THE OKLAHOMA BAR
Journal
Volume 89 — No. 1 — 1/13/2018

Court Issue

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Journal

Volume 89 – No. 1 – 1/13/2018

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Oklahoma Bar Association

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NOTICE

INTEREST ON JUDGMENTS
January 2, 2018

2018 Interest Rates: In accordance with 12 O.S. 2013 Supp. §727.1 (I), the postjudgment interest rate to be charged on judgments for calendar year 2018 shall be 6.50 percent. Also, the prejudgment interest rate for 2018 shall be 0.92 percent (applicable to actions filed on or after January 1, 2010). These interest rates will be in effect from January 1, 2018, through December 31, 2018.

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)

2017 OK 91

In Re: Amendment of Rule Seven (h) of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app. 5

SCBD 6584. November 20, 2017

ORDER

This matter comes on before this Court upon an Application to Amend Rule Seven (h) of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app 5. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective June 1, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 20th day of November, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A

RULE SEVEN

FEES

The following **non-refundable** fees shall be paid to the Board of Bar Examiners at the time of filing of the application:

(a) Registration:

Regular $125

Nunc Pro Tunc $500

(b) By each applicant for admission upon motion: the sum of $2,000.

(c) By each applicant for admission by examination under Rule Four, §1:

FEBRUARY BAR EXAM
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1 September.....$1,000

1 October $1,050

1 November $1,150

JULY BAR EXAM
Application filed on or before:

1 February $1,000

1 March.....$1,050

1 April $1,150

(d) By each applicant for a Special Temporary Permit under Rule Two, §5: the sum of $750.

(e) By each applicant for admission by a Special Temporary Permit under Rule Two, §6: the sum of $100.

(f) For each applicant for a Special Temporary Permit under Rule Two, §7, there will not be any fee charged to the applicant.

(g) By each applicant for a Temporary Permit under Rule Nine: $150.

(h) By each applicant for admission by examination other than those under subparagraph (c) hereof:

FEBRUARY BAR EXAM
Application filed on or before:

1 September.....~~$300~~ 400

1 October .....~~$350~~ 450

1 November .....~~$450~~ 550

JULY BAR EXAM
Application filed on or before:

1 February .....~~$300~~ 400

1 March.....~~$350~~ 450

1 April .....~~$450~~ 550

2017 OK 94

In Re: Rules Creating and Controling the Oklahoma Bar Association

SCBD 4483. December 4, 2017
As Corrected December 6, 2017

ORDER

This matter comes on before this Court upon an Application to Amend Art. II Section 2 of the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. ch. 1, app. 1, Creating a New Member Category and Suspending Further Application for Senior Member Category. This Court finds that it has jurisdiction over this

matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective January 1, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 4th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit A

ARTICLE II
Section 2 Members Classified

Members of the Association shall be divided into ~~three~~ four classes, namely, (a) ~~active members~~Active Member, (b) ~~senior members~~ Senior Member, (c) ~~associate members~~ Associate Member and (d) Retired Member. No other categories of membership may be allowed. The annual dues shall be paid according to Art. VIII, § 1. Tweedy v. Oklahoma Bar Assoc., 624 P.2d 1049, 1052 (Okla. 1981); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 415 (Okla. 1972); In re Integration of State Bar, 185 Okla. 505, 95 P.2d 113 (1939).

(a) Active Members. Active ~~members~~ Members shall be all members not enrolled as ~~senior members~~ Senior Members, Retired, or ~~associated members~~ Associate Members.

(b) ~~SENIOR MEMBERS~~ Senior Member. An ~~active member~~ Active Member in good standing who ~~is~~ was seventy (70) years of age as of the first day of January ~~of the then current year~~ 2018, ~~may become a senior member~~ and previously became a Senior Member by filing with the Executive Director his or her statement, setting forth the month, day and year of ~~his~~ birth and requesting ~~senior membership~~ Senior Member classification. Thereafter, he or she shall be entitled to all the privileges and advantages of an Active Member ~~active membership~~ in the Association without payment of further dues, with the exception that he or she shall not receive the Bar Journal free of charge. If a ~~senior member~~ Senior Member desires to receive the Bar Journal, ~~the senior~~ he or she shall pay for an annual subscription, the cost of which shall be based upon production and mailing costs. No additional members shall be added to this classification after January 1, 2018. After January 1, 2018, all members who are seventy (70) years of age or older, who are actively engaged in the practice of law, and who are not Senior Members, Associate Members or Retired Members shall pay dues in the amount specified for those in practice for more than three (3) years.

(c) Associate Member. A member in good standing who files, or on whose behalf there is filed, with the Executive Director, a statement that, by reason of illness, infirmity, or other disability, he or she is unable to engage in the practice of law shall become an ~~associate member~~ Associate Member of the Association for the duration of such illness, infirmity or other disability ~~and~~ until ~~he is~~ restored to ~~his~~ the former classification. An ~~associate member~~ Associate Member shall not engage in the practice of law or be required to pay dues during such period. He or she may, on annual request, receive the Bar Journal during his or her disability. The member, on causing an appropriate showing thereof to be made to the Executive Director, shall be reclassified to be an Active Member ~~the membership held prior to such illness, infirmity or other disability~~ and shall be required to pay the dues applicable thereto beginning January 2nd next following such reclassification and to pay the cost of the Bar Journal during such disability if he or she has elected to receive it.

(d) Retired Member. An Active Member in good standing who reaches age seventy (70) on, or after January 2nd, 2018 and is no longer engaged in the practice of law may notify the Executive Director, in writing, that he or she wishes to be designated as a "Retired Member." Such request shall include a statement that the member is not engaged in the practice of law in any jurisdiction. Members who request Retired Member classification shall be relieved from paying dues and may purchase the Bar Journal and other member benefits that might be made available at a price equal to the cost to the Oklahoma Bar Association in providing the member benefit. An Active Member requesting Retired Member classification must have reached age seventy (70) prior to January 2nd of the year he or she is requesting to be reclassified to Retired Status and relieved from paying dues. Those members who were previously classified as Senior Members prior to the adoption of this subsection may change their classification to Retired Member if a request in writing is submitted to the Executive Director with a request for the reclassification and a statement that the requesting member is no longer engaged in the practice of law.

~~(d)~~ (e) Reclassification to Active Membership – Showing Competence. Whenever a member seeks restoration to ~~active membership~~ Active Member classification after the lapse of two (2) years or less, he or she may be reinstated as provided in Rule 11.8 of the Rules Governing Disciplinary Proceedings. After the lapse of more ~~that~~ than two (2) years, an ~~associated member~~ Associate Member may be restored to ~~active membership~~ Active Member classification upon compliance with Rule 11.1 through Rule 11.7 of the Rules Governing Disciplinary Proceedings.

~~(e)~~ (f) Voting Members Defined. Active and ~~senior members~~ Senior Members shall constitute the voting members of the Association. Associate and Retired Members shall not be Voting Members.

2017 OK 100

JOHN HUNSUCKER, on behalf of himself and his clients; BRUCE EDGE, on behalf of himself and his clients; CHARLES SIFERS, on behalf of himself and his clients; STEPHEN FABIAN, on behalf of himself and his clients, Petitioners, v. THE HONORABLE MARY FALLIN, GOVERNOR, in her official capacity; THE HONORABLE SENATOR MIKE SCHULZ, SENATE PRESIDENT PRO TEMPORE, in his official capacity; THE HONORABLE REPRESENTATIVE CHARLES MCCALL, SPEAKER OF THE HOUSE, in his official capacity; MICHAEL THOMPSON, in his official capacity as Commissioner of Oklahoma Department of Public Safety; DAVID PRATER, in his official capacity as District Attorney for Oklahoma County; STEVE KUNZWEILER, in his official capacity as District Attorney for Tulsa County; Respondents.

No. 116,131. December 19, 2017
As Corrected December 20, 2017

APPLICATIONS TO ASSUME ORIGINAL JURISDICTION AND FOR EXTRAORDINARY DECLARATORY AND INJUNCTIVE RELIEF

¶0 Petitioners filed an application for the Court to assume original jurisdiction and petitions to grant extraordinary declaratory and injunctive relief. Petitioners challenge the constitutionality of both Impaired Driving Elimination Act 2, (S.B. No. 643), and Governor's Executive Order 2017-19, issued on June 8, 2017, to implement the new Act or a portion thereof. The Court heard oral argument with all parties participating. The Court holds: petitioners have standing; two members of the Oklahoma Legislature possess constitutional legislative immunity from legal liability sought to be imposed by petitioners and these two respondents are dismissed as parties; Section 13 of the Impaired Driving Elimination Act 2 violates Okla. Const. Art. 2 § 7; the Impaired Driving Elimination Act 2 violates Okla. Const. Art. 5 § 57 and the temporary stay pending litigation is dissolved.

ORIGINAL JURISDICTION ASSUMED; PETITION FOR EXTRAORDINARY DECLARATORY RELIEF GRANTED; AND PETITION FOR EXTRAORDINARY INJUNCTION DENIED

Brian K. Morton, Oklahoma City, Oklahoma; & Sonja R. Porter, Oklahoma City, Oklahoma, for petitioners.

M. Daniel Weitman, Assistant Attorney General, Oklahoma City, Oklahoma, for respondents Senator Mike Schulz, Oklahoma Senate President Pro Tempore, and Representative Charles McCall, Speaker of the Oklahoma House of Representatives.

Mithun Mansinghani, Solicitor General; Kevin McClure, Assistant Attorney General; Lauren E. Hammonds, Assistant Attorney General, Oklahoma City, Oklahoma, for Respondents Gov. Mary Fallin, Commissioner Michael Thompson, District Attorney David Prater, and District Attorney Steve Kunzweiler.

EDMONDSON, J.

¶1 Petitioners filed applications for the Court to assume original jurisdiction and grant extraordinary declaratory and injunctive relief. Petitioners have four constitutional claims. Two claims attack the constitutionality of Oklahoma Senate Bill No. 643, the Impaired Driving Elimination Act 2 (IDEA2). Two claims attack the constitutionality of the Governor's Executive Order 2017-19, promulgated on June 8, 2017, and designed to implement a portion of S.B. No. 643.

¶2 We hold the Impaired Driving Elimination Act 2 is unconstitutional in its entirety due to violating the single subject rule in Okla. Const. Art. 5 § 57. We hold one provision of the Act, section 13, violates the Due Process

Clause in Okla. Const. Art. 2 § 7. Because we conclude the provisions of the Act are not severable and the Act is unconstitutional in its entirety, we need not adjudicate petitioners' additional claims challenging the Act and the Governor's Executive Order. We hold these petitioners possess standing. We further hold respondents Schulz and McCall are not proper parties, and their motion to be dismissed as parties is granted.

I. Petitioners' Standing

¶3 The new Impaired Driving Elimination Act 2 (IDEA2) contains seventeen numbered sections and according to its title includes, but is not limited to, provisions which relate to revocation, modification, and reinstatement of driver licenses, ignition interlock devices installed in vehicles, making certain acts unlawful, clarifying and deleting procedures relating to blood and breath tests for the presence of alcohol, surrender of driver licenses, and authorization to the Department of Public Safety to create the Impaired Driver Accountability Program by June 30, 2018. Petitioners, four Oklahoma lawyers and licensed drivers raise two constitutional claims on behalf of themselves and their clients and argue they will be adversely affected when the Act is scheduled to become effective on November 1, 2017. Respondents challenge the standing of the petitioners to bring an action challenging a new Act which has not yet been made effective.[1] Standing is a preliminary or threshold issue adjudicated prior to an examination of the merits.[2]

¶4 Petitioners allege they possess standing based upon one or more of five criteria: 1) They are subject to potential criminal prosecution pursuant to the new legislation; 2) They are subject to potential civil drivers' revocation in the future; 3) They represent the interests of future clients subject to civil and criminal proceedings within the scope of the new Act; 4) The new Act will have an adverse economic impact on their businesses which represent many Oklahomans in criminal and civil proceedings related to the subject matter of the new Act; and 5) They possess "public interest" standing. We need not analyze the issues raised by petitioners and respondents relating to petitioners' standing based upon potential criminal proceedings,[3] potential and hypothetical civil proceedings, their representation of hypothetical future clients, or any potential adverse business impact to their practice of law.[4] We find petitioners possess a public interest standing in this matter as we now explain.

¶5 This Court possesses discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.[5] This discretion is properly exercised to grant standing where there are "competing policy considerations" and "lively conflict between antagonistic demands."[6]

¶6 A matter that affects the rights of the citizens of the State is *publici juris*.[7] During oral argument before the Court all parties commented on *publici juris* attributes of this controversy, including the great number of Oklahoma citizens in all counties of the State subject to the provisions in the new Act related to impaired driving and other provisions;[8] and additionally certain administrative procedures authorized for Department of Public Safety creation to supplement the Act, but which have not yet been created or approved for the effective date of November 1, 2017; and other administrative procedures which the Department has legislative approval to delay creation until June 30, 2018.

¶7 The adjective-law[9] component to standing in an Oklahoma state court, while creating a barrier in a private-law original jurisdiction action, does not hinder this Court from giving adequate relief in a *publici juris* original jurisdiction proceeding.[10] Any potential Okla. Const. Art. 7 § 1 jurisdictional/"judicial power" or justiciability components to standing[11] which may act as potential barriers to petitioners' standing to obtain *declaratory relief* are resolved by our findings: (1) Petitioners possess interests in challenging this specific Act which are opposed to those of respondents and the controversy presents a "lively conflict between antagonistic demands;" (2) The controversy is *publici juris* due to the negative consequences attendant to enforcing *alleged* unconstitutional provisions statewide which relate to both criminal and civil adjective and substantive law involving operating a motor vehicle; (3) The controversy has an exigent nature due to the effective date for the Act which is linked to an allegation of delayed or untimely administrative regulations affecting substantive rights granted under the Act;[12] and (4) Petitioners' standing to enforce public officials' compliance with constitutional requirements by means of declaratory relief is not a prohibited advisory opinion, but has a common-law prototype "in both the historic prerogative writ of manda-

mus and the bill in equity for an injunction which tested the legality of public officials' conduct."[13] We conclude these petitioners possess standing to vindicate the public interest in a case presenting issues of great public importance.

