children at the time of trial on which we focus in this appeal.

¶7 After the final order was filed on January 31, 2017, Mother filed a motion for new trial pursuant to 12 O.S. § 651 on February 3, 2017. Mother alleged, among other things:

> Shortly after the announcement of the verdict by the Jury, the Mother received notice by mail that the children were enrolled members of the Choctaw Nation of Oklahoma and that said membership was certified on January 10, 2017 by the United States Department of the Interior Bureau of Indian Affairs and on January 20, 2017 by the Choctaw Nation of Oklahoma.

¶8 Mother attached to her motion for new trial copies of each child's documentation of Certificate of Degree of Indian Blood, dated January 10, 2017, from the United States Department of Interior Bureau of Indian Affairs (BIA), which indicated each child "is 1/8 degree Indian blood of the Choctaw Tribe." Mother also attached copies of a Choctaw Nation membership card for each child stating each child "is 1/8 Choctaw and is a member by blood of the Choctaw Nation of Oklahoma." Each card also stated, "Date Approved: 01/20/2017."

¶9 The motion for new trial noted, "That Mother testified at trial as to her diligent effort to enroll the children with the tribe and to obtain proof of enrollment prior to trial but that the evidence of enrollment was not and could not have been discovered until after the jury rendered its verdict." She asserted, "That because the children were enrolled members of an Indian Tribe prior to and at the time of trial, all proceedings, including the trial, were subject to the Indian Child Welfare Act 25 U.S.C. 1901 et seq. and Oklahoma Indian Child Welfare Act 10 O.S. § 40 et seq." She further asserted:

> That no notice of the proceedings was given to the Tribe, no expert witness testimony was presented, and the State proceeded under an improper burden of proof at trial all in violation of the requirements of ICWA and OICWA and such violation materially affected substantial rights of the Mother, prevented her from having a fair trial and constitutes an error requiring a new trial.

¶10 State filed an objection and response asserting, *inter alia*: "At the time of trial, the evidence and record showed the children were not members of an Indian tribe." It claimed that "the only other way the children could be defined as Indian children implicating the application of ICWA was if the children were 'eligible for membership [in a tribe] of which the biological parent is a member.' See BIA Regulations §23.108(a)." State argued that, because Mother testified she is a member of the Cheyenne Arapaho Tribe and the children are not eligible to be members of that tribe, "but that she was trying to enroll the children as Choctaw (of which she could not be a full member given her membership in Cheyenne Arapaho), there was no reason to believe the children met the definition of 'Indian Child' at the time of trial given the evidence and testimony in the record." It argued that the record in the case showed that the children were not tribal members at the time of trial and the record only reflected their membership after Mother filed the motion for new trial.

¶11 The trial court denied the motion for new trial, and Mother appeals.

STANDARD OF REVIEW

¶12 "A motion for new trial is addressed to the sound discretion of the trial court. Unless it is apparent that the trial court erred in some pure question of law or acted arbitrarily the ruling will not be disturbed on appeal." *Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, ¶ 5, 22 P.3d 695. "ICWA's applicability is a question of law. The standard of review for questions of law is *de novo." In re M.H.C.*, 2016 OK 88, ¶ 7, 381 P.3d 710.

ANALYSIS

¶13 ICWA's notice provisions are triggered in an "involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved." 25 U.S.C.A. § 1912(a). The question presented is whether JeWE, IWE and JoWe are Indian children within the meaning of ICWA, 25 U.S.C.A. §§ 1901-1963. ICWA states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C.A. § 1902.

¶14 ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.A. § 1903(4).

¶15 Under the title of "How should a State court determine if there is reason to know the child is an Indian child?", 25 C.F.R. § 23.107 provides:

> (a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.
>
> (b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:
>
> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and
>
> (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.
>
> (c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:
>
> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) *The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.*

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

(Emphasis added.)

¶16 In *Geouge v. Traylor*, 808 S.E.2d 541, 551 (Va. Ct. App. 2017), the Virginia Court of Appeals analyzed the CFR's "reason to know" requirement and concluded:

> [ICWA's] notice provisions are triggered when a state court "knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a). If, for the notice provisions to become operative a party had to *prove* that a child was an "Indian child," the statutory language would provide only that notice is necessary when the state court "knows that an Indian child is involved." The inclusion of the less certain "reason to know" in addition to the more definitive "knows" is a clear indication that Congress intended the notice provisions to be effective in situations where there was still question as to whether the child is an Indian child.
>
> . . . .
>
> The recently adopted regulations implementing the Act also make clear that the "reason to know" standard requires less than actual proof that the child meets the statutory definition of "Indian child." The regulations expressly recognize that state courts will be faced with situations in which "there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an 'Indian child.'" 25 C.F.R. § 23.107(b). In such a situation, the state court must, among other things, "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' in this part." 25 C.F.R. § 23.107(b)(2).
>
> *Thus*, [the natural parent] was not required to *prove* that L.T. was an "Indian child" for the Act's notice provisions to become operative. As the Supreme Court of Michigan has observed, "the 'reason to know' standard for purposes of the notice requirement in 25 U.S.C. 1912(a) ... set[s] a rather low bar." *In re Morris*, 491 Mich. 81, 815 N.W.2d 62, 73 (2012).

¶17 In that case, however, the Virginia Court held:

> Given [the natural parent's] inability to allege that L.T. *is* an Indian child and the information provided by the federally recognized Cherokee tribes, the circuit court did not have "reason to know that an Indian child is involved" in the proceedings as contemplated by 25 U.S.C. § 1912(a). Accordingly, the circuit court did not err in concluding that the Act, including its notice provisions, did "not apply to this case."

Id. at 553.

¶18 We conclude the court here did have reason to know JeWE, IWE and JoWE were Indian children. In December 2016, the BIA issued *"Guidelines for Implementing the Indian Child Welfare Act"*[2] *(Guidelines)*, which "are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and U.S. Department of the Interior (Department) regulations." *Guidelines*, p. 4. "While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children." *Id*.

¶19 The *Guidelines* specifically address the discovery of information after child custody proceedings have started:

> ***Subsequent discovery of information.***
>
> Recognizing that facts change during the course of a child-custody proceeding, courts must instruct the participants to inform the court if they subsequently learn information that provides "reason to know" the child is an "Indian child." Thus, if the State agency subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in

compliance with the requirements of ICWA.

Guidelines, p. 11.

¶20 The *Guidelines* also offer the following guidance:

> ***Inquiry each proceeding.***
>
> The rule does not require an inquiry at each hearing within a proceeding; but, if a new child-custody proceeding (such as a proceeding to terminate parental rights or for adoption) is initiated for the same child, the court must make a finding as to whether there is "reason to know" that the child is an Indian child. In situations in which the child was not identified as an Indian child in the prior proceeding, *the court has a continuing duty to inquire whether the child is an Indian child.*

Id. (emphasis added). The *Guidelines* further instruct:

> ***When one or more factors is present.***
>
> If there is "reason to know" the child is an "Indian child," the court needs to ensure that due diligence was used to identify and work with all of the Tribes of which there is a reason to know the child may be a member or eligible for membership, to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership). In order to provide the information that the court needs, the State agency or other party seeking placement should ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information.

Id.

¶21 The *Guidelines* recognize, "The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship) is a contemporaneous communication from the Tribe documenting the determination." *Id.* at 12 (footnote omitted). The *Guidelines* suggest that where a child's status is in question, the child should be treated as an Indian child unless and until it is determined the child is not an Indian child within the meaning of ICWA. *Id.* "If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an 'Indian child,' then the State may proceed under its usual standards." *Id.*

¶22 A complicating factor is that the Choctaw Nation previously informed the trial court that JeWE, IWE and JoWE were not members of the Choctaw Nation. But Mother also explained to the court at trial that she was an established member of the Choctaw Nation and had submitted the information to the Nation to establish membership for her children. The question facing the trial court, and now this Court on appeal, is whether this information was enough to trigger the requirements of ICWA because there was reason to know these children were Indian children within the meaning of ICWA. We conclude that it was.

¶23 These were not merely Mother's claims at trial that the children might be Indian children. Mother detailed at trial how she traced her Choctaw ancestry to her great-grandfather and provided documentation to the Choctaw Nation. She also testified that she is an established member of the Choctaw Nation, which would qualify the children for membership in the Choctaw Nation. Mother's testimony was sufficient to give State and the trial court adequate reason to know at the time of the termination trial that these were Indian children.

¶24 The children were, in fact, eligible for membership and actually members of the Choctaw Nation and ICWA applied to the proceedings when the trial began. We are guided by the Oklahoma Supreme Court's decision in *In re M.H.C.*, 2016 OK 88, 381 P.3d 710, in which the Cherokee Nation filed a motion to transfer a deprived child case to tribal court after the mother became an enrolled member of the Cherokee Nation. *Id.* ¶0. The Supreme Court found no trial court error in finding that ICWA applied to the case even though the child was not an Indian child within the meaning of ICWA when State filed the case. *Id.* ¶ 1. The child at the heart of the deprived action was born in September 2013 and placed in DHS custody on November 5, 2013. *Id.* ¶ 2. Although the Cherokee Nation appeared at the initial appearance on November 21, 2013, the mother informed the court she was not a member of the Cherokee Tribe but she had a Certificate of Degree of Indian Blood. *Id.* After State informed the Cherokee Nation that it planned to adjudicate the child as deprived, the Nation notified DHS that the child was eligible for enrollment and sent DHS an enrollment application. *Id.* ¶ 3. DHS did not complete the application and the Cher-

okee Nation later sent DHS three additional applications. *Id.* The trial court ruled on December 3, 2013, that ICWA did not apply to the case. *Id.* No one informed the mother of the benefits and protections provided by ICWA, and she initially declined to enroll the child as a tribal member. *Id.*

¶25 State filed a motion to terminate the mother's parental rights in September 2014 and the court entered a default order on December 18, 2014, terminating her rights after she failed to appear. *Id.* ¶ 5. The mother became an enrolled citizen of the Cherokee Nation on February 5, 2015. *Id.* Cherokee Nation filed a motion to intervene on February 19, 2015, and a motion to transfer the case to tribal court on March 24, 2015. *Id.* The trial court later vacated the default order terminating the mother's parental rights due to defective service. *Id.* The trial court also granted the motion to transfer to tribal court. *Id.* ¶ 6. State and the child's foster mother objected to the transfer. *Id.*

¶26 The Supreme Court noted, "ICWA applies prospectively to a proceeding when the record establishes the child meets ICWA's definition of an Indian child." *Id.* ¶ 16. The Court rejected the argument that the trial court erred when it found "ICWA applicable at a stage in the proceeding later than the proceeding's commencement." *Id.* Instead, the Oklahoma Supreme Court stated, "We agree with the Supreme Court of Nebraska, 'the provisions of ICWA . . . apply prospectively from the date Indian child status is established on the record.'" *Id.* ¶17 (quoting *In re Adoption of Kenten H.*, 725 N.W.2d 548, 555 (Neb. 2007)). In line with this reasoning, the Supreme Court held:

> Upon the date the record shows that ICWA is applicable, the proceedings must be ICWA compliant. *In the present case, ICWA became applicable on February 5, 2015, when the natural mother gained membership in the Cherokee Nation, making the child an Indian child under ICWA.* Retroactive application of ICWA is not applicable here to invalidate the district court's prior orders.
>
> . . . .
>
> The provisions of ICWA become effective in a state child custody proceeding on the date that the record supports a finding that ICWA applies.

Id. ¶¶ 17, 20 (emphasis added). It is important to note that the Supreme Court stated that the date ICWA became applicable was the date the mother gained membership, February 5, 2015. The Court determined this was "the date the record shows that ICWA is applicable." *Id.* ¶ 17.

¶27 State argued in our present case, "[P]roof of the children's Indian status was established on the record on February 3, 2017," the date of the motion for new trial. We reject this argument because it clearly contradicts the holding of *In re M.H.C.*, which unambiguously held that "the date the record shows that ICWA is applicable" was the date that the mother gained membership. *Id.* Pursuant to the holding of *In re M.H.C.*, the key date is not the date the children's membership is entered into the court record, but the date the membership became entered into the Choctaw Nation's record.

¶28 Although it is clear the trial court and State may not have been affirmatively informed of the children's membership in the Choctaw Nation until February 3, 2017, this date is not determinative of the date ICWA became applicable. We reiterate that the trial court and State had reason to know at trial that ICWA may very well apply and this warranted further investigation. Despite the Choctaw Nation's previous communication about the children's membership status, Mother's detailed testimony about establishing her own membership and the children's membership raised red flags that further inquiry at trial was needed despite the Choctaw Nation's earlier communication.

¶29 We recognize that that does not mean that IWCA applied to the case from the date it was filed in 2011. ICWA became applicable on the date the children became eligible for enrollment[3] or the date they enrolled, which was January 20, 2017. At the latest, ICWA applied as of January 20, 2017, a date before trial started. ICWA's provisions, including the heightened burden and expert witness requirements, were applicable at trial. ICWA specifically commands:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C.A. § 1912(f). These requirements were not met in this case.

¶30 We acknowledge that the children have been out of Mother's home for a very extended period of time and this decision entails further delay. We cannot, however, ignore ICWA's requirements and the rights of the Choctaw Nation and its interest in these children, who are members of the Nation. The better course in the circumstances, given Mother's testimony at trial, would be to contact the Choctaw Nation to determine whether the children were eligible for membership at the time of trial.

¶31 Given ICWA's applicability to the trial of this case and the failure to comply with ICWA requirements, it was error as a matter of law to deny Mother's motion for new trial. The decision of the trial court must be reversed and the case remanded for further proceedings.

CONCLUSION

¶32 Mother was entitled to a new trial because ICWA applied when the trial on the termination of her parental rights to JeWE, IWE and JoWE was held. We reverse the trial court's decision and remand for further proceedings.