II. Motion to Dismiss Filed by Respondents Schulz and McCall

¶8 Oklahoma Senate President Pro Tempore, Senator Mike Schulz, and Speaker of the Oklahoma House of Representatives, Representative Charles McCall, were named as respondents by petitioners. These two respondents filed a response and motion to dismiss the action against them. They assert they are immune from petitioner's action, and they are correct.

¶9 Petitioners allege these two respondents "in their official capacities violated the Oklahoma Constitution's single subject provision in passing SB 643."[14] In their response to the motion to dismiss, petitioners argue respondents' legislative immunity applies "only to certain criminal charges and lawsuits seeking damages." They further argue without citation of authority: "Because the legislators are the ones who passed the bill, it is only appropriate that they be made a party to the suit that seeks to have the bill voided."[15] We disagree with petitioners' interpretation of respondents' constitutionally granted legislative immunity.

¶10 The language of Oklahoma Constitution, Article 5 § 22 states: "Senators and Representatives shall, except for treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, and, for any speech or debate in either House, shall not be questioned in any other place." We have explained this language: The Speech or Debate Clause of the Oklahoma Constitution, Art. 5, § 22, absolutely protects legislators from suit calling for judicial inquiry into their performance "within the sphere of legitimate legislative activity."[16] We added:

> Legislators may not be haled into court, either to account for acts that occurred in the course of legislative process or for judicial inquiry into their motivation for those acts. The legislative privilege has never been limited to words spoken in debate. The constitution's immunity shields all enactment-related conduct, whether a legislator be sued (1) personally, (2) in an official capacity, or (3) as the Legislature's leader. The line separating protected from unprotected legislative activity lies in the distinction between "purely legislative activities" and those that are nongermane "political matters".

Brock v. Thompson, 1997 OK 127, ¶ 14, 948 P.2d 287-288 (notes omitted).

¶11 Petitioners have haled into this Court these two legislators for the purpose of giving an account and defense for their participation in enacting a piece of legislation while serving in the Oklahoma Legislature. The petitioners' claim against these respondents does not fall within a listed exception in Okla. Const. Art. 5 § 22, but is based solely on petitioners' claim the legislation violates a provision of the State Constitution.

¶ 12 Senator Mike Schulz and Representative Charles McCall *clearly possess immunity from the legal liability sought to be imposed by petitioners and they are dismissed as parties.*

III. Okla. Const Art. 2 § 7 Due Process Clause and Senate Bill No. 643

¶13 Section 13 of the new Act amends 47 O.S. 2011 § 754, and provides upon arrest by an officer for a prohibited alcohol concentration in a breath test the evidence of driving privilege shall be seized by the officer who shall deliver it to the Department of Public Safety and the "Department shall destroy the evidence of driving privilege upon receipt thereof." The officer provides the driver with a paper receipt which serves as a driver's license for no longer than forty-five (days). No Department of Public Safety administrative hearing is allowed for challenging the seizure of the license. Petitioners argue this provision violates the Due Process Clause in our State Constitution because no opportunity for a hearing takes place (procedural due process), and "there is no need to take an individual's property and certainly no reason to destroy it" (substantive due process claim - taking of property, *i.e.*, the driver's license).

¶14 More than forty years ago the U.S. Supreme Court explained that revocation of a driver's license must conform to the Due Process Clause.[17] The Due Process protection of the licenses was viewed not as a mere state-created interest, right, or privilege, but when drivers' licenses are issued "their continued possession may become essential in the pursuit of a livelihood . . . [and] [s]uspension of issued licenses

thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."[18] In addressing whether a license suspension hearing complied with procedural due process, the Court observed: "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard."[19]

¶15 In 1986, we explained: "One's claim to a driver's license is indeed a protectible property interest that may not be terminated without due process guaranteed by the Fourteenth Amendment."[20] The Due Process Clause in the Oklahoma Constitution, Okla. Const. Art. 2 § 7,[21] does not provide any less protection for those rights which are also protected by its federal counterpart in the 14th Amendment.[22] An Oklahoma driver's license is an interest protected by both State and Federal Due Process Clauses.

¶16 Respondents argue that the seizure and destruction of a driver's license upon arrest without the opportunity for an administrative hearing does not violate the State Due Process Clause because no driving privilege is revoked when the licence is seized and destroyed and an additional license may be obtained by the driver. At oral argument, counsel for the Commissioner for the Department of Public Safety stated that the new Act and new administrative rules expected to be promulgated allow a person whose license is seized and destroyed under the new Act to appear at the Department of Public Safety and replace the seized license with "a new plastic driver's license" for twenty-five dollars ($25.00), or a new temporary paper license valid for an additional forty-five days. Again, contrary to petitioners' claim that 47 O.S. § 6-303(G)[23] would prohibit a person from obtaining a new license after seizure and destruction of a license under the new Act, counsel for the Commissioner of Public Safety argued such is not the case and further argued *on this basis there is no due process violation* when the "piece of plastic" is seized and destroyed.

¶17 The new Act provides for revocation of driving privileges upon a person's criminal conviction of certain crimes (when final), receipt of a deferred criminal sentence, and receipt of a deferred prosecution agreement for these statutorily specified crimes.[24] Counsel for the Department of Public Safety agreed during questioning from the Court that a person arrested whose license is seized upon arrest could theoretically thereafter obtain an unrestricted number of new serial plastic driver's licenses for $25.00 each when obtained after each new and additional arrest for impaired driving (with seizure and destruction of each new serial driver's license) *if the serial arrests occurred during the time his or her first criminal case was being adjudicated in the District Court*. When questioned what the purpose was for seizing a license and destroying it upon arrest when no new or additional requirement would be imposed on obtaining a new license while the criminal case was being adjudicated, counsel responded that revocation of driving privileges in the new Act, with one exception, was based upon what happened in the District Court with the criminal case. He further stated that the license is not seized to commence an administrative revocation of driving privileges.[25]

¶18 The one exception to revocation of driving privileges based upon District Court criminal adjudications (conviction, deferred sentence and deferred prosecution) occurs where the Department is given discretion to revoke driving privileges in certain other circumstances. For example, when the Department receives "a report of a verified ignition interlock violation" it may revoke a driving privilege.[26] The Governor's Executive Order 2017-19 states in part:

> I am requiring the DPS to follow directions consistent with the recent Oklahoma Supreme Court Order in *Nichols v. State, ex rel. Dept. of Public Safety,* 2017 OK 20. I also direct and order the DPS to grant a hearing on revocation of license in conformity with the due process clause of the Fourteenth Amendment of the United States Constitution, and within the time limits imposed by our Supreme Court. DPS may create an exception to these hearings for any individual that receives a deferred adjudication, a suspended sentence, or a formal conviction under the criminal code.

Executive Order, 2017-19, (June 8, 2017).

At oral argument, counsel for the Governor explained that Executive Order 2017-19 was intended to apply only when the Department revokes driving privileges unrelated to revocation as a direct consequence from convictions or deferred sentences prosecutions. He again

explained that under the new Act revocations are either a consequence of (1) a criminal conviction (including deferred sentence/prosecution) or (2) specific statutory violations where the Department is given the power to revoke the driving privilege. He explained it is only in the latter circumstances where a driver may have an opportunity for an administrative hearing before the Department of Public Safety.

¶19 The parties agree the new Act provides for mandatory seizure of the license, its transmittal to the Department, and its immediate destruction upon receipt. The parties agree this action is not reviewable by an opportunity for any administrative proceeding. This Court determines (1) if there is a legitimate government interest (a) articulated in the legislation or (b) championed by the parties or (c) expressed by a recognized public policy in support of the legislation, and (2) if that interest is reasonably advanced by the legislation.[27] The seizure and destruction of "the piece of plastic" resulting in a circumstance where a driver must pay an additional fee to the Department for its replacement is not a nominal economic harm for the citizens of the State. The seizure takes place as part of a law enforcement *procedure*, but this procedure *is entirely divorced from any law enforcement substantive goal,* when the driver whose license is seized may obtain another identical replacement license upon payment of the standard mandatory fee.

¶20 A law enforcement seizure and immediate destruction of a driver's license constitutes an arbitrary deprivation of property when no legitimate State purpose is shown for seizure and destruction. No opportunity to challenge this seizure and destruction is given to the driver. Respondents rely upon *Price v. Reed, supra,* and the constitutionality of an immediate seizure of a license. However, the license seizure in *Price* was part of an administrative/regulatory scheme combining seizure with loss of driving privileges and with an opportunity for a driver to challenge the regulatory actions of the State. *Price* gives no support to respondents' due process argument on petitioners' substantive due process property claim. No State purpose, regulatory goal, or law enforcement goal for the seizure and destruction was articulated during oral argument by respondents, or is revealed in their filings, or is revealed by our review of S.B. No. 643 when construed consistent with the respondents' arguments.[28] We must conclude S.B. No. 643 amending 47 O.S. 2011 § 754 and requiring seizure and destruction of a driver's license violates the Due Process Clause of the State Constitution, Okla. Const. Art. 2 § 7.

IV. Okla. Const Art. 5 § 57 Single Subject Rule and Senate Bill No. 643

¶21 The Oklahoma Constitution, Art. 5 § 57,[29] states that every act of the Legislature, apart from specified exceptions, shall embrace but one subject. Petitioners assert S.B. No. 643 violates this constitutionally required single subject rule for legislative acts. Petitioners argue the Act includes more than one subject because it enacts law concerning: (1) revocation and modification of a driver's license for non-impaired driving offences; (2) license destruction; (3) creation of an impaired driver diversion program; (4) bond requirements; (5) criminal liability for refusing a breath test; (6) notice requirements for prosecutors in cases including those not involving impaired driving; and (7) an admission of evidence in criminal trials. This constitutional challenge requires an analysis of the provisions of the Act.

¶22 Section 1 of the Act provides the name "Impaired Driving Elimination Act 2," and is not codified. Section 2 states a purpose of Act to include "effective and meaningful *administrative monitoring by the Department of Public Safety* of impaired driving offenders" and is not codified. Section 3 has no reference to impaired driving, but provides for notice given by the Department to those to whom notice is authorized or required.[30] Section 4 provides a court and prosecutor shall provide notice to the Department when a person receives a deferred sentence or deferred prosecution for "any offense" which Title 47 "makes mandatory the revocation of a driving privilege.[31]

¶23 Section 5 requires revoking driving privileges when a person receives a deferred sentence, conviction, or deferred prosecution for the eleven enumerated offenses listed in the statute.[32] One of the eleven enumerated statutory offenses involves driving, operating, or being in actual physical control of a motor vehicle while under the influence of alcohol, any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance.[33] The language in S.B. No. 643, § 5, relating to deferred prosecutions and deferred sentences was not limited by the legislature to the offenses involving impaired driving relating to intoxicating substances, but

placed the language in the statute so as to include other types of offenses.

¶24 Section 6 provides for revocations based upon conviction, deferred sentence, or deferred prosecution unless the person has successfully completed, or is currently participating in, the Impaired Driver Accountability Program."[34] This program is authorized by the new Act and which also provides the Department shall create this program by June 30, 2018. Section 6 requires the issuance of a modified driver's license and a mandatory continuous ignition interlock device. Section 6 provides for increasing time periods (one year to 4 years) for modified licenses corresponding to longer time periods for mandatory continuous ignition interlock devices based upon a driver's repeat offenses. Section 6 as amended states that the period of modification "shall be mandatory and neither the Department nor any court may grant driving privileges for the duration of that period."

¶25 Section 7 of the Act states the Department "is authorized" to make an agreement with a person whose license is revoked or suspended "for issuance of a provisional license that allows a person to drive between statutorily specific places.[35] Section 7 also includes a requirement the Department shall establish the Impaired Driver Accountability Program by June 30, 2018, approximately eight months after the Act's effective date of November 1, 2017.[36] This section provides for driver participation fees for the program and length of required participation by the driver. A driver must request participation in the program within fifteen calendar days of his or her license being seized.[37]

¶26 Section 8 of the Act includes provisions relating to ignition interlock devices and restricting driving privileges based upon receipt of a report of a "verified ignition interlock violation as defined by the Board of Tests for Alcohol and Drug Influence."[38] This section provides for issuance of a "restricted driver license" and fees to be paid to the Department, and the fees collected shall be remitted to the State Treasury for use by the Department of Public Safety for administering this section of law.

¶27 Section 9 forbids a person to "knowingly authorize or permit" another person to operate a motor vehicle without an ignition interlock device, when the person is required to use such a device; and a violation of this section is defined as a misdemeanor punishable by fine or imprisonment.[39] The section also prohibits a person interfering with the operation of the ignition interlock device or driving a vehicle without the device. The ignition interlock device is made a mandatory condition of any bond, unless the person has successfully completed the Impaired Driver Accountability Program prior to a plea or verdict in the person's criminal case.

¶28 Section 10 provides that breath shall be tested unless the officer requests a blood test.[40] Section 11 provides that blood may drawn by an "Intermediate Emergency Medical Technician," and additionally "Advanced Emergency Medical Technicians or Paramedics" when requested by a law enforcement officer.[41] Section 12 states it shall be a misdemeanor for a conscious person to refuse to submit to a breath test when under arrest for driving while impaired, driving under the influence or while under the influence being in actual physical control of a motor vehicle upon public roads, or other public place, or any private road which provides access to one or more dwellings.[42] Section 13 provides for seizure and destruction of a driver's license upon arrest of an individual.[43] Section 14 states that a person whose license revocation is modified "may only operate a motor vehicle equipped with an approved ignition interlock device.[44]

¶29 Section 15 contains provisions for admission of test results in any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of alcohol."[45] The section specifies "the following may be considered as evidence that the test of the breath of the person was validly administered in accordance with the rules of the Board of tests for Alcohol and Drug Influence" and then lists four criteria. Section 15 states a person's refusal to a test or tests is admissible, and further provides that in some circumstances the results of " the test of a [sic] the breath or blood of the person, if admissible, shall be admitted without reference to measurement uncertainty."