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

THORNBRUGH, C.J., and FISCHER, J., concur.

JANE P. WISEMAN, PRESIDING JUDGE:

1. Although Mother raises other grounds for reversal, the question of ICWA's application is dispositive and these additional propositions of error will not be addressed.

2. *Guidelines for Implementing the Indian Child Welfare Act*, December 2016, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

3. Depending on the Choctaw Nation's membership requirements, this could have been the date Mother became an established member, if becoming an established member made the children eligible for enrollment in the Choctaw Tribe. It is unclear the date on which Mother became an established member or if this date triggered the children's eligibility under the Choctaw Nation's membership laws, rules, or regulations.

2018 OK CIV APP 30

OSU-AJ HOMESTEAD MEDICAL CLINIC, PLC, and MOORE PRIMARY CARE, INC., Petitioners/Appellants, vs. THE OKLAHOMA HEALTH AUTHORITY, THE OKLAHOMA HEALTH CARE AUTHORITY BOARD, REBECCA PASTERNIK-IKARD, ADMINISTRATOR OF THE OKLAHOMA HEALTH CARE AUTHORITY, Respondents/Appellees.

Case No. 116,267; Comp. w/116,100; 116,504
January 19, 2018

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE LORI M. WALKLEY, TRIAL JUDGE

REVERSED AND REMANDED

James Robert Johnson, Carrie L. Palmer, RESOLUTION LEGAL GROUP, Oklahoma City, Oklahoma, for Petitioner/Appellant,

Maria Maule, Joseph H. Young, OKLAHOMA HEALTH CARE AUTHORITY, Oklahoma City, Oklahoma, for Respondents/Appellees.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

¶1 Petitioners/Appellants, OSU-AJ Homestead Medical Clinic, PLC, and Moore Primary Care, Inc. (Providers), seek review of the trial court's order granting the motion to dismiss filed by Respondents/Appellees, Oklahoma Health Care Authority, Oklahoma Health Care Authority Board, and Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority (collectively Agency), on the grounds that the claims did not meet the standard for a writ of prohibition. We reverse, holding that the petition properly states a justiciable claim for declaratory relief under the Oklahoma Administrative Procedures Act (APA), 75 O.S. 2011 §306.[1]

I. Background

¶2 Agency administers the Medicaid program in Oklahoma. Providers contracted with Agency to provide medical care to persons who receive Medicaid services. Agency audited Providers' billings and issued an audit report requiring that Providers refund substantial amounts of Medicaid payments that Providers had received from Agency.

¶3 Providers petitioned for a declaratory ruling and a writ of prohibition, asserting that Agency performed the audit by applying rules that had not been properly promulgated under the Administrative Procedures Act, 75 O.S. 2011 §§302-308.1. In particular, they alleged that 56 O.S. §1011.9(A)(1) required Agency to "establish a method to deter abuse and reduce errors in Medicaid billing, payment, and eligibility through the use of technology and accountability measures for the Authority, providers, and consumers." They alleged Agency failed to promulgate rules in compliance with §1011.9(A)(1), but instead delegated authority to its Medicaid Director

to create and implement standards on an ad hoc basis by issuing numbered memoranda. These memoranda included, among others, one numbered "OHCA 2014-37" establishing requirements for allergy testing services by providers. Providers allege that the numbered memoranda fit within the definition of an administrative rule under 75 O.S. 2011 §250.3(17).[2]

¶4 Providers also alleged that Agency audited them, and they filed an administrative appeal of the audit report. They allege that they then discovered additional unpromulgated audit standards, including statistical analyses and guidelines for authorization, that Agency had applied to Providers. The administrative appeal remained pending at the time Providers filed the petition below.

¶5 Providers further alleged that Agency's promulgated rules, OAC 317:30-3-1 and OAC 317:30-3-2.1, fail to define enforceable standards for billing and audits. OAC 317:30-3-1(f) requires that services provided under the Medicaid Program must meet medical necessity criteria.[3] OAC 317:30-3-2.1 addresses "probability sample audits," stating that the sample claims must be selected based on "recognized and generally accepted sampling methods." The rule does not specify the methods. Providers contend the audits applied numerous requirements and methodologies that were not contained within these promulgated rules, and that those requirements and methodologies were themselves rules within the meaning of the APA.

¶6 Providers also alleged that OAC 317:30-5-4, adopting the Health Care Financing Administration Common Procedure Coding System, including CPT (Current Procedural Terminology) codes, was an improper delegation to the American Medical Association of Agency's authority to establish billing standards. Providers alleged that Agency applied rules retroactively. In addition, they allege that the rule, OAC 317:1-1-9.1, which provides that Agency "may deny record requests in anticipation of litigation," contradicts the Open Records Act, at 51 O.S. §24A.20, which provides,

> Access to records which, under the Oklahoma Open Records Act, would otherwise be available for public inspection and copying, shall not be denied because a public body or public official is using or has taken possession of such records for investigatory purposes or has placed the records in a litigation or investigation file.

¶7 Providers also alleged that Agency imposed internal unpromulgated rules defining "personally rendered services" by a Provider under OAC 317-30-3-1(b)[4] and OAC 317:30-3-2[5] as limited to those services performed by staff members who were direct employees of Provider rather than those who were contractors placed by a healthcare employment agency. Providers alleged that in each audit, Agency had no objection to services provided by employees while it did object to services provided by contractors, notwithstanding the identical nature of the services, qualifications, and supervision.

¶8 Providers sought a writ prohibiting Agency from enforcing unpromulgated rules, from applying any rule retroactively, and from interpreting its promulgated rules in any manner not in conformity with the express language. They sought a declaration that use or application of the specified unpromulgated rules was null, void, and unenforceable, and the audit reports predicated on the unpromulgated rules were null, void, and unenforceable.

¶9 Agency moved to dismiss the petition on the grounds that Providers' claims did "not meet the standard for a writ of prohibition." Agency attached to its motion a copy of its general provider agreement, an email relating to an open records request from Providers' attorney, Providers' grievance request, and a copy of an advertisement by Providers' attorney. Agency asserted that its attachment of the documents did not convert the motion to dismiss into one for summary judgment. However, its motion argued the merits of Providers' claims.

¶10 In response, Providers similarly argued the merits of their claims. In addition, they asserted that their petition supported a present and justiciable cause of action.

¶11 The trial court granted the motion to dismiss on the grounds it failed to state a claim upon which relief may be granted. Providers appeal from this order.

II. Standard of Review

¶12 Although the motion to dismiss presented matters outside the pleadings, the attachments did not relate to issues of fact and the trial court did not convert the motion to one for summary judgment under 12 O.S. 2011 §2012(B). There-

fore, we will treat the ruling below as a disposition by dismissal. We review a disposition by dismissal under a de novo standard. *May v. Mid-Century Ins. Co*., 2006 OK 100, ¶10, 151 P.3d 132, 136. The purpose of a motion to dismiss is to test the law that governs the claims, not the underlying facts. *Id*. For the purposes of reviewing a ruling on a motion to dismiss, we take the allegations of the petition as true. *Indiana Nat. Bank v. State Dept. of Human Services*, 1994 OK 98, ¶3, 880 P.2d 371, 375. Motions to dismiss are viewed with disfavor, and the burden is on the movant of showing the legal insufficiency of the petition. *Id*. A plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. *Darrow v. Integris Health, Inc*., 2008 OK 1, ¶7, 176 P.3d 1204, 1208-1209. Oklahoma is a notice pleading state, and all that is required for notice pleading is that the petition give fair notice of the claim and the grounds upon which it rests. *Gens v. Casady School,* 2008 OK 5, ¶ 9, 177 P.3d 565, 569.

III. Analysis

¶13 Section 306 of the APA authorizes the district court to determine the validity or applicability of a rule in a declaratory action if the plaintiff alleges that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the plaintiff's legal rights or privileges. Pursuant to §306(D), the plaintiff need not exhaust administrative remedies prior to seeking declaratory relief.

¶14 Under the APA, a rule includes any agency statement of general applicability and future effect that implements, interprets, or prescribes law, policy, procedure, or practice of the agency as it applies to the public. 75 O.S. 2011 §250.3(17). It does not include statements concerning only the internal management of an agency and not affecting the private rights of the public. §250.3(17)(c). The Legislature defined "rule" broadly so as to prevent an agency from circumventing the procedural requirements of the APA by using labels such as "bulletins" or "guides," which amount to rules in legal operation and effect. *Grand River Dam Auth. v. State*, 1982 OK 60, ¶9, 645 P.2d 1011, 1014. In determining whether something is a rule, the court should look not to the mode by which it was created but to its impact or effect. *Id.* at ¶17.

¶15 When a rule is challenged under the APA, the burden of proof shifts to the promulgating agency to show:

> 1. that the agency possessed the authority to promulgate the rule;
>
> 2. that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority;
>
> 3. that the rule is not violative of any other applicable statute or the Constitution; and
>
> 4. that the laws and administrative rules relating to the adoption, review and promulgation of such rules were faithfully followed.

§306(C). If the agency fails to meet its burden, the petitioner is entitled to a judgment declaring that the rule is invalid.[6]

¶16 Providers' petition properly states a claim for declaratory relief under §306. The petition alleges Agency has made statements that meet the definition of a rule under the APA but were not promulgated in compliance with the APA. It also alleges that Agency has promulgated rules that are inconsistent with statutory authority. Providers allege that these rules interfere with or impair their legal rights or privileges. They have established that at the time the petition was filed, Agency had not entered a final order in an individual proceeding determining Providers' rights. The petition is legally sufficient to establish a justiciable controversy as to whether Agency's statements were unpromulgated rules and whether the promulgated rules were consistent with Agency's statutory authority.

¶17 On remand, Providers bear the burden of showing that the statements it challenges as unpromulgated rules were rules within the meaning of §250.3(17) of the APA. The burden then shifts to Agency to negate Providers' assertions or show that the rules were properly promulgated. With regard to the Oklahoma Administrative Code rules challenged as improper, the burden has already shifted to Agency to establish the requirements of §306(C).

¶18 The petition does not otherwise state any claim for relief. Prohibition is an extraordinary remedy, not to be resorted to where usual remedies are available. *Kutch v. Cosner,* 1950 OK 48, ¶0, 470, 215 P.2d 300. It lies only where a lower tribunal is without jurisdiction or is about to make an unauthorized use of judicial power.

Id. A necessary element is that the injury cannot be remedied by another means. *Umholtz v. City of Tulsa*, 1977 OK 98, ¶6, 565 P.2d 15, 18. Prohibition could lie to prevent an administrative agency from exercising unauthorized quasi-judicial power. Id. at ¶11.

¶19 However, extraordinary relief is inappropriate where another remedy is available. It is undisputed that Providers are pursuing relief in the district court while their appeal of the recoupment decision has been stayed. Where relief is available from an administrative agency, it must ordinarily be pursued before proceeding to the courts. Okla. Pub. *Welfare Comm'n v. State ex rel. Thompson*, 1940 OK 364, ¶¶8-9, 105 P.2d 547, 549. Insofar as Providers desire prohibition to reverse the decision on recoupment, that relief is available in the agency action that has been stayed. A petitioner should not be permitted to obtain a stay in an agency action in order to pursue the same relief by extraordinary remedy in the district court.

¶20 For the foregoing reasons, the trial court's order dismissing the petition is REVERSED and this matter is REMANDED for further proceedings consistent with this opinion.

SWINTON, P.J., and MITCHELL, J., concur.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

1. 75 O.S. 2011 §306 provides,
   A. The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied, if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.
   B. The agency shall be made a party to the action.
   C. Rules promulgated pursuant to the provisions of the Administrative Procedures Act are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. When a rule is appealed pursuant to the Administrative Procedures Act, it shall be the duty of the promulgating agency to show and bear the burden of proof to show:
   1. that the agency possessed the authority to promulgate the rule;
   2. that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority;
   3. that the rule is not violative of any other applicable statute or the Constitution; and
   4. that the laws and administrative rules relating to the adoption, review and promulgation of such rules were faithfully followed.
   The provisions of this subsection shall not be construed to impair the power and duty of the Attorney General to review such rules and regulations and issue advisory opinions thereon.
   D. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.
2. 75 O.S. 2011 §250.3(17) provides,
   "Rule" means any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term "rule" includes the amendment or revocation of an effective rule but does not include:
   a. the issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license,
   b. the approval, disapproval or prescription of rates. For purposes of this subparagraph, the term "rates" shall not include fees or charges fixed by an agency for services provided by that agency including but not limited to fees charged for licensing, permitting, inspections or publications,
   c. statements and memoranda concerning only the internal management of an agency and not affecting private rights or procedures available to the public,
   d. declaratory rulings issued pursuant to Section 307 of this title,
   e. orders by an agency, or
   f. press releases or "agency news releases", provided such releases are not for the purpose of interpreting, implementing or prescribing law or agency policy;...
3. Subsection f specifies that:
   Medical necessity is established through consideration of the following standards:
   (1) Services must be medical in nature and must be consistent with accepted health care practice standards and guidelines for the prevention, diagnosis or treatment of symptoms of illness, disease or disability;
   (2) Documentation submitted in order to request services or substantiate previously provided services must demonstrate through adequate objective medical records, evidence sufficient to justify the client's need for the service;
   (3) Treatment of the client's condition, disease or injury must be based on reasonable and predictable health outcomes;
   (4) Services must be necessary to alleviate a medical condition and must be required for reasons other than convenience for the client, family, or medical provider;
   (5) Services must be delivered in the most cost-effective manner and most appropriate setting; and
   (6) Services must be appropriate for the client's age and health status and developed for the client to achieve, maintain or promote functional capacity.
4. OAC 317-30-3-1(b) provides:
   Payment to practitioners under Medicaid is made for services clearly identifiable as personally rendered services performed on behalf of a specific patient. There are no exceptions to personally rendered services unless specifically set out in coverage guidelines.
5. OAC 317:30-3-2 provides in relevant part:
   In order to be eligible for payment, providers must have on file with OHCA, an approved Provider Agreement.
6. A number of cases continue to cite pre-1987 case law for the proposition that the burden of establishing a rule is invalid is upon the protestant. Eg., *Matlock v. State ex rel. Okla. Tax Comm'n*, 2001 OK CIV APP 104, ¶4, 29 P.3d 614, 616, which cites *Public Service Co. of Oklahoma v. State ex rel. Corp. Comm'n ex rel. Loving*, 1996 OK 43, 918 P.2d 733, 738, which in turn cites *J. Brotton Corp. v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*, 1991 OK 126, ¶5, 822 P.2d 683 (Okla.1991) and *Toxic Waste Impact Group Inc. v. Leavitt*, 755 P.2d 626 (Okla.1988). The latter cases cite pre-1987 cases without examining the effect of the 1987 statutory change.

2018 OK CIV APP 31

CHRIST'S LEGACY CHURCH, a/k/a CORNERSTONE CHURCH, Plaintiff/Appellant, vs. TRINITY GROUP ARCHITECTS, INC., Defendant/Appellee, and VAN HOOSE CONSTRUCTION CO., and JAMES VAN HOOSE, Individually, Defendants.

Case No. 116,117. March 19, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROGER H. STUART, TRIAL JUDGE

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

Dan L. Holloway, Marissa T. Osenbaugh, HOLLOWAY, BETHEA & OSENBAUGH, Oklahoma City, Oklahoma, for Plaintiff/Appellant

W. Michael Hill, Jeffrey Fields, Jennifer L. Struble, SECREST, HILL, BUTLER & SECREST, Tulsa, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Plaintiff alleges it sustained damages as a result of Defendants' poor construction and design of its church. In this appeal, Plaintiff seeks review of the trial court's May 2012 order dismissing its negligence theory asserted against Defendant Trinity Group Architects, Inc. (Trinity), and of the trial court's January 2016 order granting summary judgment in favor of Trinity as to Plaintiff's breach of contract theory. Based on our review, we affirm in part, reverse in part, and remand for further proceedings.

PRELIMINARY ISSUE

¶2 As against Trinity, Plaintiff asserted theories of negligence and breach of contract. As stated, the trial court dismissed Plaintiff's negligence theory and granted summary judgment in favor of Trinity with regard to the remaining theory of breach of contract. In the prior appeal in this case (Case No. 114,682), Plaintiff appealed from this summary judgment ruling. However, the prior appeal was dismissed by the Oklahoma Supreme Court for lack of an appealable order. As explained by the Supreme Court in the prior appeal, the trial court's January 2016 order "grant[ed] summary judgment in favor of one defendant [i.e., Trinity], leaving claims remaining against the other [two] defendants, and which [did] not contain an express determination that there is no just reason for delay, and an express direction for the filing of judgment[.]" The Supreme Court explained that the trial court's January 2016 order was, therefore, "not appealable at this time," but that Plaintiff "will have the opportunity to seek review of the January 6, 2016 order in a timely and properly brought appeal from an order which is appealable pursuant to 12 O.S. § 994, or the judgment in the case."

¶3 Plaintiff and Defendant Van Hoose Construction Co. subsequently settled their claims and, in addition, Plaintiff dismissed its claims against Defendant James Van Hoose.[1] Plaintiff's "Dismissal With Prejudice" of James Van Hoose was filed on May 16, 2017, and, on the same date, the trial court issued its "Judgment" which states, in pertinent part, as follows:

> Plaintiff and Defendant Van Hoose Construction Co. have informed the Court that they have reached an agreement as to the settlement of all issues herein. Judgment is rendered in the above-styled and numbered cause of action in favor of the Plaintiff and against [Van Hoose Construction Co.] only, in the total amount [of the agreed-upon settlement] . . . .

¶4 Plaintiff filed its Petition in Error in the present appeal within thirty days of this May 2017 settlement order. However, Trinity asserts on appeal in its Summary of Case as follows:

> [Plaintiff] brings this matter before this Court as a Final Order granting summary judgment. The order submitted with the Petition in Error does not meet the definition of a final order under 12 O.S. § 953 as it failed to dispose of all claims and does not contain language making it a final appealable order as required by 12 O.S. § 994.[2]

¶5 As in the present case, in *Patmon v. Block,* 1993 OK 53, 851 P.2d 539, an order granting partial summary judgment was "memorialized . . . without an express statutorily authorized command for an immediate appeal." *Id.* ¶ 7 (emphasis omitted). However, the remaining "claim for relief" which was not adjudicated in the partial summary judgment order was later dismissed by the trial court. The *Patmon* Court explained that the order dismissing the remaining claim for relief "mark[ed] the disposition of all the claims and the settlement of all the issues among the parties," and, therefore, this later order constituted an appealable event. *Id.* (emphasis omitted).

¶6 Indeed, if some claims (or parties) are not adjudicated in an interlocutory, partial summary judgment ruling, a voluntary dismissal of the remaining claims (or parties) is sufficient to render the partial summary judgment ruling final and reviewable, and the filing of the dismissal triggers the commencement of appeal time.[3] Consequently, we conclude the dismissal of James Van Hoose, combined with the settlement order, both of which were filed on May 16, 2017, marks the disposition of all remaining claims and the settlement of all the issues among the parties. Consequently, the commencement of appeal time was triggered on this date, and Plaintiff has timely appealed.[4]

¶7 We therefore turn, in the remainder of this Opinion, to the issues raised by Plaintiff as to whether the May 2012 order dismissing Plaintiff's negligence theory against Trinity, and the January 2016 order granting summary judgment in favor of Trinity with regard to breach of contract, were properly entered.[5]

FACTS AND PROCEDURAL BACKGROUND AS TO TRINITY

¶8 Plaintiff originally filed suit against Defendants on January 31, 2011. However, the trial court dismissed Plaintiff's original petition without prejudice and, in January 2012, Plaintiff re-filed its petition. As stated above, Plaintiff asserted theories of breach of contract and negligence against Trinity. However, in March 2012, Trinity filed a motion to dismiss in which it argued, among other things, that Plaintiff's negligence theory is barred by the applicable two-year statute of limitations. Trinity pointed out that, in the petition filed in January 2012, Plaintiff alleged it "learned, in the late Spring of 2006," that Trinity had not fulfilled its contractual duties and was "proceeding with no intention to perform according to the contract and associated building plans, and instead . . . wholly failed to perform as contracted and in a good and workmanlike manner[.]"[6] Trinity asserted that because the original petition was not filed until January 2011 – almost five years after Plaintiff "learned" of the above allegations – the negligence theory was asserted well outside the two-year limitations period and is, therefore, barred.

¶9 In Plaintiff's response to the motion to dismiss, it asserted that a question of fact was nevertheless presented as to precisely when Plaintiff discovered Trinity's alleged negligence – in particular, a question of fact remained as to when Plaintiff learned of Trinity's failure to ensure that the construction conformed to Trinity's design plans. However, in an order filed in May 2012, the trial court dismissed Plaintiff's negligence theory as barred by the applicable statute of limitations. The trial court granted Plaintiff "leave to amend [its] Petition in respect to this claim." Plaintiff did not file an amended petition.

¶10 In October 2015, Trinity filed a motion for summary judgment as to the remaining theory of breach of contract. Trinity correctly asserted that while a five-year statute of limitations applies to an allegation of breach of a written contract, a three-year limitations period applies to an alleged breach of any other contract, whether oral or implied. Trinity asserted that, in the present case, "[t]here is no written contract, only an oral agreement between the parties" and, thus, Plaintiff was required to file its petition within three years of either the discovery of the alleged breach in the late spring of 2006, or within three years of the completion of the construction project in February 2007. Thus, according to Trinity, because Plaintiff did not file its petition until 2011, its breach of contract theory is also barred.

¶11 The trial court granted Trinity's motion for summary judgment in the January 2016 order. Plaintiff appeals from both the dismissal[7] and summary judgment rulings entered in favor of Trinity.

STANDARD OF REVIEW

¶12 The standard of review for a district court's decision granting a motion to dismiss is de novo. *Dani v. Miller,* 2016 OK 35, ¶ 10, 374 P.3d 779. When reviewing a dismissal ruling, we "test the law that governs the claim, not the underlying facts." *Id.* (citations omitted). That is, we take as true all factual allegations made by the plaintiff in its petition, together with all reasonable inferences, and if relief is possible under any set of facts that can be gleaned from the petition, the motion to dismiss will be denied. *Id.* ¶¶ 10 & 11.

¶13 This appeal also concerns the trial court's order granting Trinity's motion for summary judgment.

> Summary judgment is proper only if it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law. Only when the evidentiary materials eliminate all *factual* disputes relative to a question of law is summary judgment appropriate on that issue. The trial court's ruling on the legal issue is reviewed de novo as a question of law. However, an appellate court will reverse the grant of summary judgment if the materials submitted to the trial court indicate a substantial controversy exists as to any material fact.

Plano Petroleum, LLC v. GHK Exploration, L.P., 2011 OK 18, ¶ 6, 250 P.3d 328 (citations omitted) (internal quotation marks omitted). "When this Court reviews the trial court's grant of summary judgment, all inferences and conclusions

drawn from the evidence must be viewed in the light most favorable to the party opposing the motion." *Geyer Bros. Equip. Co. v. Standard Res., L.L.C.*, 2006 OK CIV APP 92, ¶ 7, 140 P.3d 563 (citation omitted).

ANALYSIS

I. Negligence

¶14 A two-year statute of limitations applies to Plaintiff's negligence theory. "The statute of limitations applicable to an action for negligence is found in 12 O.S. 2011 § 95(A)(3) and it provides that such a claim must be filed two (2) years after the cause of action shall have accrued." *Calvert v. Swinford*, 2016 OK 100, ¶ 6, 382 P.3d 1028 (footnote omitted).[8] As to the accrual date, "Oklahoma . . . follows the discovery rule allowing limitations in certain tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." *Calvert*, ¶ 11 (footnote omitted). However, even when applying the discovery rule to this case, it is clear – pursuant to Plaintiff's own allegations in its petition – that the negligence theory is barred under the two-year statute of limitations.

¶15 As set forth above, Plaintiff alleges in its petition that it "learned, in the late Spring of 2006," that Trinity had not fulfilled its alleged duties and was "proceeding with no intention to perform according to the contract and associated building plans, and instead . . . wholly failed to perform as contracted and in a good and workmanlike manner[.]" The time period during which Plaintiff alleges it learned Trinity had "wholly failed" in this regard (i.e., the late spring of 2006) falls almost five years prior to the date in January 2011 that Plaintiff filed its original petition.[9]

¶16 As stated above, the trial court provided Plaintiff with the opportunity to amend its petition, but Plaintiff declined.[10] Even when applying the discovery rule to this case, as Plaintiff requests, and even when taking Plaintiff's allegations as true, Plaintiff knew or, in the exercise of reasonable diligence, should have known of the alleged injury caused by Trinity's acts or omissions more than two years prior to the filing of this action in January 2011. Therefore, we conclude the trial court did not err in dismissing Plaintiff's negligence theory asserted against Trinity as barred by the two-year statute of limitations.[11]

II. Breach of Contract

¶17 The parties agree that an agreement was reached between Trinity and Plaintiff, but they disagree as to whether or not their agreement should be categorized as a contract in writing for purposes of determining the applicable statute of limitations.[12] For example, Trinity states: "There is no written contract, only an oral agreement between the parties." Trinity bases this assertion on the fact that although it sent what it describes as a written proposal to Plaintiff, this document was never signed. Trinity states: "The written proposal from [Trinity] is only a proposal, and any acceptance was oral as the proposal is not signed – thereby creating an oral contract."

¶18 Trinity's argument is motived by the fact that although the statute of limitations for "[a]n action upon any contract, agreement, or promise in writing" is five years, the limitations period is only three years for "[a]n action upon a contract express or implied not in writing[.]" 12 O.S. 2011 § 95(A)(1) & (2). That is, if an "instrument constitutes a written contract" then "the five-year statute of limitations applies; if not, the three-year statute of limitations applies." *Harlow Pub. Co. v. Patrick*, 1937 OK 579, ¶ 3, 72 P.2d 511 (citations omitted). Because the original petition was filed in January 2011, a three-year limitations period would reach back only to January 2008, after Plaintiff (pursuant to its own allegations) "learned" in the late spring of 2006 of the particular failures described above, and after it is undisputed Plaintiff moved into the new church and noticed deficiencies in the construction in 2007.[13] However, a five-year limitations period would reach back to January 2006, prior to all these occurrences.

¶19 In support of the assertion that the agreement constitutes a contract in writing, Plaintiff has attached to its response to the motion for summary judgment an affidavit of its representative – David Brooks (Pastor Brooks) – who states in his affidavit that he is "the Senior Pastor at Christ's Legacy Church" and that, "because of the recommendation of James Van Hoose, [I] contacted and met with Kevin Galliart, an architect who was employed by and who owned [Trinity], to design and provide all related architectural services for [Plaintiff's] new church building[.]" According to additional evidentiary materials attached to Plaintiff's response, in May 2004 Galliart sent a letter to Pastor Brooks which states:

> I enjoyed meeting you and I appreciate you allowing me the opportunity to introduce [Trinity] to you. [Trinity] is a firm qualified and interested in performing architectural work for [Plaintiff]. I feel confident that no other firm combines the qualities of integrity and experience as effectively as [Trinity].
>
> I have enclosed a proposal for your proposed new facility and information that will further introduce our firm . . . . Thank you again for this opportunity, and if you should have any questions or require any additional information please feel free to contact us at any time.
>
> Thank you for your time and consideration.
>
> Kevin Galliart, NCARB
>
> Enclosure

¶20 The written "proposal" attached to this letter is entitled "Qualifications and Proposal." In addition to certain introductory information about Trinity, this document sets forth what are described as "the critical aspects of the project":

- Provide A/E services for the design and construction of a new 35,000 +/- sf. facility.
- Provide design/design development documents for owner review and approval, to determine potential square footage, costing.
- Provide construction documents for pricing, permit and construction as per attached scope of services.
- Help the owner with the negotiation with a selected contractor for cost effective timely construction of the project.
- Assist the owner during construction to ensure the project is in conformance with the construction documents and the project schedule.
- Help in the selection of critical design team members.