¶30 Section 16 of the Act repeals 47 O.S.2011 § 755, and section 17 makes November 1, 2017, the effective date of the Act.

¶31 Legislation with multiple sections or provisions must be germane, relative, and cognate to a common theme and purpose.[46] Com-

pliance with this test allows those voting on the law in question to avoid making an otherwise constitutionally prohibited forced decision to accept an all or nothing choice between two or more unrelated provisions contained in one measure.[47] The public is entitled to a clear picture of how their elected officials have voted on a particular issue,[48] the public is entitled to be adequately notified of the potential effect of legislation,[49] and these constitutionally protected public policies have been recognized since statehood.[50] Respondents argue the Act is necessary as "a common purpose" for Department of Public Safety administrative enforcement of statutes prohibiting impaired driving, and further "administrative monitoring" is a stated purpose in the Act. Respondents also invoke the highly generalized subject of "impaired driving."

¶32 Section 13's license seizure and destruction upon arrest does not advance an articulated goal related to administrative monitoring of an impaired driving. New criminal liability for a breath test refusal is created by section 12, and while this subject relates generally to "impaired driving" its function within the legislatively stated purpose of the Act, "administrative monitoring by the Department of Public Safety" is not present on the face of the Act. Section 11's expanded scope in authorizing additional medical personnel to draw blood for a test upon request by an officer is related to "impaired drivers" in a general sense. However, the individual legislator's calculus in deciding whether to vote for or against such language involves the legislator's discretion concerning the professional expertise of the classes of individuals named for the statutory task and not the Department's administrative monitoring of impaired drivers. Sections 13, 12, and 11 violate the single subject rule in Okla. Const. Art. 5 § 57 when measured against the other provisions of the Act.

¶33 Section 15's creation of an evidentiary standard for admission of breath tests states it applies to "a proceeding arising out of of acts alleged to have been committed by a person … under the influence of alcohol," and this is sufficiently broad to include DPS administrative enforcement of the impaired driving statutes and administratively monitoring impaired drivers. However, the language is expressly made applicable to "the trial of any criminal action," a forum outside the purview of the Department of Public Safety's "administrative monitoring" of impaired driving. Section 15's reach into District Court criminal proceedings is beyond administrative monitoring and violates the single subject rule in Okla. Const. Art. 5 § 57 when measured against the other provisions of the Act.

¶34 Section 4 of the Act clearly provides for notices to the Department when a person receives a deferred sentence or deferred prosecution for offenses other than those related to impaired driving. Section 4's reach to include non-impaired offenses is beyond the stated purpose of administrative monitoring for impaired drivers and violates the single subject rule in Okla. Const. Art. 5 § 57 when measured against the other provisions of the Act. Section 4's invalidity impacts both sections 5 and 6. Section 5 requires revocation upon receipt of a notice of a deferred sentence or a deferred prosecution. This provision appears to involve "administrative monitoring by the Department of Public Safety," but enforcement is based upon notices required by section 4, and section 4 violates the single subject rule. Similarly, section 6 also relies upon these section 4 notices of deferred sentences and prosecution agreements.

¶35 Again, requiring notice of deferred sentences and prosecutions for crimes other than impaired driving clearly goes beyond the scope of an Act seeking to administratively monitor impaired driving offenders. The Act does not contain a severability clause, but 75 O.S.2011 § 11a[51] requires a severability analysis. We are required to ask whether §§ 5 & 6 (assuming they also do not violate Art. 5 § 57) are capable of statewide equal enforcement in the absence of the statutory mandatory procedure in § 4 for providing the notices of deferred sentences or deferred prosecutions upon which sections 5 and 6 expressly rely.[52] Fundamental fairness cannot be afforded except within a framework of orderly procedure, and an orderly procedure is required when procedure is used to deprive a person of a constitutionally protected right, such as a driver's license with its driving privileges.[53] We hold §§ 5 and 6 are not severable, and must fall with section 4.

¶36 Generally, a severability analysis requires us to ask whether constitutional sections of an Act are capable of being executed in accordance with legislative intent.[54] Stripping those sections from the Act which we have now determined are constitutionally invalid, §§ 4, 5, 6, 11, 12, 13, and 15, upon examination of the remaining sections we must conclude they are

not capable of being executed independently. These sections, although containing legislative subjects therein not germane to the invalid sections, they nevertheless contain internal references to, and rely upon, the invalid sections of S.B. No. 643, and they contain various provisions for repealing current procedures which would turn a selective enforcement of these sections[55] into an unpalatable legislative choice by a legislator when faced with approving an all-or-nothing choice on these sections.[56] We decline to give our opinion an effect which would have created an impermissible choice when originally presented to the legislators.

¶37 We conclude S.B. No. 643 violates Okla. Const. Art. 5 § 57 and Section 13 of S.B. No. 643 also violates Okla. Const. Art. 2 § 7. Because of these conclusions we need not address petitioners' additional claims that S.B. No. 643 impermissibly (1) revokes and modifies a driver's license for non-impaired driving offences, or (2) creates an impaired driver diversion program, or (3) creates invalid bond requirements. The parties agree the Governor's Executive Order 2017-19, was issued to administratively implement the new Act or a portion thereof. Due to our holding S.B. No. 643 violates Okla. Const. Art. 5 § 57 in its entirety, and leaving nothing for the Executive Order to enforce, we need not reach petitioners' additional claims characterizing the Executive Order as a pocket veto,[57] or challenging the order based upon the separation of powers provision in Okla. Const. Art. 4 § 1.[58] We presume public officials perform their public duties in good faith and we withhold equitable mandatory relief in anticipation of this performance.[59] Petitioners' request for injunctive relief is denied.

V. Conclusion and Effective Date of Court's Opinion

¶38 The Court concludes the petitioners have standing. Two members of the Oklahoma Legislature possess constitutional legislative immunity from the legal liability and their motion to dismiss them as parties is granted. Section 13 of the Impaired Driving Elimination Act 2 violates Okla. Const. Art. 2 § 7. Several provisions of the Impaired Driving Elimination Act 2 violate Okla. Const. Art. 5 § 57 and non-offending sections are not capable of being severed for independent enforcement. We conclude the Impaired Driving Elimination Act 2 is unconstitutional in its entirety, and we need not adjudicate petitioners' remaining claims challenging either the Act or the Governor's Executive Order. Petitioners' request for an injunction is denied.

¶39 The Court previously issued an order staying the application of the 2017 Impaired Driving Elimination Act 2, (S.B. No. 643). *Hunsucker v. Fallin*, ___ P.3d ___, 2017 OK 84 (October 30, 2017). The Court noted its stay was for the purpose of granting temporary relief in order to protect the rights of parties pending resolution of a judicial controversy.[60] This Court's opinion is an exercise of original jurisdiction, the opinion is immediately effective upon its filing with the Clerk of this Court, and no post-opinion mandate issues by this Court.[61] The stay pending this litigation is dissolved upon the conclusion of the matter before this Court. The stay shall be dissolved upon denial of a petition for rehearing if rehearing is sought by any party and not granted, or upon final adjudication of any petition for rehearing granted by the Court, or upon expiration of the time to file a petition for rehearing if no rehearing is sought. The temporary stay of the Act pending litigation will be effectively replaced by a final opinion of this Court concluding the Act is unconstitutional and lacking legal enforceability.

¶40 COMBS, C.J.; WATT, EDMONDSON, COLBERT, and REIF, JJ., concur.

¶41 GURICH, V.C.J.; KAUGER, and WYRICK (by separate writing), JJ., concur in part and dissent in part.

¶42 WINCHESTER, J., (by separate writing), dissent.

WINCHESTER, J, with whom GURICH, V.C.J. joins, dissenting:

¶1 I dissent to the majority opinion which prematurely strikes down the Legislature's attempt to restructure the State's impaired driving laws, 47 O.S.2011 §517 *et seq*. I do not find that the plaintiffs in this case, attorneys who claim their business interests will be affected by the enactment of the proposed laws, have the requisite standing to bring suit.

¶2 Today's majority opinion strays far from our traditional standing authority, stretching the *publici juris* standing doctrine well beyond the intent of the rule's exception. As a result, the majority opinion will allow back-door lawsuits brought by attorneys to challenge any legislation that might potentially impact their bottom dollar, all under the guise of a public interest controversy. The majority fails to rec-

ognize that the plaintiffs in this case have no directly traceable interest to the rights alleged to be violated by the proposed statutes. Indeed, the plaintiffs' own, admitted personal interest in the case is a hypothetical, monetary loss reliant on the retention of future, potential clients who illegally drive while impaired in this State. In my opinion, this is insufficient to constitute the necessary, directly traceable interest to confer standing.

BACKGROUND

¶3 The State's current impaired driving laws have created an administrative nightmare for the Department of Public Safety (DPS), which is extremely costly and inefficient for the State, but beneficial to attorneys hired by clients arrested for impaired driving to represent them in license revocation hearings before DPS. The Legislature, with the proposition of S.B. 643, created a new Act, the Impaired Driving Accountability Program (IDAP), to remedy the backlog of administrative hearings by eliminating automatic license privilege revocations.

¶4 S.B. 643 eliminates the administrative backlog by removing the need for driver's license revocation hearings and foregoing automatic suspension of the driver's license, instead deferring the decision on revocation until the driver's criminal case is resolved or the driver under arrest enters an agreement with DPS for the placement of an ignition interlock device. Under such an agreement, the driver is allowed to continue to drive with an unrevoked license, in the form of a temporary receipt, so long as the interlock device is installed in their car. If the driver successfully completes the interlock device program, full, unrestricted driving privileges will be restored, no license revocation will appear on the driver's record, and the driver will not be charged a license reinstatement fee. If the driver refuses to enter the IDAP agreement, the temporary license will remain in effect until the driver's criminal case is resolved. Also new under the proposed statutes, a driver will face a misdemeanor charge if he or she refuses to take State's blood or breath test.

DISCUSSION

¶5 Standing refers to a party's legal right to seek relief in a judicial forum. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 7, 163 P.3d 512, 519. The burden is on the party invoking a court's jurisdiction to establish that it has the requisite standing to seek relief in the court. *Oklahoma Education Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 7, 158 P.3d 1058, 1062. I believe the plaintiffs in this case have failed to meet their burden.

¶6 The U.S. Supreme Court has defined the question of standing as whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). *See also, Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 5, 976 P.2d 545, 547 (To have standing, the party must be "proper party to seek adjudication of the asserted issue."). The general, threshold criteria of standing include: (1) a legally protected interest which must have been injured in fact *i.e.*, suffered an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 7, 163 P.3d 512, 519. The doctrine of standing ensures a party has a personal stake in the outcome of a case and the parties are truly adverse. *Id.* Moreover, the injury in fact must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

¶7 As a general rule, a litigant lacks standing to assert the rights of others. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S.Ct. 1428, 1431, 108 L.Ed.2d 701 (1990) (plurality opinion). *See also Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed.2d 1586 (1953) (Ordinarily, one may not claim standing to vindicate the constitutional rights of a third party); *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (A plaintiff must assert his own legal rights and interests and may not rest his claim to relief on the legal rights or interests of third parties.). Judicial review should not "be placed in the hands of 'concerned bystanders' to use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986)(quoting *United States v. SCRAP*, 412 U.S. 669, 687, 935 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973)).

¶8 The U.S. Supreme Court does not look favorably on third party standing and has

imposed a more stringent exam when standing is sought in such cases. *Kowalski v. Tesmer,* 543 U.S. 125, 125-126, 125 S.Ct. 564, 565, 160 L. Ed.2d 519 (2004). Two additional showings must be made: (1) "whether the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) "whether there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski,* 543 U.S. at 130, 125 S.Ct. at 567, citing *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 1370-1371, 113 L.Ed.2d 411 (1991).

¶9 In *Kowalski v. Tesmer*, 543 U.S. 125, 125-126, 125 S.Ct. 564, 565, 160 L.Ed.2d 519 (2004), the Court held that attorneys lacked third party standing to bring suit on behalf of future, hypothetical clients. Recognizing no existing relationship between the attorneys and the alleged, future clients, the Court found the requisite "close relationship" lacking. *Kowalski*, 543 U.S. at 131, 125 S.Ct. at 568. Likewise, the Court disregarded the attorney's arguments that the alleged clients were actually hindered from asserting their own rights. *Kowalski*, 543 U.S. at 132, 125 S.Ct. at 569. The *Kowalski* Court recognized that "it would be a short step from the ... grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." *Kowalski*, 543 U.S. at 134, 125 S.Ct. at 570.

¶10 A similar hypothetical injury was deemed insufficient by the Court in *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). There, the Court refused to confer third party standing on a pediatrician who alleged possible future, pecuniary harm from higher rates of abortions. In that case, Illinois had opted not to defend one of its statutes that interfered with the right to abortion. Diamond, a pediatrician, had been allowed to intervene in the case below to defend the constitutionality of the Illinois provision. His interest in the case rested on his assertion that if the laws were struck down, abortion would increase resulting in fewer births, which would ultimately cause his client base to shrink. The *Diamond* Court found that such a speculative claim of "injury in fact," based upon numerous future contingencies, was insufficient to allow third-party standing. *Diamond*, 476 U.S. at 66.

¶11 Our own Court has recognized that standing must be predicated on cognizable, economic harm when a legislative act is challenged as unconstitutional or invalid. *Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, ¶ 61, 394 P.3d 1224, 1244. To invalidate a statute as unconstitutional, a party must establish standing by showing that the legislation sought to be invalidated detrimentally affects his/her interest in a direct, immediate and substantial manner. *Id.*

¶12 Typically, our *publici juris* standing cases have involved situations such as where taxpayers were challenging government expenditures, which is not the case herein. We have, however, recognized judicial discretion in select cases, not involving government expenditures, to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance. *See Gentges v. Okla. State Election Bd.*, 2014 OK 8, 319 P.3d 674; *State ex rel. Howard v. Oklahoma Corporation Commission,* 1980 OK 96, 614 P.2d 45. Nevertheless, we have held that this limited discretion is only properly exercised to grant standing where the party challenging the legality of the government action **is the actual object of the action at issue.** *Oklahoma Public Employees Association v. Oklahoma Department of Central Services,* 2002 OK 71, ¶ 16, 55 P.3d 1072, 1079 (emphasis added). In such cases, "there is ordinarily little question that the action ... has caused ... injury, and that a judgment preventing or requiring the action will redress it." *Id.*

¶13 Here, the plaintiffs are unable to claim that they are the object of the challenged action and any judgment regarding the statute's constitutionality would only potentially affect them indirectly. The admitted and overriding reason for the involvement herein of the plaintiffs is their alleged potential, pecuniary loss at the abolition of administrative hearings for driver's license revocations. This claimed injury is as speculative and hypothetical as the injury alleged in both *Kowalski* and *Diamond* and should not serve as any basis upon which to confer standing.

¶14 The majority emphasizes that granting standing to plaintiff attorneys in this case would benefit the community as a whole. I find it difficult to see how an attorney making an alleged profit on potential, future criminal defendants is a benefit for the public interest or community as a whole. Not only is there a complete absence of evidence to show that the plaintiffs would in fact earn less income as a result of the proposed statutes, the plaintiffs cannot even point to a named client who has been or is threatened by the proposed statutes.

Significantly, there is no reason why an alleged future client could not assert his or her own claim. This fact alone should be sufficient to deny standing to plaintiffs.

¶15 Even if we are to assume standing in this case as the majority urges with its convoluted reasoning, the plaintiffs cannot escape the requirement of an actual, justiciable controversy. In actions seeking declaratory relief, the existence of a justiciable controversy is paramount. In *Knight ex rel. Ellis v. Miller,* 2008 OK 81, 195 P.3d 372, this Court set forth the requirements for standing under the Oklahoma Declaratory Judgment Act:

> The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protect[a]ble interest; and (4) the issue involved in the controversy must be ripe for judicial determination. (emphasis added).

Id. at ¶ 8, 195 P.3d at 375 (quoting *Gordon v. Followell,* 1964 OK 74, ¶ 8, 391 P.2d 242, 244.

¶16 If courts were to decide hypothetical controversies, it would take the judiciary beyond the bounds of authorized judicial action and offend the basic principles of the separation of powers. *See Dank v. Benson*, 2000 OK 40, 5 P.3d 1088 (Opala, J., concurring at ¶ 6)("The barriers of justiciability prevent judges from roving outside the judicial role and giving voice to abstract grievances.") Providing a judgment based on a set of hypothetical facts is no different than issuing a disfavored, advisory opinion. *See Knight ex rel. Ellis v. Miller*, 2008 OK 81, ¶ 8, 195 P.3d 372, 375 ("This Court does not issue advisory opinions or answer hypothetical questions where there is no case or controversy, and this rule does not change when a declaratory judgment is involved."); *Richardson v. State ex res. Okla. Tax Comm.,* 2017 OK 85, ¶ 5, __ P.3d __ ("The Supreme Court will not decide abstract or hypothetical questions.").

CONCLUSION

¶17 This case is a classic example of placing the cart before the horse. Here, the plaintiffs, as third parties to the claimed constitutional violations of the proposed S.B. 643, have suffered no actual, present injury and it is unknown how, if at all, their income would be affected by the implementation of the proposed statutes. Enlarging public interest standing to allow attorneys to challenge a proposed law's possible application to a potential, future client flies in the face of U. S. Supreme Court case law, as well as our own, requiring strict adherence to the justiciability of a case.

¶18 The relaxation of standing requirements such as is promoted by the majority opinion will result in a standardless evaluation of standing. Future standing queries will be left to a subjective, case by case assessment by a court regarding the claims it deems sufficiently significant to merit review. Standing jurisprudence has long provided a fundamental limitation on government authority that cannot be disregarded based on discretion. I respectfully dissent.

Wyrick, J., with whom **Gurich, V.C.J.**, and **Winchester, J.**, join, concurring in part and dissenting in part:

¶1 Our Constitution grants the Court the power to decide justiciable cases – *i.e.*, live controversies where there is a plaintiff with standing and an issue that is ripe for review. This limitation is a crucial component of the separation of powers between the co-equal branches of our government. It is what keeps our non-political branch out of the business of resolving policy disputes.

¶2 Because the litigants who bring it lack standing under our well-accepted three-part test (no member of the Court argues otherwise), this matter does not meet the constitutional standard for justiciability. The Court nonetheless invokes a boundless "public importance" exception to our normal standing rules so that it may assume jurisdiction and declare SB 643 unconstitutional. In so doing, the Court disregards constitutional limits on its jurisdiction and does damage to the separation of powers between the co-equal branches of government. I respectfully dissent, except to that part of the judgment correctly dismissing the claims against the legislative Respondents.

I.

A.

¶3 The Court "grants" standing to the DUI attorneys who challenge SB 643 based on what it calls its "discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance."[1] We have no such discretion. Rather, we have repeatedly said that the "*irreducible* constitutional minimum of standing"[2] requires that a litigant establish (1) a concrete and particularized injury-in-fact that is not conjectural or hypothetical in nature, (2) that is fairly traceable to the complained of actions, and (3) which will be redressed by a favorable decision.[3] We also require "the party who invokes the court's authority to show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."[4] In other words, the injury must be personal to the party suing, rather than a generalized grievance suffered by the public at large[5] – a key limitation that seemingly forecloses the possibility of any standing based on a generalized "public interest." The DUI attorneys who bring this case do not come close to meeting this standard.

¶4 First, the attorneys claim that the new law might harm them in the future *if* they decide to drive drunk, *if* they happen to be arrested for doing so, and *if* they are then charged with driving under the influence. This is precisely the sort of remote, hypothetical, "future eventuality" that we have repeatedly said does not give rise to an injury in fact.[6]

¶5 Second, they claim that the new law *might* harm unidentified members of the public who also *might* choose to drive drunk, who *might* be arrested for drunk driving, and who then *might* choose to retain the Petitioners as counsel. This claim not only suffers from the same imminence problem as their first claim, but also has the additional fatal defect of being an attempt to vindicate vicariously an injury to a third party.[7]

¶6 Third, the attorneys claim that the new law *might* cause them a decrease in business, presumably by reducing the number of administrative hearings they *might* have the opportunity to litigate. But we have never recognized standing in an attorney on the basis that a change in the law might reduce their business. This is so because an attorney has no "legally protected interest" in the law remaining static for the benefit of the attorney's practice.[8] Moreover, these attorneys' claim of lost business is still both hypothetical and remote, given that it will be many months before the rules and regulations defining the scope and nature of future administrative proceedings are implemented. Thus, even if these attorneys had a protectable interest in the law, because we don't yet know its true impact, any claim that it will produce fewer billable hours for these attorneys is too speculative to support standing.[9]

¶7 To this point, we quite recently reaffirmed our adherence to the rule that "[t]o be appropriate for judicial inquiry, a controversy must be . . . definite [and] concrete."[10] In *Richardson v. State ex rel. Oklahoma Tax Commission*, we rejected as not ripe a challenge to HB 2348 because the effect of the law was "unclear at this time," due to the fact that the relevant impact of the law would not be known until action was taken by a federal administrative agency (the IRS) to promulgate rules setting the federal standard deduction amount.[11] Just as was the case there, the actual effects of SB 643 will not be known until state administrative agencies promulgate rules defining the processes that will be utilized to implement the new law. Given all this, our judicial process would be better served by waiting for an actual case to arise where an actual person is charged with DUI and is actually subjected to the new procedures, so that we can examine the legality of the law as it actually is, rather than as we speculate it may be.

B.

¶8 The Court doesn't bother to analyze these claims, and understandably so; they fail our standing test by every measure. The Court instead focuses solely on the DUI attorneys' claim that they possess "public interest" standing. Pointing to comments made at oral argument about "the great number of Oklahoma citizens in all counties of the State subject to the . . . new Act," and "the negative consequences attendant to enforcing *alleged* unconstitutional provisions," the Court concludes that the matter is *publici juris*.[12] And in the Court's view, that means it has "discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance," discretion that is "properly exercised . . . where there are 'competing policy considerations' and 'lively conflict between antagonistic demands.'"[13]

¶9 Let that sink in. The Court believes it can reduce to nil "the *irreducible* constitutional minimum" of standing anytime it is presented with two parties disagreeing over important policy considerations. In other words, the Court can disregard constitutional limits on its jurisdiction anytime it is presented with *precisely the type of policy dispute that those constitutional limits are designed to bar it from deciding*. But nothing in our Constitution permits us to assume jurisdiction over a case merely because the issue it presents is "important," and the Court's invocation of the *publici juris* standard as a measure of justiciability is without precedent.

¶10 The Court cites two cases in support of its claim of unfettered "discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance."[14] But neither case justifies today's remarkable expansion of the Court's jurisdiction. In *Gentges v. Oklahoma State Election Board*, the Court found that an individual voter had standing to challenge a new state law requiring that she present a valid driver's license at her polling place prior to voting.[15] Because she was "no doubt" a member of the class that was the object of the challenged legislation, the voter had standing to sue, even if her injury was shared by other voters.[16] To be sure, the Court also recognized that Gentges's vindication of her right to vote necessarily worked to vindicate the rights of all others in the class of voters affected by the law, but that wasn't to say that Gentges would have standing even if she wasn't a member of the class regulated by the law.[17] It was merely a recognition of the broad reach of the voter-identification law, and the far-reaching impact of a judgment in Gentges's favor.

¶11 *State ex rel. Howard v. Oklahoma Corporation Commission*, meanwhile, presented a highly unusual fact pattern that dictated its sui generis result.[18] The Legislature enacted a measure imposing certain obligations on the Corporation Commission. The Attorney General – a former Corporation Commissioner who had opposed the measure in that capacity – opined that the measure violated Article V, Section 57, due to an allegedly deficient title. The Attorney General's opinion was advisory only, but the Commission nonetheless declined to follow the new law. In response, members of the Legislature brought an original action seeking a writ that would force the Commission to comply with the new law. Staff attorneys for the Commission entered appearances as counsel for the Commission, but the Attorney General did the same, arguing that only he could legally represent the Commission. The Attorney General also argued that the members of the Legislature lacked standing and that he was the sole party entitled to vindicate the State's interest in execution of the law – an interest he intended to vindicate by dismissing the legislators' lawsuit so as to thwart judicial review of the issue upon which he had opined.

¶12 The Court first rejected the Attorney General's claim that the legislators lacked standing, finding that the legislators possessed "an interest in vindicating the State Legislature's exercise of its power, sought to be nullified by the Attorney General's opinion in question."[19] With regard to whether the Attorney General was the sole party entitled to pursue the State's interest, the Court concluded that "[g]enerally the Attorney General as chief law officer of the State, would be the proper party to maintain litigation to enforce a matter of public interest."[20] But given the highly unusual circumstance where "the Attorney General[,] in pursuing a minority view he had previously asserted as a member of the Commission, now under the cloak of authority of chief law officer of the state, asserts the right to negative an act of the legislative branch," the Court allowed "a private citizen in the name of the State" to "vindicate a public right."[21] Weighing these "competing policy considerations" over who could bring the case, the Court ultimately allowed the legislators to sue, the Commission to be represented by its own counsel, and the Attorney General to appear *ex officio* such that the case would proceed "as a three-cornered proceeding" with "lively conflict between antagonistic demands."[22]

¶13 Nothing in *State ex rel. Howard* stands for the proposition that the mere presence of important "competing policy considerations" allows the Court to grant standing to those who otherwise lack it. Indeed, the Court found that the suing legislators possessed standing to vindicate their interests as legislators in having the State's laws enforced. The only question was whether state law required that the Attorney General pursue that interest on their behalf. The "competing policy considerations" the Court described were the policy concerns relating to who ought to bring such a suit – the legislators or the Attorney General – and *not* the competing policy considerations raised by the underlying merits question. The result the Court

reached, meanwhile, ensured that the matter wouldn't evade judicial review – a concern not present in this case.

¶14 These cases do not compel today's decision, nor is today's outcome a logical extension of those cases; today's decision is an outright abandonment of any pretense that the Constitution limits the Court's jurisdiction in any meaningful way. The Court treats our "irreducible" jurisdictional rules as mere technical requirements that sometimes hamper its ability to be the final arbiter of the thorniest issues facing our State. But when we say that a plaintiff must have standing in order to bring suit, we aren't describing a limitation for limitation's sake; we're talking about a key structural feature of our Constitution designed to maintain the separation of powers between the co-equal branches of government. Our Constitution requires that "the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others,"[23] and Article VII, Section 4's grant of jurisdiction to this Court to hear "cases" is key to this design. By limiting our jurisdiction to justiciable "cases," the Constitution ensures that the judicial branch stays confined to its role of exercising judicial judgment rather than political will.

¶15 Our Constitution empowers us to be judicial, but with that power comes the obligation to be judicious.[24] Because decisions like today's are unreviewable, we meet that obligation only by adhering to objective legal standards that demonstrate the ability to constrain judicial discretion. The "public interest" standing test the Court invokes fails this test. When is a case "important" enough to trigger this form of standing? When we tell you it is, of course. That isn't a power-confining legal standard, but rather a constitution-trumping card to be invoked at the will of five.

II.