¶21 The document also sets forth, among other things, the following:

> We propose a lump sum approach to be billed based upon percentage of completion of each phase. Based upon our understanding of the scope of services as outlined previously in this proposal our fees are as follows:
>
> | | |
> |---|---|
> | • Architectural | $40,000.00 |
> | • Civil Engineering | $15,255.00 |
> | • Structural Engineering | $20,000.00 |
> | • Reimbursable expenses | $1,500.00 |
> | **Total A/E Fees:** | **$76,755.00** |
>
> . . . .
>
> All fees for services are based on our understanding of the scope of services as outlined in this proposal. An invoice will be submitted monthly based upon completion of each phase. Additional services (i.e. services not described above) will be charged on a cost basis [at the listed hourly rates].

¶22 Pastor Brooks testified at his deposition that he did not sign this document; however, when presented with the document during his deposition, he observed: "I don't see any place for it to be signed." When questioned whether he had a written contract with Trinity, Pastor Brooks, referring to the above-quoted document, stated: "I have a paper that [Galliart] said, we agree to provide these following services, and he listed them including this, this, this, this and this with an amount on it. [Galliart] and I agreed that's what I would pay him for those services."[14]

¶23 In his affidavit, Pastor Brooks makes the following pertinent assertions, among others:

> 7. After discussion, [Galliart] presented a written offer to me which laid out in detail all of the services that he, acting for [Trinity], would provide, as well as the total fee to be paid to [Trinity] for designing and overseeing all of the related architectural services involved in the construction of the new church building.
>
> 8. I accepted his offer; and thereafter both I and [Galliart] spoke and acted in accord with the written details of the contract we both considered final and binding in all conversations and activities by us that were related to the construction of the new church building.
>
> 9. Thereafter, in conformance with the contract, [Galliart] designed the new church building and oversaw all of the related architectural services involved in the construction of the new church building, and periodically billed the church accordingly.

. . . .

16. I was recently deposed by [Galliart's] attorneys and was asked if there was ever a contract between the church and [Trinity].

17. I stated that my opinion was there was a written contract between the two parties which laid out in detail the services [Galliart] would provide and the payment that would be made by the church.

18. As a non-attorney, I did not understand the meaning and validity of the subsequent questioning which appeared to insist that the law requires every written contract to be signed by the parties before it could be enforceable.

19. I believed then, and still believe, that the church had a binding written contract with [Trinity].

¶24 In the present case, it appears from the evidentiary materials that neither party signed the proposal. However, the parties do not dispute that they entered into a binding agreement. Trinity merely argues that because its proposal was either orally accepted by Plaintiff, or accepted through subsequent performance, an oral or implied contract was created.

¶25 We disagree with Trinity that the mode of acceptance of a contract necessarily dictates whether that contract is or is not in writing for purposes of determining the applicable statute of limitations. By statute in Oklahoma, "[i]f a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; *but in other cases any reasonable and usual mode may be adopted*." 15 O.S. 2011 § 68 (emphasis added). *See also* 15 O.S. 2011 § 70 ("Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal."). Thus, if a written proposal does not prescribe conditions concerning the communication of its acceptance, it may be accepted in "any reasonable and usual mode" under the circumstances – the contract formed under such circumstances does not become an oral or implied contract merely because the acceptance is other than by signature.

¶26 As articulated in the Restatement, "[a]cceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50(1) (1981). As in Oklahoma, "[u]nless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 30(2). Although "the offeror is entitled to insist on a particular mode of manifestation of assent" and "[t]he terms of the offer may limit acceptance to a particular mode," *id.* at cmt. a., the evidentiary materials in the present case disclose no such insistence or terms as to a particular mode of acceptance. Indeed, as articulated in the Restatement, the "form of acceptance" is unlikely "to affect the substance of the bargain" and "is often quite immaterial," id., and "[i]nsistence on a particular form of acceptance is unusual" – "[o]ffers often make no express reference to the form of acceptance," *id.* at cmt. b. Even when offers do provide the form of acceptance, "[l]anguage referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded." *Id. See also* J. E. Keefe, Jr., Annotation, *What Constitutes a Contract in Writing Within Statute of Limitations*, 3 A.L.R.2d 809 (Originally published in 1949) (Stating, among other things, that "[a] written contract within the meaning of the statute of limitations is generally defined as one which in all its terms is in writing," and "[i]t has been observed that two persons may adopt a writing containing all the terms of a contract so that it would constitute a contract in writing, even though it is signed by neither.").

¶27 Thus, at the very least, disputes of material fact exist – disputes which render summary judgment inappropriate – as to whether the written proposal was accepted, and properly accepted, either orally or through performance.[15] *Cf. Farmers' Produce Co. v. McAlester Storage & Comm'n Co.*, 1915 OK 530, ¶ 0, 150 P. 483 (Syllabus by the Court) ("Where there is no direction as to the mode of communicating the acceptance of a proposed contract, the acceptance may be accomplished" through "any reasonable and usual mode" "unless it can be fairly and reasonably inferred from the offer, or other prior communications, that some other means is expected, and that would be a question of fact to be determined by the jury[.]"). If the written proposal was properly accepted, and if it constitutes the parties' contract, then clearly their contract is in writing and the five-year statute of limitations applies.[16] As indicated above, a five-year statute of limitations

reaches back in this case to January 2006, prior to any triggering events thus far uncovered.

¶28 For these reasons, we conclude summary judgment was inappropriately granted as to the breach of contract theory asserted against Trinity.

CONCLUSION

¶29 We conclude the trial court did not err in dismissing Plaintiff's negligence theory asserted against Trinity as barred by the two-year statute of limitations. However, we conclude summary judgment was inappropriately granted as to the breach of contract theory asserted against Trinity. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

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

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Plaintiff had also named Kevin Galliart, individually, as a defendant. However, Galliart was dismissed, apparently because, pursuant to Plaintiff's own allegations, his actions related to this case were undertaken only as an employee or representative of Trinity. Regardless, the dismissal of Galliart as an individual is not a contested issue on appeal.

2. In addition, "[j]urisdictional inquiries into appellate or certiorari cognizance may be considered and re-examined, on motion or *sua sponte,* at any stage of the proceedings." *Stites v. DUIT Const. Co., Inc.*, 1995 OK 69, ¶ 8, 903 P.2d 293 (emphasis omitted) (footnote omitted).

3. *See, e.g., Vance v. Fed. Nat. Mortg. Ass'n*, 1999 OK 73, ¶ 5, 988 P.2d 1275 ("After the trial court refused to certify the summary-judgment order as immediately appealable, [the plaintiff] dismissed his remaining claims so as to impart finality to the otherwise interlocutory order."); *Bivins v. State ex rel. Okla. Mem'l Hosp.*, 1996 OK 5, ¶ 5 n.15, 917 P.2d 456 (An interlocutory, partial summary judgment ruling is timely appealed when the remaining defendants in a case are later voluntarily dismissed by the plaintiff – such a dismissal "marks the final disposition date for all the claims" and "constitutes the appealable event[.]" (emphasis omitted)); *Blair v. Nat. Gas Anadarko Co.*, 2017 OK CIV APP 57, ¶ 1 n.2, 406 P.3d 580 ("Although the trial court's order did not resolve all issues between all parties, claims against the remaining defendants were subsequently dismissed without prejudice, making the order before us final in all respects." (citation omitted)); *Waits v. Viersen Oil & Gas Co.*, 2015 OK CIV APP 95, ¶ 10, 361 P.3d 562 ("It is an increasingly common practice for plaintiffs to dismiss viable claims without prejudice in order to create appellate jurisdiction over an interlocutory decision that is not otherwise ripe for appeal." (footnote omitted)).

4. We note that while the cases cited above involve the voluntary dismissal of remaining claims or parties, the present case involves both a voluntary dismissal of one defendant and also a settlement with another defendant. Our Supreme Court has long cautioned that "one cannot be heard to urge error in a proceeding leading to judgment or order which was entered by consent." *Conterez v. O'Donnell*, 2002 OK 67, ¶ 11 n.15, 58 P.3d 759 (emphasis omitted) (citing *Wray v. Ferris*, 1938 OK 649, 85 P.2d 402). In *Conterez*, the plaintiff sought to raise errors on appeal relating to a certain discovery dispute – a dispute which led to the denial by the trial court of a request for sanctions by the plaintiff – which arose earlier in the litigation with the same defendant with which the plaintiff later settled. The Supreme Court explained that the settlement with that defendant prevented the plaintiff from pursuing an appeal seeking review of the denial of sanctions. The Court explained: "A voluntarily released and satisfied judgment moots both an appeal that is lodged against it and against all nisi prius vacation process. This is so because any errors in its entry become abstract, hypothetical or academic and hence no longer available for the exercise of judicial cognizance." *Conterez*, ¶ 11 n.15 (emphasis omitted) (citations omitted). However, in the present appeal, Plaintiff does not attempt to raise any issues on appeal pertaining directly to the defendant (i.e., Van Hoose Construction Co.) with which it has settled. The issues it raises pertain only to Trinity, a party with which it has not reached a voluntarily released and satisfied judgment. Hence, the errors on appeal are not merely abstract or hypothetical. *See also Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citation omitted)).

5. In *Martin v. Johnson*, 1998 OK 127, 975 P.2d 889, the issue presented was whether the Supreme Court could properly review an interlocutory order entered prior to judgment that dismissed only one of multiple claims. The *Martin* Court explained:

> We agree that the dismissal order was unappealable at the time of adjudication, because it disposed of only one of the many claims pled. However, when this Court reviews a judgment upon appeal it may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. Intermediate or interlocutory orders anterior to judgment may thus be reviewed on appeal from the judgment.

Id. ¶ 18 (internal quotation marks omitted) (citations omitted).

6. Plaintiff raised this assertion against all the defendants.

7. Plaintiff's desire to appeal the dismissal of its negligence theory is made clear in its Petition in Error, where Plaintiff articulates the following issues in its Issues to be Raised on Appeal: "7. Whether Trinity was negligent in its standard of care and duty as to the design and drawings," and "8. Whether Trinity was negligent in its standard of care and duty as to the design and implementation of its proposal/contract by not properly overseeing the project . . . ."

8. Title 12 O.S. 2011 § 95(A) provides, in pertinent part, as follows:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> . . . ;
>
> 3. Within two (2) years: An action for … injury to the rights of another, not arising on contract, and not hereinafter enumerated[.]

See also Lee v. Phillips & Lomax Agency, Inc., 2000 OK 65, 11 P.3d 632 (two-year statute of limitations under § 95 applicable to negligence theory); *Marshall v. Fenton, Fenton, Smith, Reneau & Moon, P.C.*, 1995 OK 66, ¶ 6, 899 P.2d 621 (A two-year statute of limitations applies to tort actions.).

9. We note that Plaintiff also does not dispute in its response to Trinity's motion for summary judgment that its representative – Pastor David Brooks – noticed the deficiencies in the construction in 2007, shortly after moving in to the new church building, and felt at that time "like he had [not] gotten the church [Plaintiff] had contracted for." Nevertheless, almost four years passed before the petition was filed.

10. Plaintiff actually states in its petition that it learned in the late spring of 2006 that "Defendants" had wholly failed in the manner set forth above. If Plaintiff intended to refer to only some of the multiple Defendants, Plaintiff was provided with an opportunity to amend and change this portion of its petition but failed to do so. Moreover, even if Plaintiff had amended this language to refer, for example, only to the construction company, the discovery rule requires the exercise of reasonable diligence. Thus, if Plaintiff learned in 2006 that the construction company had wholly failed to construct a church consistent with the design plans, and its primary complaint regarding Trinity is that Trinity failed to ensure the design plans were properly executed by the construction company (and, when/if they were not, to notify Plaintiff), the statute of limitations would still have begun to run more than two years prior to the filing of this action in 2011.

11. Plaintiff also states in its Petition in Error (i.e., in its Issues to be Raised on Appeal) that it seeks to raise the issue of "[w]hether the statute of limitations has [run] pursuant to 12 O.S. § 109." However, as Trinity accurately stated below, § 109 is a statute of repose, not a statute of limitations. Thus, even if a claim is timely brought within the ten-year period of repose under § 109, it is still subject to the applicable statute of limitations and stands barred if in violation of the limitations period. For example, the Oklahoma Supreme Court has explained:

> Section 109 is a statute of repose; it may bar a cause of action that has not yet accrued. As such, the ten-year limit was incorrectly applied by the Court of Appeals to allow the [plaintiff] to bring suit. Obviously the action was brought within ten years after completion and is not interdicted by Section 109. But we must look to 12 O.S. [§ 95] to determine whether the tort action is barred by the applicable statute of limitations.

Samuel Roberts Noble Found., Inc. v. Vick, 1992 OK 140, ¶ 20, 840 P.2d 619 (citation omitted). In the present case, although Plaintiff has clearly

brought this action within ten years of all dates relevant to this action, we must look to § 95 to determine whether the negligence theory is nevertheless barred by the applicable statute of limitations.

12. We note that the contract at issue – one for architectural services – does not appear to fall under the Statute of Frauds in Oklahoma, see 15 O.S. Supp. 2013 § 136, and the parties do not argue otherwise.