¶16 The Court's decision on the merits is no less problematic. The Court invokes Article V, Section 57's single-subject rule as a basis for invalidating all of SB 643. This shouldn't come as a surprise; our increasingly permissive standing rules and amorphous single-subject (and special-law) jurisprudence have created a potent one-two punch that allows the Court to judicially veto virtually any of the Legislature's and People's laws so long as someone files the proper papers in the clerk's office to initiate suit – this despite the fact that the single-subject rule was never intended "to be so exactingly enforced and in such technical manner as to cripple legislation."[25] But even as flawed as our single-subject jurisprudence is, this law passes the test; there is nothing to suggest that any legislator lacked notice of the effects of SB 643 or that the measure passed only because unpopular provisions were logrolled with popular provisions.[26]

¶17 In concluding otherwise, the Court first errs by misidentifying SB 643's subject. The Court points to a portion of the Act's stated purpose ("administrative monitoring by the Department of Public Safety") as the reference point for its single-subject analysis.[27] But an act's purpose (what it is designed to accomplish) is not the same as its subject matter (the area or realm in which it operates). Article V, Section 57 requires that an act's subject be contained in its title,[28] and SB 643's title describes the Act as "[a]n Act relating to impaired driving"[29] – a subject confirmed by reading the Act to ascertain the answer to the question: "What is this bill about?" Thus, for our purposes, the subject of SB 643 is "impaired driving," and our analysis should turn on whether the Act's contents fairly relate to that subject (they do). The Court's identification of a more narrow subject, and subsequent insistence that most of the Act does not relate to it, demonstrates the result-driven approach that our single-subject jurisprudence invites. That the bulk of the Act doesn't relate to the Court's narrowly crafted subject isn't proof that the Act violates the single-subject rule; it is evidence that the Court misidentified the actual subject of the Act. It should go without saying that the identification of the subject of a legislative act should be driven not only by its title or stated purpose, but also by its contents.

¶18 The Court begins with section 13 of the Act, which authorizes license seizure and destruction when a person is arrested for impaired driving or where a person arrested on suspicion of impaired driving refuses to take a breath or blood test.[30] This section is related to the subject of impaired driving, and as the linchpin section of the Act, no one can seriously argue that the Legislature was forced to compromise the integrity of its "impaired driving" bill by adding it. Accordingly, the Court says nothing about section 13's subject or its potential for logrolling. Its only explanation for

striking section 13 as a single-subject violation is that "[s]ection 13's license seizure and destruction upon arrest does not advance an articulated goal related to administrative monitoring of an [sic] impaired driving."[31] But whether section 13 is effective in advancing the Legislature's goal is irrelevant in a single-subject analysis; the relevant question is whether the provision relates to the subject of the Act. Because it plainly does, the inquiry is complete. And even if the Court is correct in identifying the subject as administrative monitoring of those arrested for drunk driving, this section relates to that subject too, as an arrest for impaired driving is a necessary predicate to any subsequent administrative monitoring, and seizure of the plastic license is an administrative consequence of such an arrest.

¶19 The same is true for section 12, which makes it a misdemeanor to refuse to take a breath test upon suspicion of impaired driving.[32] The Court acknowledges that the section relates to the subject of impaired driving, but argues that "while this subject relates generally to 'impaired driving' its function within the legislatively stated purpose of the Act, 'administrative monitoring by the Department of Public Safety' is not present on the face of the Act."[33] Again, how the provision functions or how well it furthers a stated purpose is immaterial. If section 12 relates to the Act's subject of impaired driving – and it does – the single-subject inquiry is complete. And just as before, even if the Court is correct in identifying the subject as administrative monitoring of those arrested for drunk driving, this section relates to that subject too, as an arrest is a necessary predicate to any subsequent administrative monitoring, and a breath test is an important component of an impaired-driving arrest.

¶20 Section 11, meanwhile, expands the class of persons eligible to perform blood tests on suspected impaired drivers to include EMT's and paramedics.[34] No one disputes that a law regulating who can perform blood tests on those suspected of impaired driving relates to the subject of impaired driving.[35] Despite that uniformity of subject, the Court nonetheless concludes that this section violates the single-subject rule because "the individual legislator's calculus in deciding whether to vote for or against such language involves the legislator's discretion concerning the professional expertise of the classes of individuals named for the statutory task and not the Department's administrative monitoring of impaired drivers."[36] But whether a legislator may have to consider broader policy implications in deciding whether to make an amendment to a particular section of law has nothing to do with whether the law survives single-subject scrutiny; all that matters is whether the amendment fairly relates to the same subject as its sister provisions. According to the Court's logic, the Legislature would be constitutionally prohibited from enacting any comprehensive regulatory scheme,[37] as doing so inevitably involves legislative consideration of cross-cutting policy concerns. And the same would be true for any law that lists classes to which it applies,[38] as any additions or deletions to the list inevitably involves weighing the relative characteristics of the classes and their appropriateness for inclusion. The single-subject rule requires uniformity of subject, *not* singularity of legislative policy concern. And again, even if the Court is correct in its identification of the subject, any provision relating to an arrest that is a necessary predicate to any subsequent administrative monitoring is necessarily related to that administrative monitoring, and blood tests are certainly integral to that scheme.

¶21 Section 15 establishes certain procedures for introducing the results of an alcohol-concentration test as evidence in proceedings pertaining to impaired driving.[39] This section pertains to the subject of impaired driving. Subpart A of the law begins

> Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of alcohol or any other intoxicating substance . . . evidence of the alcohol concentration in the blood or breath of the person as shown by analysis of the blood or breath of the person performed in accordance with [applicable law] . . . is admissible.[40]

Again, even assuming the Court is correct in defining the subject of the Act more narrowly as the "administrative monitoring of impaired driving," the Court admits that section 15 "is sufficiently broad to include DPS administrative enforcement of the impaired driving statutes and administratively monitoring impaired drivers."[41] That should end the inquiry, but somehow it doesn't. The Court concludes that section 15 nonetheless violates the single-subject rule because the evidentiary rules it creates

apply in all impaired-driving proceedings, both criminal and administrative. With no citation of authority or meaningful analysis, the Court simply says that "[s]ection 15's reach into District Court criminal proceedings is beyond administrative monitoring and violates the single subject rule."[42]

¶22 This conclusion is unsupportable. Section 15 – like the rest of this bill – is amendatory; it amends 47 O.S. § 756, which *already* applies to both criminal and administrative proceedings related to impaired driving. Indeed, the above-quoted portion of subpart A exists as part of 47 O.S. § 756 and was unchanged by the Act. SB 643 merely adds subpart D, which lists things that may be offered as proof that a breath test was "validly administered"; subpart E, which prohibits reference to measurement uncertainty when admitting breath or blood tests; and subpart F, which requires the district attorney to share documents pertaining to the maintenance of the breath-test instruments and makes the persons responsible for such logs available to testify. Nothing added by SB 643 expands the reach of 47 O.S. § 756 into proceedings it didn't already reach. In fact, only subpart D even references the scope of the law, and merely parrots the language used in the pre-existing subpart A: "Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of alcohol . . . ."[43] Thus, the rules for admitting evidence of impaired driving were already codified in a single section and applied to both criminal and administrative proceedings.[44] Under the Court's logic, the prior version of 47 O.S. § 756 must also be unconstitutional because it too was enacted in a single bill, and thus the result of invalidating the new version of the statute would be to reanimate a prior version presumably suffering from the same constitutional infirmity.[45] While the Court may prefer that the Legislature enact separate laws establishing the rules for admission of breath- and blood-test results into evidence in criminal and administrative proceedings – even where the rules are to be identical – nothing in the Constitution compels the Legislature to operate in such an inefficient manner.

¶23 The Court employs similar logic to invalidate section 4, which requires DPS to now receive notice of not just convictions, but also deferred sentences and deferred prosecution agreements "for any offense for which this title makes mandatory the revocation of the driving privilege."[46] According to the Court, section 4 violates the single-subject rule because the offenses for which title 47 requires revocation (and thus for which section 4 requires notice) include more than just impaired-driving offenses.[47] As an initial matter, title 47 requires revocation for impaired-driving offenses[48] and accordingly section 4 relates to the subject of impaired driving. Moreover, like with section 15, section 4 merely amends a statute that already contained the laundry list of traffic offenses to which it applied. Thus, prior to the amendment, 47 O.S. § 6-204 required DPS to receive notice of all convictions for which title 47 required revocation,[49] and § 6-205 already included those non-impaired-driving offenses.[50] SB 643 merely adds that notice also be given of deferred sentences and deferred prosecution agreements. So again, it appears that to satisfy this Court's single-subject rules, rather than merely add deferred sentences and deferred prosecution agreements to the existing notice provision, the Legislature would have to enact one law that requires notice of deferred sentences and deferred prosecution agreements for impaired-driving offenses, and then enact another law doing exactly the same thing for non-impaired-driving offenses. Nothing in Article V, Section 57 compels such legislative inefficiency.

¶24 The Court concludes its single-subject analysis with sections 5 and 6 of the Act, which respectively define the offenses for which driving privileges are revoked and prescribe the lengths of those revocations.[51] Section 5, which amends 47 O.S. § 6-205, includes impaired driving as a revocation-triggering offense, and section 6, which amends 47 O.S. § 6-205.1, sets the lengths of time a person's driving privileges are revoked for impaired-driving offenses. Sections 5 and 6 thus relate to the subject of impaired driving. But rather than strike down sections 5 and 6 for relating to some other subject, the Court strikes sections 5 and 6 because they relate to section 4 – specifically, because they depend on section 4's notice requirements in order to be effective. The Court does not – and cannot – explain how sections 5 and 6 create disuniformity of subject. Indeed, this is the first time of which I am aware that the Court has ever held that being *too related* to another section of the bill amounts to a violation of the single-subject rule.

¶25 SB 643 doesn't violate the single-subject rule; its title adequately describes its effect, and the entirety of the bill relates to impaired driving. There is nothing to suggest that this overwhelmingly popular piece of legislation[52] passed only because our legislators were bamboozled as to its contents or were forced to vote for it despite their objection to unpopular provisions unrelated to impaired driving. That the Court nonetheless manages to invoke Article V, Section 57 as a basis for invalidating this duly enacted law demonstrates just how broken our single-subject jurisprudence has become. We say that the single-subject rule isn't "to be so exactingly enforced and in such technical manner as to cripple legislation,"[53] yet today we quibble over whether provisions all plainly related to the common subject of impaired-driver regulation are *closely related enough* to satisfy an entirely subjective standard. This isn't what the rule was meant to be. It is high time we take a critical look at our single-subject jurisprudence and ask ourselves whether we are providing the Legislature with adequate notice of what the law requires, whether we are applying the single-subject rule in line with the text and original understanding of Article V, Section 57, and whether we are providing the public with confidence that our invalidations of democratically enacted statutes are the predictable product of even-handed application of a neutral rule. In my view, we are not.

III.

¶26 Despite having deemed the law unconstitutional in its entirety for violating the single-subject rule,[54] the Court volunteers that section 13 of the Act also violates the DUI attorneys' "substantive" due process rights because the hypothetical seizure of their license card advances no legitimate "State purpose, regulatory goal, or law enforcement goal."[55] This conclusion will likely come as a surprise to the parties because this matter has at all times proceeded as a *procedural* due process challenge to SB 643 – *i.e.*, a claim that section 13 of the Act did not provide adequate notice and opportunity to be heard prior to the seizure of the license.[56] The phrase "substantive due process" makes its first appearance in this case not in the parties' briefs or oral arguments, but in the Court's opinion, where it is abruptly unveiled as a basis for striking down the law.[57] There is much wrong with this, both as a matter of process and as a matter of substance.

¶27 First, because the claim wasn't raised in the Application, wasn't briefed, and wasn't supported by a single citation to substantive due process authority, we would normally refrain from deciding the case on that basis – fair process demands as much.[58] This is particularly true where the Court bases its substantive due process conclusion on the fact that "no State purpose, regulatory goal, or law enforcement goal for the seizure and destruction was articulated during oral arguments by Respondents, or is revealed in their filings."[59] If due process means anything, it means not penalizing a party for failing to anticipate that the Court will decide a case on grounds the parties never briefed.

¶28 Second, it is "[t]he party seeking a statute's invalidation as unconstitutional [that] has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution."[60] And there is a "strong presumption" in favor of the validity of legislative enactments,[61] a presumption that is particularly strong when a law is alleged to be facially invalid because such a challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[62] Because of these presumptions, the Court cannot insist that the State supply it with a legitimate basis for its law when the DUI attorneys have not met their initial burden of demonstrating that no such legitimate basis is conceivable.[63] The burden, after all, isn't on the State to prove the law is constitutional, but rather on the DUI attorneys to prove it is not.

¶29 Third, substantive due process is typically invoked to protect unenumerated "fundamental" rights,[64] but no one argues that SB 643 implicates any such right. Even on the exceedingly rare occasion where substantive due process has been invoked to invalidate laws without specifically identifying a fundamental right, a legally protected life, liberty, or property interest of *some* sort must be implicated.[65] The DUI attorneys have no such protected right in their plastic drivers' license card because the law explicitly says so: "No person shall have a property interest in the physical driver license issued pursuant to the laws of this state."[66] In concluding otherwise the Court merely cites a case where we held that persons have a protected property interest in their driving privileges.[67] It is possible that the Court is implicitly holding that the driving privilege

and the plastic license card are inextricably intertwined such that deprivation of one always works a deprivation of the other. But all parties agree that isn't so because SB 643 allows arrestees to retain their driving privileges after their plastic license card is seized.[68] And given the Court's ultimate conclusion that section 13 is irrational because it allows arrestees to lose their plastic card but not their driving privileges, it seems that even the Court ultimately thinks that the two things are distinct (it can't have it both ways). Additionally, the Court upheld a previous version of the statute that also allowed seizure of the plastic license upon arrest, finding that the previous version raised no due process concerns.[69] Given the constitutionality of this long-existing statutory scheme, the Court's sudden reversal of course is not only puzzling, but it results in a return to the prior scheme that also allows for seizure of the plastic license without notice and an opportunity to be heard. If there is in fact a protected property interest in the plastic license, a due process challenge to that preexisting law will surely follow.

¶30 Lastly, even if the DUI attorneys had a protected interest in their plastic license card, it is possible to conceive of legitimate reasons why the Legislature would allow for its seizure without also suspending the privilege to drive. For example, the Legislature might have concluded that the prior statutory scheme, which caused automatic suspension of driving privileges unless the arrestee requested an administrative hearing, was too costly in light of this Court's recent decision requiring that those administrative hearings occur at a faster pace.[70] Given the State's dire financial situation, the Legislature may well have concluded that satisfying the Court's directive would be too costly, and thus determined that the financial costs of administrative suspension of driving privileges were simply more than it could bear. The Legislature would also have a legitimate reason to retain the requirement that the plastic card be seized if it rationally determined that the inconvenience of loss of that plastic card (a plastic card that people use daily to verify purchases, to access airports, etc.) might serve as a deterrent to even a single drunk-driving incident. Or perhaps, given the goal of increasing enrollment in the IDAP program and the proven success of interlock-device programs in other states, the Legislature may have concluded that eliminating immediate loss of privileges with protracted administrative review would encourage arrestees to opt into the IDAP program to soften the criminal consequences of their impaired driving. Recall, we have said that our obligation is to uphold a law under rational basis review if we can conceive of any rational basis for the law.[71] The Court makes no attempt to do so here, opting instead to stop at the State's failure to offer such a basis in response to a claim that was never made.

¶31 As best I can tell, the United States Supreme Court has in 227 years invalidated only a single law applying rational basis review to a substantive due process claim[72] – appropriately so, given that "[r]ational-basis scrutiny is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power."[73] This Court, however, has now done so twice in two years,[74] this time to tell the Legislature that it "clearly lies beyond the outer limits" of its power to enact a law allowing law enforcement to seize licenses from drunk drivers – licenses that exist only under the condition that "[n]o person shall have a property interest" in them. The rub of today's decision is that no matter how much process is provided prior to the seizure, the Legislature is now constitutionally forbidden from authorizing law enforcement to take the licenses of drunk drivers *unless it comes up with a better reason for doing so.* And who gets to decide whether the reason is good enough? Who else but the Court. We may well insist that "it is not the place of this Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality,"[75] but the version of substantive due process review that we unveil today is a proxy for doing just that.

* * *

¶32 For these reasons, the application to assume original jurisdiction should be denied. I respectfully dissent to all of the judgment except that part dismissing the legislative Respondents.

EDMONDSON, J.

1. Respondents rely in part on *Kowalski v. Tesmer*, 543 U.S. 125, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) where the Court concluded the attorneys did not have standing in an Art. III federal court to assert the rights of third parties who were *hypothetical* future clients.

2. *State ex rel. Howard v. Oklahoma Corporation Commission,* 1980 OK 96, 614 P.2d 45, 47.

3. We also do not reach issues necessarily raised by petitioners' claim which relate to this Court's jurisdiction to determine the proper application of a criminal statute to a party before this Court, including, but not limited to, the propriety of a declaratory and injunctive relief request to a court in a civil action to enjoin or prevent a criminal action.

4. *In some circumstances*, economic loss occasioned by governmental regulation has been sufficient to show Article III standing in a federal court. *Nova Health Systems v. Gandy,* 416 F.3d 1149, 1155 (10th Cir. 2005) citing *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1047 n. 10 (2d Cir.1975); *Montana Shooting Sports Ass'n v. Holder,* 727 F.3d 975, 979 (9th Cir. 2013); *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495-498, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998). We need not analyze circumstances when government regulation involving economic loss shows standing in an Article III federal court, or how such relates or compares to a petitioner's standing in an Oklahoma state court.

5. *Gentges v. Oklahoma State Election Board*, 2014 OK 8, ¶ 7, 319 P.3d 674, 676, quoting *State ex rel. Howard v. Oklahoma Corporation Commission*, 1980 OK 96, 614 P.2d 45, 51.

6. *Gentges*, 2014 OK 8, ¶ 7, 319 P.3d at 676, quoting S*tate ex rel. Howard*, 614 P.2d at 52.

7. *State ex rel. Freeling v. Lyon*, 1917 OK 229, 165 P. 419, 420.

8. The response filed by Governor Fallin, et al., states that in 2015 over 13,000 requests were made by drivers for Department of Public Safety administrative hearings. Response (July 21, 2017) at p. 2.

9. The concept of "adjective law" includes legal rules or procedure or practice as opposed to substantive law. *Black's Law Dictionary* 62 (4th ed. 1951); *Maurizi v. Western Coal & Mining Co.*, 321 Mo. 378, 11 S.W.2d 268, 272 (1928) ("All of the authorities hold that a 'substantive law is that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.'").

10. *Ethics Commission v. Cullison*, 1993 OK 37, 850 P.2d 1069, 1073.

11. *Tulsa Industrial Authority v. City of Tulsa*, 2011 OK 57, ¶ 13, 270 P.3d 113, 120-121, discussing *Gordon v. Followell*, 1964 OK 74, 391 P.2d 242, 243 – 244, and the concept that declaratory relief is limited to cases of actual controversy, and such is a jurisdictional component in the context of declaratory relief.

12. *Dank v. Benson*, 2000 OK 40, ¶ 6, 5 P.3d 1088, 1090-1091 ("only under the most exigent circumstances are we to intercede in the internal affairs of a coordinate branch of government when it exercises a function – *i.e.*, legislative or executive – committed to it by the Constitution"). *See also Ethics Commission v. Keating*, 1998 OK 36, ¶ 3, 958 P.2d 1250, 1253 ("Frequently, when this Court has assumed original jurisdiction in a *publici juris* controversy we have done so because of a public need for a speedy judicial determination.").

13. *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, n. 135, 264 P.3d 1197, citing Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L.Rev. 1265, 1269, 1273 – 1274 (1961).

14. Petitioners' Application to Assume Original Jurisdiction and Petition for Declaratory and Injunctive Relief, Okla. Sup. Ct. No. 116,113 (June 21, 2017) at p. 2.

15. Petitioners' Reply to Respondents' Response, etc., Okla. Sup. Ct. No. 116,131 (August 11, 2017) at p. 11.

16. *Brock v. Thompson*, 1997 OK 127, ¶ 14, 948 P.2d 279, 287 (notes omitted).

17. *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (a "property" interest may be "intangible" and relate "to the whole domain of social and economic fact;" and the Court listed *Bell* and a driver's license as an additional example).

The United States Const., Amend. 14, provides in pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...."

18. *Bell*, 402 U.S. at 539.

19. *Bell*, 402 U.S. at 542.

20. *Price v. Reed,* 1986 OK 43, 725 P.2d 1254, 1260 (notes omitted).

21. Okla. Const. Art. 2, § 7 provides that: "No person shall be deprived of life, liberty, or property, without due process of law."

22. *State ex rel. Bd of Regents of University of Oklahoma v. Lucas*, 2013 OK 14, n. 25, 297 P.3d 378, 391 ("Oklahoma's Due Process Clause, Okla. Const. Art. 2, § 7, is coextensive with its federal counterpart, although there may be situations in which the Oklahoma provision affords greater due process protections than its federal counterpart."), citing *Oklahoma Corrections Professional Ass'n, Inc. v. Jackson*, 2012 OK 53, n. 13, 280 P.3d 959, 963.

23. 47 O.S.Supp.2016 § 6-303 (G):

G. It shall be a misdemeanor punishable by imprisonment for not less than seven (7) days nor more than six (6) months, or by a fine of not more than Five Hundred Dollars ($500.00), or by both such fine and imprisonment, for any person to apply for a renewal or a replacement license to operate a motor vehicle while the person's license, permit or other evidence of driving privilege is in the custody of a law enforcement officer or the Department. A notice regarding this offense and the penalty therefor shall be included on the same form containing the notice of revocation issued by the officer.

24. S.B. No. 643, § 5, amending 47 O.S. 2011 § 6-205, as amended by Section 1, Chapter 279, O.S.L. 2013 (47 O.S.Supp. 2016, § 6-205), states:

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:

1. Manslaughter or negligent homicide resulting form the operation of a motor vehicle;

2. Driving, operating or being in actual physical control of a motor vehicle while under the influence of alcohol, any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, or any offense in subsection A of Section 11-902 of this title;

3. Any felony during the commission of which a motor vehicle is used;

4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another;

5. Perjury or the making of a false affidavit or statement under oath to the Department under the Uniform Vehicle Code or under any other law relating to the ownership or operation of motor vehicles;

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;

7. Failure to pay for gasoline pumped into a vehicle pursuant to Section 1740 of Title 21 of the Oklahoma Statutes;

8. A misdemeanor conviction for a violation of Section 1465 of Title 21 of the Oklahoma Statutes;

9. A misdemeanor conviction for a violation of Section 609 of Title 37 of the Oklahoma Statutes;

10. Failure to obey a traffic control device as provided in Section 11-202 or 11-703 of this title when such failure results in great bodily injury to any other person; or

11. Failure to stop or to remain stopped for school bus loading or unloading of children pursuant to Section 11-705 or 11-705.1 of this title.

B. The first license revocation under any provision of this section, except for paragraph 2, 6, 7 or 11 of subsection A of this section, shall be for a period of one (1) year. Such period shall not be modified.

C. A license revocation under any provision of this section, except for paragraph 2, 6, or 7 of subsection A of this section, shall be for a period of three (3) years if a prior revocation under this section, except under paragraph 2 of subsection A of this section, commenced within the preceding five-year period as shown by the records of the Department. Such period shall not be modified.

D. The period of license revocation under paragraph 2 or 6 of subsection A of this section shall be governed by the provisions of Section 6-205.1 of this title.

E. The first license revocation under paragraph 7 of subsection A of this section shall be for a period of six (6) months. A second or subsequent license revocation under paragraph 7 of subsection A of this section shall be for a period of one (1) year. Such periods shall not be modified.

F. The first license revocation under paragraph 11 of subsection A of this section shall be for a period of one (1) year. Such period may not be modified. Any appeal of the revocation of driving privilege under paragraph 11 of subsection A of this section shall be governed by Section 6-211 of this title.

G. As used in this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

25. Historically, a driver's license seizure was part of a civil regulatory/administrative proceeding. *Price v. Reed*, 1986 OK 43, 725 P.2d 1254, 1258-1259.

26. S.B. No. 643, § 8 (B), amending 47 O.S.2011 § 6-212.3, as amended by Section 2, Ch. 393, O.S.L. 2013 (47 O. S. Supp.2016, § 6-212.3): "The Department of Public Safety may revoke, suspend or restrict the driving privileges of the person upon receipt of a report of a verified ignition interlock violation as defined by the Board of Tests for Alcohol and Drug Influence."

27. *Torres v. Seaboard Foods, L.L.C.*, 2016 OK 20, ¶ 28, 373 P.3d 1057, 1072.

28. The receipt/temporary license given by the arresting officer appears to be used by the Act as a triggering event for a driver's fifteen calendar days to request participation in the Impaired Driver Accountability Program to be created by June 30, 2018. *See* S.B. No. 643, § 7 (F)(1) ("The Department may enter into an IDAP program agreement with a person if: (1) The Department receives the request for IDAP participation pursuant to this section within fifteen (15) calendar days from the date reflected on the dated receipt issued by the officer to the person pursuant to subsection B of Section 754 of this title, on the form provided by the Department...."). No argument was made concerning why a notice to a driver used for commencing time for requesting participation in the program requires seizure and destruction of that person's license.

29. Okla. Const. Art. 5 § 57:

Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the laws as may not be expressed in the title thereof.

30. S.B. No. 643, § 3, amends 47 O.S.2011 § 2-116.

31. S.B. No. 643, § 4, amends 47 O.S.2011 § 6-204.

32. S.B. No. 643, § 5, amends 47 O.S.2011 § 6-205, as amended by section 1, Ch. 279, O.S.L. 2013 (47 O.S.Supp. 2016 § 6-205).

33. S.B. No. 643, § 5, amending 47 O.S.Supp.2016 § 6-205 (A)(2).

34. S.B. No. 643, § 6, amends 47 O.S.2011 § 6-205.1, as amended by section 1, Ch. 393, O.S.L. 2013 (47 O.S.Supp. 2016 § 6-205.1).

35. S.B. No. 643, § 7, amends 47 O.S.2011 § 6-212, as amended by section 3, Ch. 97, O.S.L. 2015 (47 O.S.Supp. 2016 § 6-212).

36. Due to our holdings herein we need not reach the issue raised during oral argument concerning a statutory right created under the new Act effective November 1, 2017 to not have a license revoked based upon a driver's participation in an administrative program which may not be created until several months after creation of the statutory right.

37. See note 28, *supra*.

38. S.B. No. 643, § 8, amends 47 O.S.2011 § 6-212.3, as amended by section 2, Ch. 393, O.S.L. 2013 (47 O.S.Supp. 2016 § 6-212.3).

39. S.B. No. 643, § 9, amends 47 O.S.2011 § 11-902a.

40. S.B. No. 643, § 10, amends 47 O.S.2011 § 751.

41. S.B. No. 643, § 11, amends 47 O.S.2011 § 752.

42. S.B. No. 643, § 12, amends 47 O.S.2011 § 753, as amended by section 1, Ch. 131, O.S.L. 2015 (47 O.S.Supp. 2016 § 753).

43. S.B. No. 643, § 13, amends 47 O.S.2011 § 754.

44. S.B. No. 643, § 14, amends 47 O.S.2011 § 754.1, as amended by section 4, Ch. 393, O.S.L. 2013 (47 O.S.Supp. 2016 § 754.1).

45. S.B. No. 643, § 15, amends 47 O.S.2011 § 756.

46. *Fent v. Fallin*, 2013 OK 107, ¶ 5, 315 P.3d 1023, 1025; *Burns v. Cline*, 2016 OK 121, ¶ 27, 387 P.3d 348; *Douglas v. Cox Retirement Properties, Inc*., 2013 OK 37, ¶ 6, 302 P.3d 789, 792.

47. *Fent v. Fallin*, 2013 OK 107, ¶ 5, 315 P.3d 1023, 1025.