13. *See* n.9, *supra*.

14. Trinity states in its motion for summary judgment that Pastor Brooks "repeatedly testified that there was no written contract between Plaintiff and [Trinity]." To the extent Pastor Brooks appears to have testified, at certain junctures, that there was no written contract between Plaintiff and Trinity, these responses constitute a legal conclusion. Moreover, although it appears Pastor Brooks was at certain points confused by the questioning and "did not understand the meaning and validity of [certain] questioning" (as he asserts in his affidavit, quoted below), the portion of his testimony quoted above is more representative of his overall testimony in this regard, especially when viewing the facts in the light most favorable to the nonmovant.

15. For purposes of determining whether summary judgment was properly entered, we need not determine on this appeal whether it is an established fact that the parties' contract is in writing. Trinity asserts at one point in its motion for summary judgment that "[t]he terms of [Trinity's and Plaintiff's] agreement are wholly oral and therefore unrecorded, but can be inferred from circumstances surrounding the actions of the parties." The evidentiary materials reveal, at the very least, that a dispute of fact exists in this regard rendering summary judgment inappropriate.

16. We note that our Supreme Court has stated that "evidence of a writing signed by one party and acceptance of the terms of the writing by the other is sufficient to bring the action within the statute of limitations for written contracts." *Cortright v. City of Okla. City*, 1997 OK 158, ¶ 8, 951 P.2d 93 (footnote omitted). Consistent with 15 O.S. § 68 and the Restatement, we do not take this statement from *Cortright* to mean that *only the scenario presented in that case* – i.e., where at least one party has physically signed the contract – is sufficient to bring the action within the statute of limitations for written contracts. It is nevertheless worth noting that Galliart's name is typed at the bottom of the cover letter to the written proposal, and no signature lines appear on the written proposal for a representative of either party to place a signature.

2018 OK CIV APP 32

IN THE MATTER OF J.C., J.D., and W.D., Alleged Deprived Children: TYLOR CLARK, Appellant, vs. STATE OF OKLAHOMA, Appellee.

Case No. 116,322. March 19, 2018

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA

HONORABLE MARK A. IHRIG, TRIAL JUDGE

VACATED AND REMANDED FOR FURTHER PROCEEDINGS

Timothy J. Gifford, LAW OFFICE OF TIMOTHY J. GIFFORD, Tulsa, Oklahoma, for Appellant

Max Cook, DISTRICT ATTORNEY, Kelly Allen, ASSISTANT DISTRICT ATTORNEY, Sapulpa, Oklahoma, for Appellee

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Appellant, Tylor Clark (Father), appeals from an order adjudicating as deprived Father's biological child, J.C. (Child), after the trial court denied Father's request for a trial in response to the State of Oklahoma's (State's) petition for an adjudication of Child as deprived on multiple grounds, to which Child's biological mother (Mother) stipulated. For the reasons enumerated below, we vacate that part of the trial court's order adjudicating Child as deprived and remand for a non-jury trial, on the question of whether Child is deprived, compliant with the requirements of the Indian Child Welfare Act.

BACKGROUND

¶2 The record reflects that the Department of Human Services (DHS) took Child and two of Child's half-siblings, J.D. and W.D. (collectively, Children), into protective custody on May 8, 2017, after Mother and J.D. and W.D.'s purported father, Joshua Driever, were arrested for alleged possession and being under the influence of methamphetamines and for child endangerment. At that time, Child was age 9, while J.D. and W.D. were ages 5 and 4, respectively. It is not disputed that Mother and Father were married when Child was born but were divorced at the time Children were taken into custody.

¶3 On May 16, 2017, State filed a petition to adjudicate all three Children as deprived, listing Father as a defendant along with Mother and Driever. The petition described the circumstances under which Children had been taken into custody, including Mother and Driever's admission that they had used and/or possessed illegal drugs and drug paraphernalia. The allegations specifically pertaining to Father were (1) that he "has been diagnosed with Bipolar Disorder but is not currently taking any medications"; (2) that Mother and Father had a "domestically violent relationship"; (3) that Father had a "criminal history for domestic assault and battery" based on a 2010 misdemeanor charge and a 2010 protective order; and (4) that Father had failed to protect Child from the "deprivations" listed in the petition. State alleged the conditions constituted "neglect, failure to provide a safe and stable home, failure to protect, and domestic violence and inadequate supervision," and requested the court to adjudicate J.C. "to be deprived by [Father]." In a separate paragraph State requested that all three Children be adjudicated deprived as to Mother and Driever, but in addition listed the conditions of "substance abuse" and "threat of harm" as grounds for the adjudication.

¶4 At the adjudication hearing on July 5, 2017, Mother stipulated to the allegations of State's petition and to Child's deprived status. Father, however, objected to the adjudication and requested a non-jury trial on the question of whether Child should be adjudicated deprived. The court at that time denied Father's request, noting that it had long followed a rule set down in a Court of Civil Appeals case – the citation of which the judge could not recall but with which he agreed – that "the status of being a deprived child . . . belongs to the child, not to the parent." Therefore, the court found that because Mother had stipulated to Child's deprived status there was no need for a trial on State's allegations against Father.

¶5 On July 20, 2017, the Cherokee Nation filed a Notice to Intervene, stating that Children are "Indian children" within the meaning of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), and that the Nation intended to be involved with the case.[1] On July 26, the trial court entered a written order finding that the Indian Child Welfare Act applied and memorializing Children's adjudication as deprived based on "[s]tipulation of the Mother . . . that continued custody of [Child] by the parent or Indian custodian is likely to result in serious emotional or physical damage or harm to the [Child]." The order further recited that the court had denied Father's request for a non-jury trial and had overruled Father's objection to the adjudication of Child as deprived.[2] In addition, over Father's objection the court ordered an Individualized Service Plan (ISP) for all parents, and described the following conditions as having caused Children to be adjudicated deprived: possessing/using illegal drugs/addiction; domestic violence; failure to maintain safe and/or sanitary home; threat of harm; neglect; and inadequate supervision. Children were declared wards of the State and have been placed in foster care.[3]

¶6 Father filed this appeal. His sole proposition of error is that the trial court denied his constitutional right of due process by refusing his request for a non-jury trial on the issue of whether Child is deprived.

STANDARD OF REVIEW

¶7 This Court reviews *de novo* a claim that the procedure used in a deprived child action resulted in a denial of procedural due process. *In re A.M.*, 2000 OK 82, ¶ 6, 13 P.3d 484. Statutory construction, a question of law, also is reviewed *de novo*. *In re Adoption of Baby Boy A*, 2010 OK 39, ¶ 20, 236 P.3d 116.

ANALYSIS

¶8 Adjudication proceedings in Oklahoma are governed by 10A O.S.2011 §§ 1-4-601 through 1-4-603. If an Indian child is involved – as in this case – both the federal Indian Child Welfare Act, 25 U.S.C. §§ 1911 through 1923, and its Oklahoma counterpart, 10 O.S.2011 §§ 40 through 40.9 (collectively ICWA), apply. The ICWA requirements apply even if the Indian child is not "in the physical or legal custody of an Indian parent" when a state proceeding is initiated. *In re Baby Boy L.*, 2004 OK 93, ¶ 18, 103 P.3d 1099 (quoting 10 O.S.2011 §§ 40.1 and 40.3).

¶9 Title 10A O.S.2011 § 1-4-601(D) provides that, at the hearing to determine whether a child should be adjudicated deprived, the court shall:

> 1. Accept a stipulation by the child's parent, guardian, or other legal custodian that the facts alleged in the petition are true and correct;
>
> 2. Accept a stipulation by the child's parent, guardian, or other legal custodian that if the state presented its evidence supporting the truth of the factual allegations in the petition to a court of competent jurisdiction, such evidence would be sufficient to meet the state's burden of proving by a preponderance of the evidence that the factual allegations are true and correct;
>
> 3. Conduct a nonjury trial to determine whether the state has met its burden of proving by a preponderance of the evidence that the factual allegations in the petition are true and correct.

¶10 Father argues the trial court's acceptance of Mother's stipulation alone and refusal of Father's request for a non-jury trial in order to contest the allegations of State's petition, effectively deemed him unfit to take responsibility and care for Child without affording him the opportunity to contest the deprived determination. He contends the court's interpretation of § 1-4-601 as allowing Mother's stipulation to bind both parents, and to thereby deny Father custody and control of Child without a hearing, violated Father's right to due process and is prohibited by the holding of the U.S. Supreme Court in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972). We agree.

¶11 In *Stanley,* the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment (1) prohibited states from deeming an unwed father unfit as a parent solely on the basis of his unmarried status, and (2) required states to provide each parent with a hearing on his or her fitness before taking a child from the parent's custody and control. The case involved an unwed father who sought custody of his two youngest children after the children's mother died. The children had been taken into the state's custody without a hearing as to the father's fitness, under a state law that presumed unwed fathers were unfit. The Supreme Court, calling the state's method a "procedure by presumption," found it unconstitutional and held that states must provide a parent with an individualized hearing on the parent's fitness before removing a child from the parent's custody. *Id.* at 656-57.

¶12 First noting the legal presumption that a child's natural parent is fit to raise the child, the Court reiterated its previous recognition that the integrity of the family unit is entitled to constitutional protection. *Id.* at 651. It then explained:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.
>
> . . . .
>
> The State's interest in caring for [the father's] children is de minimis if [the father] is shown to be a fit father. It insists on presuming rather than proving [the father's] unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Id. at 656-58 (footnotes omitted).

¶13 As suggested by the excerpt above, the *Stanley* Court in reaching its conclusion specifically considered the fact that the State of Illinois had a stated statutory objective of "removing [a minor child] from the custody of his parents only when [the child's] welfare or safety or the protection of the public cannot be adequately safeguarded without removal." *Id.* at 652 (emphasis added). It then observed that "the State registers no gain towards its declared goals" if it separates a child from a fit parent, but instead "spites its own articulated goals when it needlessly separates [a child] from his family." *Id.* at 652-53.

¶14 Like Illinois, Oklahoma's articulated policy objective favors maintaining family integrity. The law presumes that "the best interests of a child are ordinarily served by leaving the child in the custody of the parents," and the State will "[i]ntervene in the family only when necessary to protect a child from harm or threatened harm." 10A O.S.2011 § 1-102(A)(1) and (B)(1). Our state Supreme Court also has consistently recognized that a parent's interest in "the care and management of one's child is a fundamental liberty interest" protected by the Constitution. *See, e.g., In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080 (citing *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388 (1982)); *Matter of Chad S.*, 1978 OK 94, ¶ 12, 580 P.2d 983 (citing *Stanley v. Illinois*); *In re Adoption of L.D.S.*, 2006 OK 80, ¶ 11, 155 P.3d 1. Although the child also has constitutional rights, *see In re T.H.L.*, 1981 OK 103, ¶ 13, 636 P.2d 330, none of these cases suggests that the parental liberty interest at stake presumptively belongs to one parent alone.

¶15 A proceeding to adjudicate a child as deprived clearly threatens *each parent's* interest by threatening to disrupt each parent's relationship with her *or his* child. Depending on the reasons leading to the adjudication hearing and its outcome, the proceeding may result not only in making a child a ward of the court but also in removing a child from its parent's custody and allowing State to impose a variety of standards of conduct, sanctions, and requirements on each parent before one or both parents may regain custody. The specific conditions that State may impose on a specific parent will depend on the conditions leading to the child being taken into custody and, if warranted, adjudication as deprived. While in some cases those conditions will be the same for each parent, in other cases they will be different. Whether different conditions exist for each parent cannot fairly be determined if one parent is permitted to bind the other parent without the explicit or implicit agreement of the parent so bound. Moreover, allowing the result urged by State here deprives

the parent requesting a non-jury trial of the *only* option afforded under 10A O.S.2011 § 1-4-601(D) to challenge State's allegations. Father both exercised that option here and made clear his objection to Mother's stipulation.

¶16 We reject State's contention that the outcome here is dictated by the holding of the Oklahoma Court of Civil Appeals in *In re C.T.,* 1999 OK CIV APP 55, 983 P.2d 523. Both parties identify this case as the opinion on which the trial judge relied when it denied Father's request for a non-jury trial. We find such reliance was misplaced under the circumstances presented.

¶17 In *C.T.,* the Court reversed a trial court order adjudicating two minor children deprived only with respect to their mother but not as to their father. The trial court had conditionally placed custody with the father while also making the children wards of the court. The State appealed, and COCA held that the trial court should have deemed the children deprived as to their father as well as their mother, as the *evidence presented at the adjudication hearing* showed the father was complicit and culpable in creating the children's deprived condition. Although, as State argues, the Court held that the "focus in an adjudication proceeding" is on the child rather than the parent and that a child is "either deprived or not deprived," *id.* at ¶ 7, the Court did *not* hold that such a determination is made at the expense of one parent's right to a hearing on that very issue. It is also significant that, unlike the case before us, the Court's decision in *C.T.* in fact occurred *after* conducting a full hearing attended by both parents. The case before us now is distinguishable.

¶18 Procedural due process mandates that a person be accorded an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965)). Denying Father an opportunity to challenge State's allegations in a non-jury trial was both unfair to Father and wholly inconsistent with Oklahoma's stated legislative policy of protecting a natural parent's fundamental right to the care and custody of his or her child. Father's and Mother's status as divorced was undisputed, and nothing in the record demonstrates that Father was aware of or involved in Mother's activities when Child was taken into protective custody. Father should not be denied the opportunity to be heard on his defense that Child would not be deprived – under state and ICWA standards[4] – if allowed to remain in Father's custody. We therefore find that the trial court committed reversible error in denying Father's request for a non-jury trial, and its order adjudicating Child as deprived must be vacated.