48. *Fent v. Fallin*, 2013 OK 107, ¶ 5, 315 P.3d 1023, 1025.

49. *Douglas v. Cox Retirement Properties, Inc*., 2013 OK 37, ¶ 4, 302 P.3d 789, 792.

50. *Fent v. State ex rel. Oklahoma Capitol Improvement Authority,* 2009 OK 15, ¶ 15, 214 P.3d 799, 804-805, citing *In re County Commissioners of Counties Comprising Seventh Judicial Dist*., 1908 OK 207, 98 P. 557.

51. 75 O.S.2011 § 11a:

In the construction of the statutes of this state, the following rules shall be observed:

1. For any act enacted on or after July 1, 1989, unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable, the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid, unless the court finds:

a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

2. For acts enacted prior to July 1, 1989, whether or not such acts were enacted with an express provision for severability, it is the intent of the Oklahoma Legislature that the act or any portion of the act or application of the act shall be severable unless:

a. the construction of the provisions or application of the act would be inconsistent with the manifest intent of the Legislature;

b. the court finds the valid provisions of the act are so essentially and inseparably connected with and so dependent upon the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

c. the court finds the remaining valid provisions standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

52. *Thomas v. Henry*, 2011 OK 53, ¶ 31, 260 P.3d 1251, 1261-1262.

53. *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, ¶ 10, 171 P.3d 899, 903 ("The due process clauses of the United States and the Oklahoma Constitutions provide that certain substantive rights – life, liberty and property – cannot be deprived except by constitutionally adequate procedures.") (notes omitted); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179, 71 S.Ct. 624, 652, 95 L.Ed. 817 (1951) (Douglas, J., concurring) ("It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.").

54. *Thomas v. Henry*, 2011 OK 53, at ¶ 31, 260 P.3d at 1261-1262.

55. *See, e.g.*, S.B. No. 843 § 14, referencing modification under S.B. No. 643, § 6, amending 47 O.S.Supp. 2016 § 6-205.1.

56. *Fent v. Fallin*, 2013 OK 107, ¶ 7, 315 P.3d 1023, 1025 (The single subject rule prohibits this unpalatable choice thust upon a legislator to approve or disapprove a bill with multiple subject.).

57. A bill does not become law when a Governor creates an impermissible pocket veto of a substantive (non-appropriations) bill by giving a partial or qualified approval of the bill. *Johnson v. Walters*, 1991 OK 107, 819 P.2d 694, 699, quoting *State ex rel. Wiseman v. Oklahoma Board of Corrections*, 1978 OK 158, 614 P.2d 551, 555.

58. Okla. Const. Art. 4 § 1:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

59. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, n. 20, 326 P.3d 496, 504.

60. The Court possesses judicial discretion to grant temporary relief or relief on the merits, with an opinion to follow, in order to protect the rights of parties pending resolution of a judicial controversy when a short period of time occurs between oral argument and the time an event will occur concerning the merits of the controversy. *In re Initiative Petition No. 314*, 1980 OK 174, 625 P.2d 595, 596; *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission,* 1994 OK 142, 897 P.2d 1116, 1118-1119.

61. *In re Guardianship of Berry,* 2014 OK 56, n. 1, 335 P.3d 779, 783, citing Okla. Sup. Ct. R. 1.16, 1.193; *Chronic Pain Associates, Inc. v. Bubenik,* 1994 OK 127, 885 P.2d 1358, 1364 ("In all original proceedings, other than those to review a decision of the Workers' Compensation Court or to impose bar discipline, the decision of this Court shall become effective when the opinion or order is filed with the Clerk of this Court, unless this Court stays the effective date."); Okla. Sup. Ct. R. 1.16 (no mandate is issued upon conclusion of an original jurisdiction action).

Wyrick, J., with whom Gurich, V.C.J., and Winchester, J., join, concurring in part and dissenting in part:

1. Majority Op. ¶ 5.

2. *E.g., Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶ 8, 890 P.2d 906, 910 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). That we have repeatedly said that federal standing jurisprudence guides our state law standing jurisprudence should come as no surprise; the language of the state and federal Constitutions closely parallel one another, with Oklahoma's grant of jurisdiction to this Court modeled on Article III's grant of jurisdiction to the federal courts. *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity[.]"); Okla. Const. art. VII, § 4 ("The appellate jurisdiction of the Supreme Court shall be co-extensive with the State and shall extend to all cases at law and in equity[.]").

3. *Toxic Waste Impact Grp.*, 1994 OK 148, ¶ 8, 890 P.2d at 910-11 (quoting *Lujan*, 504 U.S. at 560-61).

4. *Hendrick v. Walters*, 1993 OK 162, ¶ 5 n.14, 865 P.2d 1232, 1236 n.14 (emphasis added) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

5. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

6. *See Toxic Waste Impact Grp.*, 1994 OK 148, ¶ 9, 890 P.2d at 911.

7. *See Barzellone v. Presley*, 2005 OK 86, ¶ 18 n.32, 126 P.3d 588, 594 n.32 ("[The] Court does not address a party's asserting vicariously the constitutional rights of others."(citing *Forest Oil Corp. v. Corp. Comm'n of Okla.*, 1990 OK 58, ¶ 31, 807 P.2d 774, 788)); *see also Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (denying standing to vindicate rights of hypothetical clients).

8. *Toxic Waste Impact Grp.*, 1994 OK 148, ¶ 9, 890 P.2d at 911. The majority cites a handful of federal cases that it says stand for the proposition that "economic loss occasioned by governmental regulation has been sufficient to show Article III standing in a federal court." Majority Op. ¶ 4 & n.4. But each of the cases cited merely stands for the non-controversial proposition that when a business is the target of a new regulation that causes it economic harm, the business has suffered an injury-in-fact. None of the cases stand for the proposition that a business not actually regulated by the new law – and these DUI attorneys' law practices are in no way the target of these regulations – has standing merely because the regulation might have an attenuated negative effect on their revenues.

9. To that point, this Court has in the past said that "[s]peculation as to which of many paths the law in a given area will take in the future is a transparent veil behind which people act out their own policy preferences," and that "'[g]uesses about the future development of any rule of law have never been an acceptable rule of decision in Anglo American jurisprudence." *In re Initiative Petition No. 349, State Question No. 642,* 1992 OK 122, ¶ 13, 838 P.2d 1, 7 (internal quotation marks omitted) (relying on those statements as a basis for preventing the people of this State from voting on a measure that would have placed in our Constitution a provision preempted under current federal law). The Court today engages in just that sort of speculation so that it may preemptively invalidate a law duly enacted by the People's representatives.

10. *Richardson v. State ex rel. Okla. Tax Comm'n*, 2017 OK 85, ¶ 5, – - P.3d – – .

11. *Id.*

12. Majority Op. ¶¶ 6-7.

13. *Id.* ¶ 5 (quoting *Gentges v. Okla. State Election Bd.*, 2014 OK 8, ¶ 7, 319 P.3d 674, 676; *State ex rel. Howard v. Okla. Corp. Comm'n*, 1980 OK 96, ¶¶ 37-38, 614 P.2d 45, 52).

14. *Id.* ¶ 5 & n.5 (citing *Gentges*, 2014 OK 8, ¶ 7, 319 P.3d at 676; *State ex rel. Howard*, 1980 OK 96, ¶¶ 29, 31, 614 P.2d at 51).

15. 2014 OK 8, ¶¶ 9, 12, 319 P.3d at 677.

16. *Id.* ¶¶ 10-12, 319 P.3d at 677.

17. For example, no one would seriously argue that Gentges would have possessed standing had she been a resident of Texas or not otherwise been registered to vote in Oklahoma.

18. 1980 OK 96, 614 P.2d 45.

19. *Id.* ¶ 34, 614 P.2d at 52.

20. *Id.* ¶ 35, 614 P.2d at 52.

21. *Id.*

22. *Id.* ¶¶ 37-38, 614 P.2d at 52.

23. Okla. Const. art. IV, § 1.

24. The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1788) ("If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

25. *Brooks v. State*, 1931 OK 580, ¶ 17, 3 P.2d 814, 816.

26. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 4, 302 P.3d 789, 792 ("The purposes of the single-subject rule are to ensure the legislators or voters of Oklahoma are adequately notified of the potential effect of the legislation and to prevent logrolling." (citing *Nova Health Sys. v. Edmondson*, 2010 OK 21, 233 P.3d 380)).

27. *E.g.*, Majority Op. ¶ 32 (quoting Impaired Driving Elimination Act 2 [hereinafter IDEA2], ch. 392, § 2, 2017 O.S.L. 1560, 1561-62).

28. Okla. Const. art. V, § 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title …").

29. IDEA2, 2017 O.S.L. at 1560-61.

30. *Id.* § 13, 2017 O.S.L. at 1576-78 (to be codified at 47 O.S. § 754).

31. Majority Op. ¶ 32.

32. IDEA2, sec. 12, § 753(B), 2017 O.S.L. at 1576 (to be codified at 47 O.S. § 753).

33. Majority Op. ¶ 32.

34. IDEA2, sec. 11, § 752(A), 2017 O.S.L. at 1573 (to be codified at 47 O.S. § 752).

35. Majority Op. ¶ 32; OA at 26:29 (counsel for Petitioners, in response to a question about how the section relates to the subject of impaired driving, conceded that it "actually would be related to impaired driving in that when there's an accident, if they believe somebody is driving under the influence, it just provides for an EMT to be one of the designated people to draw blood in that instance").

36. Majority Op. ¶ 32.

37. *But see Bond v. Phelps*, 1948 OK 76, ¶ 35, 191 P.2d 938, 947 ("The constitutional prohibition of more than one subject in an act does not impose any limitation on the comprehensiveness of the subject, which may be as comprehensive as the Legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several. To constitute plurality of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. Within the meaning of the constitutional provision, matters which apparently constitute distinct and separate subjects are not so where they are not incongruous and diverse to each other. Generally speaking, the courts are agreed that a statute may include every matter germane, referable, auxiliary, incidental, or subsidiary to, and not inconsistent with, or foreign to, the general subject or object of the act." (quoting 50 Am. Jur. *Matters Germane to the General Subject or Object* §197, at 178 (1941)).

38. *See, e.g.*, 5 O.S.2011 § 1 (listing persons disqualified from practicing law); 10A O.S.Supp.2017 § 1-1-105(21) (listing those that qualify as a "deprived child"); 12 O.S.Supp.2017 § 95 (listing the limitation periods for various causes of action); 12 O.S.2011 § 134 (listing the various venues in which it is appropriate to sue a domestic corporation); 12 O.S.Supp.2017 § 2004(C) (listing methods to effectuate service in a civil proceeding); *id.* § 2023(B) (listing the kinds of cases appropriate for class-action treatment); 12 O.S.2011 § 2103 (listing the tribunals and decisions to which the rules of evidence apply); 20 O.S.Supp.2017 § 3.1 (listing the salaries for the various members of this Court); 21 O.S.Supp.2017 § 701.7(B) (listing all the offenses that qualify as first degree, "felony" murder); 31 O.S.2011 § 1 (listing all property exempt from attachment and forced sale); 51 O.S.Supp.2017 § 24A.3(2) (listing public bodies to which the Open Records Act applies); 63 O.S.Supp.2017 §§ 2-204, 2-206, 2-208, 2-210, 2-212 (listing the scheduled "controlled dangerous substances").

39. IDEA2, § 15, 2017 O.S.L. at 1579-80 (to be codified at 47 O.S. § 756).

40 *Id.* sec. 15, § 756(A), 2017 O.S.L. at 1579.

41 Majority Op. ¶ 33.

42. *Id.*

43. IDEA2, sec. 15, § 756(A), (D), 2017 O.S.L. at 1579.

44. *See* 47 O.S.2011 § 756(A) ("Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of alcohol or any other intoxicating substance . . . ."). Indeed this language dates back to the original version of section 756 enacted in 1967. *See* Act of April 19, 1967, ch. 86, § 6, 1967 O.S.L. 135, 136-37 ("Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of alcohol or intoxicating liquor . . . .").

45. *See Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 29, 850 P.2d 1069, 1079 ("[A]n invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. The natural effect of this rule . . . is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment." (citations omitted) (quoting *State ex rel. Goodner v. Speed*, 640 P.2d 13, 16 (Wash. 1982))).

46. IDEA2, sec. 4, § 6-204(C), 2017 O.S.L. at 1562 (to be codified at 47 O.S. § 6-204).

47. Majority Op. ¶ 34.

48. 47 O.S.Supp.2017 § 6-205(A)(2).

49. 47 O.S.2011 § 6-204.

50. 47 O.S.Supp.2016 § 6-205(A)(1), (3)-(11) (requiring revocation for committing a felony while using a vehicle, failing to pay for gasoline pumped into a vehicle, failing to stop for a school bus loading or unloading children, etc.).

51. IDEA2, §§ 5-6, 2017 O.S.L. at 1562-66.

52. The bill passed the Senate by a vote of 33 to 9, and the House by a vote of 58 to 26. Senate Journal, 56th Leg., 1st Reg. Sess. 1203 (Okla. 2017); House Journal, 56th Leg., 1st Reg. Sess. 1350 (Okla. 2017).

53. *Brooks v. State*, 1931 OK 580, ¶ 17, 3 P.2d 814, 816.

54. Majority Op. ¶ 2 ("We hold the [Act] is unconstitutional in its entirety due to violating the single subject rule in Okla. Const. Art. 5 §

57. We [also] hold one provision of the Act, section 13, violates the Due Process Clause in Okla. Const. Art. 2 § 7.").

55. *Id.* ¶ 20.