CONCLUSION

¶19 Having found the trial court committed reversible error when it denied Father's request for a non-jury trial in response to State's petition seeking to adjudicate Child as deprived, we vacate that decision. We remand for further proceedings consistent with the views expressed herein.

¶20 **VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

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

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. Until that point in the case, all filings had indicated that the Indian Child Welfare Act did not apply.

2. The order contains the following statement:

NO CONTEST STIPULATION TO PETITION BY NATURAL MOTHER . . . [FATHER] REQUESTS NON-JURY ADJUDICATION TRIAL AS TO HIS CHILD, [J.C.]. [FATHER'S] OBJECTION TO ADJUDICATION IS OVERRULED. DISPO INSTANTER, PLAN IS ORDERED AS WRITTEN FOR ALL PARENTS, OVER OBJECTION OF TIM GIFFORD ON BEHALF OF [FATHER]. . . . ALL PARTIES CAUTIONED THAT ISP MUST BE COMPLETED WITHIN 90 DAYS OR A PETITION TO TERMINATE PARENTAL RIGHTS MAY BE FILED.

3. The July 26, 2017 order recites that Child had been placed in a "kinship home" and that the two half-siblings were currently in a traditional home, but that "all three children will be placed together in a kinship home within one month."

4. Under the federal ICWA, "No foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses," that a parent's continued custody of the child "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e). *See also* Okla. Admin. Code 340:75-19-12, "Adjudication of an Indian child," stating as follows at subsection (b):

> **Standards of evidence for deprived adjudication of the Indian child.** Adjudication of an Indian child per Section 1912(e) of Title 25 of the United States Code requires a determination, by the court supported by clear and convincing evidence, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage or harm to the child.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF AUNDREA RENE' SMITH, OBAD #1853 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, May 24, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, April 5, 2018

F-2016-926 — Geric Anthony Robinson, Appellant, was tried by jury for the crime of lewd molestation in Case No. CF-2015-3105 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at fifty years imprisonment and a $10,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Geric Anthony Robinson has perfected his appeal. The judgment and sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-1114 — Jabari Barry, Appellant, was tried by jury for the crime of Murder in the Second Degree in Case No. CF-2015-4070 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 36 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Jabari Barry 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., recuse.

S-2017-423 — Appellee, Joel Benjamin Kassen, was charged by information with Count 1, conspiracy to commit a felony, and Count 2, second degree murder, in Kay County District Court, Case No. CF-2015-980. Following preliminary examination, the Honorable Lee Turner, Special Judge, sitting as examining magistrate, bound the Appellee over for trial in Count 1, sustained the Appellee's demurrer to Count 2, and dismissed the second degree murder charge for insufficient evidence. The State appealed pursuant to 22 O.S.2011, § 1089.2(C). The Honorable Sheila Kirk, Associate District Judge, affirmed. The State now appeals to this Court pursuant to 22 O.S.2011, § 1089. The order dismissing Count 2 of the information is REVERSED and REMANDED for further proceedings. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-697 — Vernon Leemountel Smith, Appellant, was tried by jury for the crime of Murder in the First Degree (Felony Murder-Kidnapping) in Case No. CF-2015-3956 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Vernon Leemountel Smith has perfected his appeal. AFFIRMED. Application for Evidentiary Hearing on Sixth Amendment Claim is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in result; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-102 — Larry Dequain Griffin, Appellant, was tried by jury for the crimes of Second Degree Rape by Instrumentation (two Counts) in Case No. CF-2014-3427 in the District Court of Tulsa County. The jury returned verdicts of guilty and set punishment at five years imprisonment and a $3,500 fine on Count 1 and six years imprisonment and a $4,000 fine on Count 2. The trial court sentenced accordingly. From these judgments and sentences Larry Dequain Griffin has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in result; Hudson, J., concurs; Kuehn, J., concurs in part and dissents in part.

F-2016-931 — Eric Anthony Robinson, Jr., Appellant, was tried by jury for two counts of lewd molestation in Case No. CF-2015-3105 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at fifty years imprisonment and a $10,000.00 fine in each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Eric Anthony Robinson, Jr. has perfected his appeal. The judgment and sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

Thursday, April 12, 2018

F-2017-244 — Donald Lee Shepherd, Jr., Appellant, was tried by jury for the crime of Burglary in the First Degree, After Former Conviction of

Two Felonies in Case No. CF-2015-1173 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at twenty years. The trial court sentenced accordingly. From this judgment and sentence Donald Lee Shepherd, Jr. has perfected his appeal. Judgment and Sentence is AFFIRMED. Application for Evidentiary Hearing and Supplementation of Record is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs, Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, April 12, 2018

115,655 — (Cons. w/115,657) Jerry L. Miller and Bonnie Miller, Plaintiffs/Appellees, vs. Michael S. Nagel, Trustee of the Rasmus Nagel Trust F/B/O Grandchildren, and GLB Exploration, Inc., an Oklahoma Corporation, Defendants/Appellants. Appeal from the District Court of McClain County, Oklahoma. Plaintiffs/Appellees, Jerry L. Miller and Bonnie Miller (Grantors), brought this action against Defendants/Appellants, Michael S. Nagel, Trustee of the Rasmus Nagel Trust f/b/o Grandchildren (Trustee), and GLB Exploration Inc., an Oklahoma Corporation (GLB), to quiet Grantors' title in and to certain minerals in McClain County and to recover royalties. Trustee appeals from the trial court's judgment entered May 18, 2017, which adopted two previous rulings in favor of Grantors. The first ruling filed April 6, 2016, found there was a deed ambiguity due to the parties' mutual mistake; Grantors intended to retain the mineral interests at issue and the discovery of the mutual mistake renders the statute of limitations inapplicable. The trial court quieted Grantors' title in and to the minerals. The trial court's second ruling filed December 2, 2016, held in favor of Grantors on their claim to royalties under the Production Revenue Standards Act (the Act), 52 O.S. 2011 §570.1 *et seq*. The trial court held Trustee and GLB are jointly and severally liable to Grantors for the full amount of royalties paid by GLB to Trustee at 12% interest prior to August 20, 2014, and at 6% interest after August 20, 2014. Grantors appeal from the trial court's order denying their application for attorney fees under the Act. Notwithstanding the evidence of the parties' mutual mistake and the numerous equitable theories in support of Grantors' claims, we hold Grantors' quiet title action was barred by the five (5) year statute of limitations at 12 O.S. 2011 §95(A)(12). Accordingly, the trial court's judgment quieting Grantors' title to the subject minerals is reversed. This Court also reverses the trial court's judgment in favor of Grantors under the Act and affirms the trial court's judgment denying Grantors' request for attorney fees. REVERSED IN PART AND AFFIRMED IN PART. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

115,696 — Michael R. Meadow, Petitioner/Appellee, vs. Meleah Meadows, Respondent/Appellant. Respondent/Appellant Meleah Meadows (Mother) appeals the trial court's order granting Petitioner/Appellee Michael Meadows's (Father) motion to modify child support. The order is not against the clear weight of the evidence and we find no abuse of discretion. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Jop;in, J., concur.

116,301 — Daniel Johnson, Plaintiff/Appellant, vs. Unit Manager Berry, Defendant/Appellee, and Marty Garrison (Facility Investigator); Terri Underwood; and Tim Wilkerson (Warden). Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. Plaintiff/Appellant Daniel Johnson filed a lawsuit against several employees at the Davis Correctional Center, including Defendant/Appellee Unit Manager Berry. The trial court found Johnson failed to exhaust administrative remedies prior to filing the lawsuit and failed to plead and demonstrate that he complied with the notice provisions of the Governmental Tort Claims Act (GTCA) and dismissed the claims against Berry. Johnson appeals from the order denying his motion for rehearing. After *de novo* review, we hold that Johnson failed to exhaust administrative remedies and the trial court did not abuse its discretion by denying Johnson's motion for rehearing. The order of the trial court is AFFIRMED. Opinion by Buettner, J., Bell, P.J., and Joplin, J., concur.

116,369 — In the Matter of the Adoption of A.J.R.G., a minor: Janice Paxton and Jay Paxton, Petitioners/Appellees, vs. Philip Gentry, Respondent/Appellant. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Norman D. Thygesen, Judge. Respondent/Appellant Philip Gentry (Father) appeals from the trial court's order finding his minor child eligible for adoption without his consent. We hold there is clear and convincing evidence that Father failed to establish or maintain a substantial and positive relation-

ship with the child and that Father has been sentenced to a period of incarceration of not less than ten (10) years and the continuation of parental rights would result in harm to the child. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Friday, April 6, 2018

115,809 — In re M.B., J.B., Jr., and K.B., adjudicated deprived children, Laura Zuniga, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge. Laura Zuniga appeals the district court's order granting the State of Oklahoma's motion to terminate parental rights. Zuniga claimed that the State failed to make reasonable reunification efforts and that the children's attorney failed to represent their interests as required by law. However, Zuniga failed to demonstrate error in the district court's decision. Consequently, the district court's order is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Tuesday, April 10, 2018

115,791 — Robert Strange, Plaintiff/Appellant, v. Jeffrey Troutt, D.O., Amber Riley, RN, and Tami Grogan, Defendants/Appellees. Appeal from an order of the District Court of Alfalfa County, Hon. Loren E. Angle, Trial Judge, granting Defendants' motion to dismiss. Plaintiff's petition claims that Defendants, employed as a physician, nurse, and health services administrator respectively with the Oklahoma Department of Corrections, were negligent and violated his constitutional rights in injecting him, not with insulin as prescribed for his diabetes, but with copaxone intended for another inmate suffering from multiple sclerosis. Defendants filed a motion to dismiss for failure to state a claim and asked the court to rule on the motion without a hearing as provided in Rule 4(h) of the Rules for District Courts 12 O.S. Supp.2016, ch. 2, app. In a previous Opinion, we reversed and remanded the case for further proceedings and also directed the trial court to comply with 12 O.S.2011 § 2012(G). After our Opinion in Case No. 115,220 issued, Plaintiff filed a motion to re-urge his objection to Defendants' motion to dismiss. Defendants filed no reply briefs. The trial court once again granted Defendants' motion to dismiss. Defendants filed no reply briefs. The trial court once again granted Defendants' motion to dismiss for failure to state a claim. We again conclude the trial court did not comply with 12 O.S.2011 § 2012(G) by either granting leave to amend if the defect could be remedied or finding that the defect requiring dismissal could not be remedied and entering the dismissal with prejudice. The order of dismissal is reversed, and the case is remanded to the trial court to specify the deficiencies as to the negligence claim which subject that claim to dismissal. The trial court must then either state that no amendment of the petition can cure the stated defects or set a reasonable time for Plaintiff to amend in accordance with 12 O.S.2011 § 2012(G). **REVERSED AND REMANDED WITH DIRECTIONS**. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Fischer, J., concurs, and Thornbrugh, C.J., not participating.

Wednesday, April 11, 2018

115,604 — HSBC Bank, USA, National Association, as Trustee, Plaintiff/ Appellant, v. John Saner, Spouse, if any of, John Saner, John Doe, Jane Doe, Defendants/Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Thomas Prince, Trial Judge, granting John Saner's petition to vacate in this foreclosure action. It became apparent in this case that in 2005 the note at issue was reported lost before HSBC had any connection with this loan, in fact before suit was filed. Despite the confusion caused by HSBC's refusal for years to abandon its claim to be the "holder" of the note after the original note's disappearance, HSBC established in its motion to ratify that it was "a person not in possession of the instrument who is entitled to enforce the instrument." 12A O.S.2011 § 3-301. It "has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." 12A O.S.2011 § 3-309(a)(1)(B). This fact was true when HSBC took over this litigation, when HSBC obtained its judgment in 2010, and when HSBC sought to have that judgment ratified in 2014. Although not disclosed to the court until HSBC's motion to ratify was filed, that fact was nevertheless true from the time HSBC asserted its claims against Saner, and thus establishes that HSBC does and always did have standing to pursue this action. This being the case, we reverse the order vacating the judgment and remand the case with directions to determine, before the entry of a corrected judgment in conformity with this Opin-

ion, whether "the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." 12A O.S.2011 § 3-309(b). This is a matter for the trial court in the first instance, although HSBC addressed it in its motion to ratify. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., concurs, and Fischer, J., concurs specially.

(Division No. 3)
Friday, April 6, 2018

116,359 — Proline Products, LLC, Plaintiff/Appellee/Counter-Appellant, and Don McBride, Plaintiff, vs. Waller County Asphalt, Inc., Defendant/ Appellant/Counter-Appellee, and Tim McBride, Cameron McBride, and T&C Asphalt Materials, LLC, Defendants. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Trial Judge. The appeal and counter-appeal in this case arise from the trial court's order granting summary judgment in favor of Plaintiff/Appellee/Counter-Appellant, ProLine Products, LLC (Manufacturer), on its claim against Defendant/Appellant/Counter-Appellee, Waller County Asphalt, Inc., (Distributor) for breach of a contract provision relating to Manufacturer's trademark, and granting summary judgment in favor of Distributor on Manufacturer's remaining claims. We affirm the trial court's order to the extent it granted summary judgment (1) in favor of Manufacturer as to Distributor's liability for violation of the Mark provisions (i.e., unauthorized use of trademarks), and (2) in favor of Distributor on Manufacturer's claim for violation of the right to publicity. We reverse it to the extent it granted summary judgment as to (1) damages and (2) liability on Manufacturer's first, second, and fifth claims. We remand for further proceedings. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Goree, V.C.J. Mitchell, Acting P.J., and Bell, J. (sitting by designation), concur.

116,472 — Isiac Smith, an Individual, Plaintiff/Appellant, vs. 3 Indians Express, LLC, an Expired Domestic Limited Liability Company; and Susette Anderson, Individually and as Sole Proprietor of 3 Indians Express, Defendants/Appellees. Appeal from the District Court of Ottawa County, Oklahoma. Honorable Robert G. Haney, Trial Judge. Plaintiff filed a retaliatory discharge action against Company and Anderson. Anderson filed a motion for summary judgment arguing, among other things, that there is no evidence she, individually, employed Plaintiff. Plaintiff argued that Company is not a legal entity because the Company's LLC status expired. Thus, Anderson employed him in her individual capacity because the Company no longer exists. The trial court reasoned that Anderson supported her motion because the Company was active "at that point in time" and that the Company, which was suspended for failure to pay franchise taxes, had been reinstated. As a result, she was protected by the Company from personal liability. The trial court granted Anderson's motion for summary judgment and declined to hear Plaintiff's motion to strike. Whether Anderson employed Plaintiff is the pivotal issue in this appeal. Anderson's statement that she as an individual did not employ Plaintiff is supported by her affidavit which repeats her statement. Plaintiff stated only that Anderson did not produce evidence that she, individually, did not employ anyone. He did not attach to his written statement of material facts any evidence that Anderson personally did employ him. Plaintiff did not specifically controvert, with acceptable evidentiary material, Anderson's statement that she did not personally employ him. Therefore, the trial court did not err in granting Anderson's motion for summary judgment. Plaintiff's motion to strike inasmuch as ruling on the motion to strike was not necessary to its decision granting Anderson's motion for summary judgment. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

Friday, April 13, 2018

115,320 — In Re the Marriage of Berney: Timothy M. Berney, Petitioner/Appellant, vs. Laura B. Berney, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Trial Judge. Petitioner/Appellant Timothy M. Berney (Husband) appeals from the trial court's order dividing property, awarding property division alimony, and spousal support in the divorce proceeding between Husband and Respondent/Appellee Laura B. Berney (Wife). Husband's primary contention of error is that the trial court improperly valued the parties' joint interest in a closely held business. Husband also argues that the trial court erred in allocating certain property as separate versus marital property, and that its award of support alimony should be reversed. Wife asserts that a buy-sell agreement provided a formula for the

company's fair market value, which was correctly utilized by the trial court. She also argues that the evidence presented supports the trial court's rulings on property division and support alimony. We affirm the trial court's valuation of the business and property division, reverse the award of support alimony, and re-mand the matter with instructions. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

116,538 — Brent Fluegel and Jessica Fluegel, Plaintiffs/Appellants, vs. Farmers Insurance Company, Inc., Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas Prince, Judge. Plaintiffs/Appellants Brent and Jessica Fluegel (Homeowners) appeal from a partial summary judgment entered in favor of Defendant/Appellee Farmers Insurance Company, Inc. (Farmers) in Homeowners' suit for breach of contract and breach of good faith and fair dealing. Homeowners alleged that Farmers was estopped from denying coverage for a loss to their home, despite the fact that no homeowners' policy was in place, because Farmers' agents promised the home would be insured when construction of the home was complete. After *de novo* review, we find the undisputed facts establish that Farmers did not make an unambiguous promise to insure the home, nor did Farmers falsely represent that the home would be insured while knowing that it could not. Accordingly, an application of promissory or equitable estoppel is not warranted here. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Monday, March 26, 2018

116,062 — Wells Fargo Bank, N.A. as, Trustee for Option One Mortgage Loan Trust 2005-4 Asset-Backed Certificates, Series 2005-4, Plaintiff/Appellee, v. Robert Heath and Shelly R. Heath, Defendants/Appellants, and John Doe, as Occupant of the Premises, Jane Doe, as Occupant of the Premises and State of Oklahoma ex rel. Department of Human Services. Appeal from an Order of the District Court of Tulsa County, Hon. Damon Cantrell, Trial Judge. The trial court defendants, Robert Heath and Shelly R. Heath (collectively "Heath"), appeal an Order confirming a sale under foreclosure and denying their petition to vacate the underlying judgment in favor of the plaintiff, Wells Fargo Bank, National Association, as Trustee for Option One Mortgage Loan Trust 2005-4 Asset Back Certificates, Series 2005-4 ("Bank"). The Oklahoma Supreme Court ruled that Bank's original petition failed to establish standing because it did not show that Bank had the right to enforce the promissory note. The Supreme Court remanded the matter for further proceedings. On remand, the Bank obtained permission to amend its petition and add an Allonge. Without objection, the amended petition shows that the Bank had the right to enforce the promissory note on the date it filed the original petition. Health maintains that the Bank had to dismiss its action before filing an amendment. This is not required when, as here, the amendment shows that the right to enforce the promissory note existed when the original petition was filed. The judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,024 — Frances Cox, Plaintiff/Appellant, v. Choctaw Casino of Pocola and the Choctaw Nation of Oklahoma, Defendants/Appellees, and Gaming Capital Group, LLC, Defendant/Real Party in Interest. Appeal from the District Court of LeFlore County, Hon. Jonathan K. Sullivan, Trial Judge. Plaintiff asserts in her petition that she "was walking in a narrow and poorly lit area of Choctaw Casinos, when she tripped and fell over the leg of a chair that was tilted forward against a slot machine." She alleges she suffered serious injuries as a result of this fall, and asserts Defendants were negligent in, among other things, failing to warn patrons of a known danger. This appeal arises from the trial court's order granting the motion to dismiss of Defendants/Appellees (collectively, the Choctaw Nation), which it certified as immediately appealable. In *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, 315 P.3d 359, the Oklahoma Supreme Court concluded "Oklahoma state courts are not courts of competent jurisdiction as the term is used in the model gaming compact" with regard to compact-based tort or prize claims. 2013 OK 77, ¶ 25. The *Sheffer* Court also specifically acknowledged that the compact entered into by the Choctaw Nation does not contain any language expressly granting jurisdiction to state district courts over compact-based tort or prize claims asserted against the Choctaw Nation. In accordance with *Sheffer,* we conclude the trial court properly determined it lacks jurisdiction with regard to Plaintiff's negligence theories asserted against the Choctaw Nation. Therefore, we affirm. AFFIRMED. Opinion from Court of Civil Appeals,

Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Monday, April 2, 2018

116,419 — Thomas Phillip Williams, Petitioner, vs. Fitness Together, Sentinel Insurance Co., Ltd., and/or Markel Insurance Co., and The Workers' Compensation Commission, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Commission, Hon. Michael T. Egan, Administrative Law Judge. The Administrative Law Judge (ALJ) dismissed with prejudice Claimant's claim for benefits for failure to pursue the claim, citing 85A O.S.Supp.2014, § 69. We hold the ALJ had no legal basis to dismiss the claim pursuant to § 69(D). The ALJ's order of dismissal was therefore improper, and the Commission's order affirming that dismissal was likewise erroneous and is reversed. We further find the order dismissing for failure to prosecute was made on unlawful procedure, if not arbitrary and capricious, and therefore erroneous since the claim was not being prosecuted because Claimant was awaiting a hearing before the ALJ. See, 85A O.S.Supp.2014,§ 78(C) (3) and (6). Because we find § 69 was not a proper basis for the dismissal of his claim, Claimant has not been aggrieved by the application of § 69 to his case. Therefore, we need not address Claimant's allegations that § 69 is unconstitutional in part or in whole. The order under review is reversed and the matter is remanded for further proceedings. Upon remand, the ALJ shall, after proper notice, determine which carrier has coverage in this matter and conduct a hearing on all outstanding motions. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, April 10, 2018

115,329 — State of Oklahoma, ex rel. Department of Transportation, Plaintiff/ Appellee, vs. H&L Double MC, LLP, a Limited Liability Partnership of Grandfield, OK, Defendant/Appellant, and Leon McComber, member; Hugh McCullough, member; Liberty National Bank; and the Cotton County Board of Commissioners, Defendants. Appeal from an Order of the District Court of Cotton County, Hon. Michael C. Flanagan, Trial Judge. This appeal arises from a condemnation action initiated by the State of Oklahoma ex rel. Department of Transportation (ODOT) seeking to acquire certain property of H&L Double MC, LLP (H&L). H&L appeals from the trial court's journal entry memorializing a jury verdict, asserting the trial court erred in the admission of ODOT's expert appraiser R.D. Grace's Appraisal and his testimony regarding the same. We find no abuse of discretion by the trial court in permitting Grace's Appraisal and testimony at trial and the order is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,715 — In re the Marriage of: Steven William McCroskey, Petitioner/Appellant, v. Jamie Sue McCroskey, Respondent/Appellee. Appeal from an Order of the District Court of LeFlore County, Hon. Jonathan K. Sullivan, Trial Judge, denying Jamie Sue McCroskey's (Wife) petition to vacate a default Decree of Dissolution of Marriage. Wife seeks vacation of the trial court's order, asserting, *inter alia*, that Steven William McCroskey (Husband) committed fraud in obtaining the default Decree as it significantly omitted marital assets and awarded Husband 100% of the marital real property while awarding her separately owned real property as marital distribution. Thus, the Decree did not fairly and equitably distribute the marital assets. The Court believes justice would be better served by permitting Wife her day in court and allowing the matter to be tried on the merits. Accordingly, under the facts presented, and given the strong public policy in this state of preferring decisions rendered on their merits rather than by default, we conclude the trial court erred in refusing to vacate the default Decree of Dissolution of Marriage. The decision of the trial court is reversed, the default judgment is vacated, and the case is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, April 11, 2018

116,323 — In the Matter of A.F., An Alleged Deprived Child, Dixie Fricovsky, Appellant, v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Greer County, Hon. Eric G. Yarborough, Trial Judge. In this Alleged Deprived Child Action Dixie Fricovsky (Mother) appeals an Order adjudicating A.F. as a deprived child. The State of Oklahoma Department of Human Services (DHS) claims that Mother is imagining medical problems for her child, A.F., and takes him excessively to

doctors and hospitals for reasons not supported by medical evidence. The term employed here is "medical child abuse" or "Munchausen by proxy" and the problem was described by witnesses at the trial. There is no dispute about whether the circumstances pertaining to "medical child abuse" do present a child abuse situation. This case involves the safety and welfare of a small child while maintaining adherence to constitutional requirements. The deprived child adjudication is a prerequisite to termination of parental rights. This fact imposes upon the appellate Court the duty to carefully review all of the evidence to ensure that the greater weight of the evidence supports the deprived child adjudication. Here, that adjudication depends upon the testimony and opinion of Dr. Stockett. Her testimony focused on the past history and the time up to late January and early February 2017. If the facts of the case stopped in early February 2017, the conclusion of medical child abuse, and thus deprived, is not against the clear weight of the evidence. However, the facts do not come to a halt in February 2017, as A.F. had tubes in his ears and adenoids removed in May 2017. The evidence is that everyone who observed A.F. before and after the May surgery testified that A.F. did not suffer breathing problems after the surgery. This Court finds that the adjudication of A.F. as a deprived child by reason of medical child abuse is not supported by the preponderance of the evidence. However, the Record does reflect cause for concern about medical child abuse. Therefore, the adjudication is vacated and the cause is remanded for further proceedings to evaluate the May 2017 surgery as it may affect any conclusion that medical child abuse is present. The trial court's dispositions shall remain in place. Mother's Motion to Supplement the Record is denied. ADJUDICATION OF DEPRIVED CHILD IS VACATED AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., concurs, and Barnes, P.J., concurs in part and dissents in part.

Monday, April 16, 2018

115,834 — In the Matter of the Guardianship of Farideh Sadeghi, an Incapacitated Adult, Shayan Yasin Mohammedzaki, Appellant, vs. M. Said Sadeghi and Lilah Kahn, Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Terry H. Bitting, Trial Judge. This is Husband Shayan Yasin Mohammedzaki's appeal from the trial court's order appointing M. Said Sadeghi and Lilah Kahn as Co-Guardians of Farideh Sadeghi (Ward), an incapacitated adult. Husband contends the trial court lacked subject matter jurisdiction. We find Oklahoma's Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, 30 O.S.2011, §§ 3-301 through 3-322 (UAGPPJA) governs these proceedings. Although not Ward's "home state," Oklahoma is a significant-connection state under the UAGPPJA for the reason that she formerly resided in Oklahoma for several years before returning to Iran, has and may still own significant real and personal property in Oklahoma, and has two adult children (Co-Guardians) living in Oklahoma. There is no suggestion in the record before us that a guardianship procedure has been initiated in either Georgia or in Iran. We reject Husband's proposition of error that the trial court lacked subject matter jurisdiction. Husband's request to vacate the trial court's order for lack of actual notice is also rejected. Finding no errors of law, we affirm the order under review. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goofman, J.; Barnes, P.J., and Thornbrugh, C.J. (sitting by designation), concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, March 27, 2018

116,192 — Richard Lynn Dopp, Petitioner/Appellant, vs. Justin Jones, Johnny Blevins, Randy Knight, David Orman, John Marlar, Debbie Morton, Terry Crenshaw, Dr. Paul Sockey, Kristy Wingo, Jim Rabon, Wayne Brakensiek, Wade Scott, David Miller, Richard Roberts, E. Scott Pruitt, and Robert Apala, Respondent/Appellees. Appellant's Petition for Rehearing, filed February 27, 2018, is *DENIED*.

Tuesday, April 10, 2018

115,399 — Wells Fargo Bank, N.A., Plaintiff/Appellee, vs. Sheila Finn, Defendant/Appellant, and Spouse of Sheila Finn, if married, Elbert Kirby, Jr., John Doe, and Jane Doe, Defendants. Appellant's Petition for Rehearing, filed April 2, 2018, is *DENIED*.

SERVICES

OF COUNSEL LEGAL RESOURCES – SINCE 1992 – Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 25 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf 405-728-9925, marygayelaw@cox.net.**

INTERESTED IN PURCHASING PRODUCING & NONPRODUCING MINERALS; ORRi. Please contact Greg Winneke, CSW Corporation, P.O. Box 23087, Oklahoma City, OK 73123; 210-860-5325; email gregwinne@aol.com.

BRIEF WRITING, APPEALS, RESEARCH AND DISCOVERY SUPPORT. Eighteen years experience in civil litigation. Backed by established firm. Neil D. Van Dalsem, Taylor, Ryan, Minton, Van Dalsem & Williams PC, 918-749-5566, nvandalsem@trsvlaw.com.

HANDWRITING IDENTIFICATION
POLYGRAPH EXAMINATION

Board Certified	Court Qualified
Diplomate – ABFE	Former OSBI Agent
Life Fellow – ACFEI	FBI National Academy

Arthur D. Linville 405-736-1925

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WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

CONTRACT LEGAL SERVICES – Lawyer with highest rating and with 30+ years' experience on both sides of the table is available for strategic planning, legal research and writing in all state and federal trial and appellate courts and administrative agencies. Admitted and practiced before the United States Supreme Court. Janice M. Dansby, 405-833-2813, jdansby@concentric.net.

OFFICE SPACE

OFFICE SPACE AVAILABLE IN ESTABLISHED FIRM. Space located in Midtown at 136 NW 10th Street, Oklahoma City. Space includes use of common areas including two conference rooms, copy room, large reception area, kitchen, workout facilities, locker rooms and more. One or several offices. Price depends upon specific needs and circumstances. Contact George Brown, gbrown@browngouldlaw.com.

OFFICE SPACE

OFFICE SPACE – MIDTOWN LAW CENTER

One space available – easy walk to multiple Midtown restaurants. Turn-key arrangement includes phone, fax, LD, internet, gated parking, kitchen, storage, 2 conference rooms and receptionist. Share space with 7 attorneys, some referrals.

405-229-1476 or 405-204-0404

OFFICE SPACE FOR LEASE IN ESTABLISHED FIRM. Space located in Boulder Towers at 1437 S. Boulder Ave., Suite 1080, Tulsa, OK. Space includes two conference rooms, kitchen, reception area, security and free parking. $750 per month. Contact Christine Fugate at 918-749-5566 or cfugate@trsvlaw.com.

TWO MONTHS FREE RENT
with 3-year lease agreement
Perimeter Center Office Complex, located at 39th and Tulsa Avenue currently has available office space for lease at $13 per square foot, ranging in size from 595 to 4,500 square feet.

EXECUTIVE SUITES – ONE MONTH FREE RENT
Single unfurnished offices. Prices range from $200 to $700 per month. Amenities include conference rooms, breakroom, fax, copy and answering services.

Please call 405-943-3001 M-F from 8-5 for an appointment.

LAW OFFICE SPACE FOR LEASE. One executive law office available in established practice. $750 per month. Furnished or unfurnished. Includes Wi-Fi and access to conference room etc. Downtown location with parking. Call Jarman Law Offices 405-606-8400 for details or email JarmanLaw@gmail.com.

POSITIONS AVAILABLE

PROGRESSIVE, OUTSIDE-THE-BOX THINKING BOUTIQUE DEFENSE LITIGATION FIRM seeks a nurse/paralegal with experience in medical malpractice and nursing home litigation support. Nursing degree and practical nursing care experience a must. Please send resume and salary requirements to edmison@berryfirm.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.

POSITIONS AVAILABLE

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Margaret Travis, 405-416-7086 or heroes@okbar.org.

LANDOWNERFIRM.COM IS LOOKING TO FILL TWO POSITIONS in the Tulsa office: 1) a paralegal or legal assistant with strong computer skills, communication skills and attention to detail and 2) an attorney position – the ideal candidate will have excellent attention to detail with an interest in writing, drafting pleadings, written discovery and legal research. Compensation DOE. Please send resumes and any other applicable info to tg@LandownerFirm.com. Applications kept in strict confidence.

CITY ATTORNEY – Provides legal assistance on matters pertaining to city functions and activities and acts as the city's legal representative. Must be licensed by the Oklahoma Bar Association with previous experience in municipal law and preferably, previous experience working in a city attorney's office. Must possess valid Oklahoma driver license and be insurable. Starting salary range: $80,947 - $88,195. Apply City of Midwest City, HR Dept., 100 N. Midwest Blvd., or www.midwestcityok.org. Apps accepted until filled. EOE.

NORTHWEST OKLAHOMA CITY LAW FIRM, MEE MEE HOGE & EPPERSON, PLLP, seeks office manager and/or assistant office manager. Strong bookkeeping background required including extensive experience with QuickBooks and TABS. Some IT knowledge and HR experience would be a plus. Send resume to srk@meehoge.com.

TULSA HOUSING AUTHORITY IS SEEKING AN ASSISTANT GENERAL COUNSEL. The assistant general counsel will assist the general counsel in the representation in a variety of legal matters and handle all legal matters related to eviction procedures. This is a generalist role. Minimum requirements include a bachelor's degree in business or closely related area; a law degree from an accredited school of law; a valid license to practice law in Oklahoma; strong communication skills; courtroom experience is preferred; and a valid driver's license. Salary $63,918. See more details at www.tulsahousing.org. Send resume to hr@tulsahousing.org.

POSITIONS AVAILABLE

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.

WESTERN FARMERS ELECTRIC COOPERATIVE IS SEEKING A STAFF ATTORNEY for its Anadarko/Moore office. Salary ranges $99,213 - $160,506. Under general supervision of senior manager, Legal & Regulatory Compliance. Staff attorney provides legal advice and counsel to cooperative management and personnel on a variety of topics including regulatory compliance, contract development, contract administration, litigation management, legal correspondence and creation and review of business documents such as contracts, interconnection agreements, transmission service agreements, and regulatory matters involving power supply, transmission services and reliability. Incumbent researches, drafts, reviews, interprets and negotiates legal documents on behalf of various departments on a wide range of legal questions. From time to time, incumbent manages litigation. Incumbent assists with regulatory compliance issues, including North American Electric Reliability Corporation compliance. Requires a J.D. or LL.B degree from an accredited law school and five years progressively responsible legal experience. View job posting and apply online www.wfec.com. Posting is open until filled. WFEC is an equal opportunity employer. Minorities, women, disabled and vets are encouraged to apply. EOE/M/W/D/V.

THE OSAGE NATION IS HIRING A STAFF ATTORNEY and accepting applications at this time. To apply please visit: www.paycomonline.net/v4/ats/web.php/jobs/ViewJobDetails?job=8078&clientkey=C7F1082DFD630A67D2F9CB5635D8679F

DOWNTOWN LAW FIRM IS SEEKING AN ASSOCIATE ATTORNEY in its Tulsa office. Ideal candidate will have 3-7 years of experience in civil litigation, with a preference for experience in the areas of insurance defense or medical malpractice. Send cover letter, resume and writing sample to pbeck@gablawyers.com.

SPECIAL MUNICIPAL JUDGE (PART-TIME). The City of Oklahoma City will accept applications through May 11, 2018. Requirements include residency in Oklahoma City and a minimum of four years' experience as a licensed practicing attorney in the state of Oklahoma. For more information and to apply go to www.okc.gov.

THE GARFIELD COUNTY DISTRICT ATTORNEY'S OFFICE SEEKS AN ASSISTANT DISTRICT ATTORNEY with 0-7 years' experience. Caseload assignments and responsibilities will depend upon successful applicant's experience and interest. Applicants should submit a cover letter, resume and references to Mike Fields, District Attorney, 114 West Broadway, Enid, OK 73701 or by email to Michael.fields@dac.state.ok.us.

POSITIONS AVAILABLE

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 OFFICE OF LEGAL COUNSEL TO THE OSU/A&M BOARD OF REGENTS HAS AN IMMEDIATE OPENING for a staff attorney. The position will report to and receive assignments from the general counsel, will render legal advice and serve as a higher education generalist, dealing with a variety of legal issues, including, but not limited to, student conduct, open records requests, regulatory compliance, contracts, research agreements and intellectual property licensing. This position will work closely with and monitor outside counsel handling intellectual property and immigration issues as well. The precise duties assigned to the position may vary from the above, based upon the experience and aptitude of the successful applicant. The position requires a bachelor's degree and J.D./LL.B. degree from an accredited law school, membership in good standing in the Oklahoma Bar Association, and 0-7 years legal experience. The position also requires a demonstrated capability for legal research, analysis and reasoning, superior oral and written communication skills, an ability to identify and resolve complicated and sensitive problems creatively and with professional discretion, and an ability to interact and function effectively in an academic community. Salary commensurate with experience. To receive full consideration, resumes should be submitted by Friday, May 18, 2018 to: Staff Attorney Search, Office of Legal Counsel, OSU/A&M Board of Regents, 5th Floor - Student Union Building, Stillwater, OK 74078. The OSU/A&M Board of Regents is an affirmative action/equal opportunity/E-verify employer committed to diversity and all qualified applicants will receive consideration for employment and will not be discriminated against based on age, race, color, religion, sex, sexual orientation, genetic information, gender identity, national origin, disability, protected veteran status or other protected category. The Office of Legal Counsel is located at OSU-Stillwater, which is a tobacco-free campus.

DISTRICT ATTORNEY CRAIG LADD WITH DISTRICT 20 DA'S OFFICE consisting of Carter, Love, Marshall, Murray and Johnston counties, has an opening in the Love County office located in Marietta, Oklahoma, for an assistant DA position. Position needs to be filled as soon as possible. Please contact the main office at 580-223-9674 for details.

POSITIONS AVAILABLE

THE OFFICE OF CONTRACT ADMINISTRATION AT THE UNIVERSITY OF OKLAHOMA IS HIRING A CONTRACT ADMINISTRATOR. Responsibilities include drafting, reviewing, negotiating and approving contracts. Reviewing grant and contract proposals to verify they are compliant with state and federal laws as well as university policies. The employee must produce deliverables with professional-level business standards. The person in this position will act as an adviser to university officers and their assigned departments regarding complex business issues. For more information or to apply go to jobs.ou.edu Job #180725. The University of Oklahoma is an equal opportunity/affirmative action institution http://www.ou.edu/eoo/. Individuals with disabilities and protected veterans are encouraged to apply.

BARBER & BARTZ IS SEEKING AN ATTORNEY WITH A MINIMUM OF 12 YEARS of civil and business litigation experience. The ideal candidate will have solid litigation experience, excellent communication skills and be well-organized. Candidates seeking a firm with a team approach to litigation and a firm characterized by an environment encouraging faith and family will be interested in this unique opportunity. The compensation package is commensurate with level of experience and qualifications. An exceptional benefit package includes bonus opportunity, health insurance, life insurance and 401K with match. Applications will be kept in strict confidence. Please send resume to Robert J. Bartz, 525 South Main Street, Suite 800, Tulsa, OK 74103.

IN-HOUSE LEGAL ADMINISTRATIVE ASSISTANT - Love's Travel Stops & Country Stores, Inc. seeks a full-time legal administrative assistant for its OKC Corporate Legal Department. Purpose of position is to provide full range of administrative support to multiple members of legal team, including clerical, receptionist, technical and organizational assistance. Provide heavy administrative support in processing the company's subpoenas as well as supporting multiple aspects of the company's litigation and adversarial matters. Eligible for full benefits package. Two years' experience as an administrative assistant working in litigation in a law firm or corporate legal department required. Qualified candidates are urged to act quickly and apply online for the "Legal Administrative Assistant" position at www.loves.com/jobs.

LOOKING FOR WILL

ATTEMPTING TO LOCATE ANY LAST WILL AND TESTAMENT or any document amending or creating a trust for Vandell Downing, born Dec. 8, 1943. Please contact Cassandra Downing at midw583@yahoo.com or 816-278-2975 if you have drafted a will or trust for the decedent or know the location of any such document.

Herbert M. Graves

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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LIMITED SPACE REMAINS

GET SOME FRESH AIR AND A FRESH PERSPECTIVE ON LEGAL ETHICS WITH NEW QUESTIONS AND SCENARIOS IN A UNIQUE OUTDOOR CLE FORMAT.

ETHICS IN 18 HOLES

THURSDAY, JUNE 20, 8 A.M. - 2:50 P.M.

2/2

The Patriot Golf Club, 5790 N Patriot Drive, Owasso, OK 74055

TUITION: $225 for early-bird registrations with payment received no later than June 15th; $250 for registrations with payment received June 16th or later. Tuition includes: 2 hours of CLE, green fee, cart, balls, grab & go breakfast and buffet lunch. Cash bar available. Member guests not staying for CLE or lunch may play for $175 early and $200 late by contacting Renee at 405-416-7029. No Walk-ins.

LODGING: If you are planning to attend the Solo & Small Firm Conference and would like to take advantage of our special $99 room rate at the River Spirit Casino Resort, please call 1-888-748-8731 and refer to the OBA Solo & Small Firm Conference or use the link on our registrationpage. The Hard Rock Hotel and Casino has arranged a room rate of $109 for those golfers wanting to stay closer to the course. Hopefully, this will make early check in onThursday morning a little less painful. It is 7.6 miles from the Hard Rock to the Patriot. Call 1-800-760-6700 and mention "Oklahoma Bar Association – OKC" to receive the special group rate by May 29, 2018.

Your "classroom" is the great outdoors at The Patriot Golf Club. Eighteen ethics scenarios and a set of multiple choice answers are your course materials. Discuss each scenario and possible answers as you play or ride to each hole. After you finish, head to the "19th Hole" for a buffet lunch and discussion of the scenarios and answers led by OBA Ethics Counsel, Joe Balkenbush.

Because of this unique format, participation is limited to 52. Register now to guarantee you or your team a place at this special CLE event! The event is set up for no mulligans, a max of bogey, and prizes will be given for 1st and 2nd place. Tie breaker is best score on the hardest handicapped holes. Flag prizes for closest to pin on hole #8 and #17 and longest drive on #11.

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