56. *See* Pet'rs' Appl. to Assume Original Jurisdiction ¶ 10, at 4 (identifying the due process question presented as "whether the Act's requirements of the taking and destroying of an individual's driver's license without due process of law" violates the Due Process Clause.); *id.* ¶ 25, at 8 ("[T]he Act requires DPS to destroy the license upon receipt. The Act also repeals all hearing requirements from the statute. Since there is no automatic revocation of the license under SB 643 there is no need to take an individual's property and certainly no reason to destroy it, both of which occur without the due process protections of notice and an opportunity to be heard."(citing *Price v. Reed*, 1986 OK 43, ¶ 11, 725 P.2d 1254, 1259-60 (a case without any substantive due process claim))); Pet'rs' Br.-in-Chief 10-11 (repeating the arguments in their Application and providing no authority in support of anything other than a procedural due process claim); Pet'rs' Reply Br. 14 (repeating their claim as one that SB 643 "provides for the seizure and destruction of property *without due process*"(emphasis added)); *see also* Exec. Resp'ts' Br. 12-13 (understanding the claim to be a procedural due process claim.); Legis. Resp'ts' Br. 8-11 (same).

57. The Court's sole basis for insisting that a substantive due process claim was raised is a line in the Application stating that "there is no need to take an individual's property and certainly no reason to destroy it." Majority Op. ¶ 13. The Court lifts this line in the Application out of context, omitting the latter half of the sentence, which makes clear the DUI attorneys are complaining that the deprivation occurs "without the due process protections of notice and an opportunity to be heard," and which is followed by a citation to a case involving no substantive due process claim or discussion. *See* Pet'rs' Appl. to Assume Original Jurisdiction ¶ 25, at 8 (citing *Price*, 1986 OK 43, ¶ 11, 725 P.2d at 1259-60).

58. Additionally, because "the adversary system is a cornerstone of our jurisprudence," the precedential value of a case "is diminished by the fact that the case was submitted without argument, or on scanty or insufficient argument." Bryan A. Garner et al., The Law of Judicial Precedent 226 (2016); *see also McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1447 (2014) (plurality opinion) (dismissing *Buckley v. Valeo*, 424 U.S. 1 (1976), as lacking precedential weight on a certain issue because the opinion in the case was "written without the benefit of full briefing or argument on the issue"); *Hohn v. United States*, 524 U.S. 236, 251 (1998) (disregarding *House v. Mayo*, 324 U.S. 42 (1945) (per curiam), for the same reasons).

59. Majority Op. ¶ 20.

60. *LaFalier v. Lead-Impacted Comtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

61. *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 18, 148 P.3d 842, 848.

62. *Davis v. Fieker,* 1997 OK 156 ¶ 35, 952 P.2d 505, 514 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

63. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."); *In re Okla. Dev. Fin. Auth.*, 2004 OK 26, ¶ 15, 89 P.3d 1075, 1080 ("[A] heavy burden is placed on those challenging a legislative enactment, and every presumption is to be indulged in favor of the constitutionality of a statute.").

64. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) ("Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking, that direct and restrain our exposition of the Due Process Clause." (internal quotation marks & citations omitted)).

65. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a Texas law without specifically defining the fundamental right implicated); *see also id.* at 586 (Scalia, J., dissenting).

66. 47 O.S.Supp.2016 § 6-209(D).

67. *See* Majority Op. ¶ 15 & n.20 (citing *Price v. Reed*, 1986 OK 43, ¶ 11, 725 P.2d 1254, 1260 (holding that due process was required prior to revocation of driving privileges)).

68. At oral argument, counsel for Petitioners agreed that under the new law the arrestee is "going to be given a piece of paper that is 45 days with no driving privilege lost, at all. . . . They face no ramifications [to] their driving license until they plead to the charge down the road in the criminal case." OA at 6:25. Under preexisting law, an impaired driver's plastic license was seized *and* his driving privilege was automatically revoked after arrest unless he timely requested an administrative hearing. *See* 47 O.S.Supp.2016 §§ 6-205.1, 753; 47 O.S. 2011 § 754. SB 643 thus changes the law in a manner that is favorable to arrestees because it allows the arrestee to retain his driving privilege pending resolution of his criminal case.

69. *Price*, 1986 OK 43, ¶¶ 11, 15, 725 P.2d at 1259-61 (citing *Robertson v. State ex rel. Lester,* 1972 OK 126, ¶ 9, 501 P.2d 1099, 1101 (holding that "[a] driver's license is not a contract or a property right in the constitutional sense, and therefore its revocation does not constitute the taking of property")). While the *Price* Court disagreed with the *Robertson* Court's conclusion that no property right exists in the driving privilege, the *Price* Court ultimately rejected the due process challenge to the statute, holding that no violation of "the fundamental law's due process safeguards" had been identified. *Id.* ¶ 15, 725 P.2d at 1261. If *Price* had, as the Court claims, found a protected property right in the plastic license card, as opposed to the driving privilege, that conclusion makes no sense, given that *no* process was afforded to the seizure of the plastic license.

70. *See Nichols v. State ex rel. Dep't of Pub. Safety,* 2017 OK 20, ¶ 29, 392 P.3d 692, 698 (holding that "if the driver requests a hearing, the proceeding should be held within sixty (60) days of the Department's receipt of notice").

71. *Gladstone v. Bartlesville Indep. Sch. Dist*. No. 30 (I-30), 2003 OK 30, ¶ 12, 66 P.3d 442, 448 (noting that a law will survive rational-basis scrutiny "so long as 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993))); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where . . . there are plausible reasons for Congress' action, our inquiry is at an end.").

72. *Lawrence v. Texas,* 539 U.S. 558 (2003).

73. *Gladstone*, 2003 OK 30, ¶ 12, 66 P.3d at 448.

74. *See* Majority Op. ¶ 20; *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶¶ 47-48, 373 P.3d 1057, 1079 (holding that no rational basis existed for a workers' compensation law requiring that employees be employed with their current employer for a continuous 180-day period before being able to file a claim for cumulative trauma).

75. *Fent v. Okla. Capital Improvement Auth.*, 1999 OK 64, ¶ 4, 984 P.2d 200, 204.

2017 OK 101

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. John Douglas Dunivan, Respondent.

SCBD No. 6604. December 18, 2017

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the Information, Plea, and Deferred Sentence, in the matter of *State of Oklahoma v. John Douglas Dunivan*, CF-2016-83, in Blaine County. On December 4, 2017, John Douglas Dunivan entered an Alford plea guilty to the following crime, occurring on March 25, 2016: Violation of a Protective Order, a misdemeanor, in violation of 22 O.S. 2011 § 60.6. On December 4, 2017, the Court entered a one-year deferred sentence, until December 4, 2018.

¶2 Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the

lawyer from the practice of law until further order of the Court." Having received certified copies of these papers and orders, this Court orders that John Douglas Dunivan is immediately suspended from the practice of law. John Douglas Dunivan is directed to show cause, if any, no later than **December 29, 2017**, why this order of interim suspension should be set aside. *See* RGDP Rule 7.3. The OBA has until **January 9, 2018**, to respond.

¶3 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, John Douglas Dunivan has until **January 25, 2018**, to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until **February 19, 2018,** to respond.

¶4 DONE BY ORDER OF THE SUPREME COURT on December 18, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2017 OK 102

STATE OF OKLAHOMA *ex rel* OKLAHOMA BAR ASSOCIATION, Complainant, v. MICHAEL JOSEPH CORRALES, Respondent.

SCBD No. 6601. December 18, 2017

ORDER APPROVING RESIGNATION FROM THE OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 Pursuant to Rule 8 (Resignation Pending Disciplinary Proceedings), Oklahoma Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A, Respondent submitted an affidavit, filed December 5, 2017, seeking to resign his membership in the Oklahoma Bar Association (OBA) and relinquish his right to practice law pending disciplinary proceedings. On the same date Complainant filed an application to this Court for an order approving the resignation of Respondent. Upon consideration of the matter we find:

1. Respondent executed an affidavit on December 4, 2017, wherein he asks to be allowed to resign his membership in the OBA and relinquish his right to practice law. Although he is aware his resignation is subject to the approval of this Court within its discretion, he intends it to be effective from the date of its execution and represents he will conduct his affairs accordingly.

2. Respondent's resignation was freely and voluntarily tendered, he was not subject to coercion or duress, and he was fully aware of the consequences of submitting his resignation.

3. Respondent is aware that two grievances have been lodged against him, DC 17-84 and DC 17-202, and are pending with the Office of the General Counsel of the OBA. Grievance DC 17-84 alleges that Respondent misrepresented facts to a third-party medical provider and misappropriated settlement funds entrusted to him in 2015. Grievance 17-202 alleges that Respondent was paid $2,000 to file an application for post-conviction relief and that Respondent incompetently represented the client and failed to earn his attorney fee.

4. Respondent is aware that, if proven, the allegations concerning his conduct would constitute violations of Rules 1.1, 1.5, 1.15, 8.4(b), 8.4(c), and 8.4(d) of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S.2011, ch. 1, app. 3-A, Rule 1.3, RGDP, and his oath as an attorney. Respondent waives any right to contest the allegations.

5. Respondent's Oklahoma Bar Association Number is 12619 and he was admitted to membership in the OBA on May 6, 1988. Respondent's official roster address is: 1913 Rosebrook Court, Norman, OK 73072-1002. Respondent has tendered his OBA membership card to the Office of the General Counsel.

6. Respondent has familiarized himself with the provisions of Rule 9.1, RGDP, and has agreed to comply with the provisions of such Rule.

7. Respondent acknowledges and agrees he may be reinstated to practice law only

upon full compliance with the conditions and procedures prescribed by Rule 11, RGDP, and that he may make no application for reinstatement to the practice of law prior to the expiration of five years from the effective date of the Order approving his Resignation Pending Disciplinary Proceedings.

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

9. Respondent acknowledges and agrees he is to cooperate with the Office of the General Counsel in identifying any active client cases wherein documents and files need to be returned to the client or forwarded to new counsel, and any fees or refunds owed by him to clients.

10. Respondent acknowledges that the OBA has incurred costs in the amount of $102.37 in this matter and that he is responsible to reimburse same.

11. The resignation pending disciplinary proceedings of Respondent is in compliance with Rule 8.1, RGDP.

¶2 **IT IS ORDERED** that Complainant's application for an Order approving the resignation pending disciplinary proceedings of Respondent, Michael Joseph Corrales, is granted, Respondent's resignation is accepted and approved, and his right to practice law is relinquished.

¶3 **IT IS FURTHER ORDERED** that Respondent's name, Michael Joseph Corrales, be stricken from the Roll of Attorneys and that he may not apply for reinstatement to membership in the Oklahoma Bar Association prior to expiration of five years from the effective date of this Order.

¶4 **IT IS FURTHER ORDERED** that Respondent shall comply with Rule 9.1, of the Rules Governing Disciplinary Proceedings.

¶5 **IT IS FURTHER ORDERED** that Respondent shall pay costs in the amount of $102.37 to the Oklahoma Bar Association within ninety (90) days of the date of this Order.

DONE BY ORDER OF THE SUPREME COURT the 18th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2017 OK 103

In re: Amendments to Rules For Mandatory Judicial Continuing Legal Education

No. SCAD-2017-91. December 18, 2017

ORDER

Pursuant to our general superintending control over all inferior courts, Okla. Const., art. 7, § 4, and our general administrative authority over state courts, Okla. Const., art. 7, § 6, we hereby amend Rules 1, 2, and 3 of the Rules for Mandatory Judicial Continuing Legal Education, 5 O.S., ch. 1, app. 4-B. The amended rules are set out in the attachments hereto, with Exhibit "A" showing markup and Exhibit "B" a clean copy of the new rules.

It is therefore ordered that the amended Rules for Mandatory Judicial Continuing Legal Education are hereby approved and adopted and shall be effective from January 1, 2017. It is further ordered that the Rules for Mandatory Judicial Continuing Legal Education as amended shall be included in the official publication of the Oklahoma Statutes.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 1. Judges Who Must Obtain Annual Judicial Continuing Legal Education.

All Judges of the Oklahoma District Courts, the Court of Civil Appeals, Court of Criminal Appeals, and Justices of the Oklahoma Supreme Court, shall complete at least twelve (12) hours annually of Mandatory Judicial Continuing Legal Education (MJCLE). Credit may be earned through teaching in an approved continuing legal education program or approved judicial continuing legal education program.

Presentations accompanied by thorough carefully prepared written materials will qualify for MJCLE credit on the basis of six (6) hours of credit for each hour of presentation.

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 2. Approved Courses for Mandatory Judicial Continuing Legal Education.

The hours of Mandatory Judicial Continuing Legal Education must be obtained by attendance at MJCLE courses or programs provided by the Administrative Office of the Courts, or a National Judicial College course, or programs presented at monthly meetings of the Oklahoma Chapters of the American Inns of Court, or any other program specially approved by the Chief Justice of the Oklahoma Supreme Court for MJCLE. General continuing legal education programs or courses may not be used to satisfy no more than six (6) hours of the MJCLE requirement.

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 3. Judicial Continuing Education Programs at Meetings of the Oklahoma Judicial Conference.

The Administrative Office of the Courts shall provide MJCLE courses or programs at all meetings of the Oklahoma Judicial Conference, and at other times as scheduled by the Administrative Office of the Courts. The Administrative Office of the Courts shall maintain records of those Judges and Justices attending MJCLE programs and courses provided ~~by the Administrative Office of the Courts~~.

Exhibit "B"

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 1. Judges Who Must Obtain Annual Judicial Continuing Legal Education.

All Judges of the Oklahoma District Courts, the Court of Civil Appeals, Court of Criminal Appeals, and Justices of the Oklahoma Supreme Court, shall complete at least twelve (12) hours annually of Mandatory Judicial Continuing Legal Education (MJCLE). Credit may be earned through teaching in an approved continuing legal education program or approved judicial continuing legal education program. Presentations accompanied by thorough carefully prepared written materials will qualify for MJCLE credit on the basis of six (6) hours of credit for each hour of presentation.

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2017 OK 104

In re: Amendments to Rule 7.3, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A

No. SCAD-2017-92. December 18, 2017

ORDER

Rule 7.3 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

Rules Governing Disciplinary Proceedings.
Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.3. Interim Suspension from Practice.

Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court ~~shall~~may by order immediately suspend the lawyer from the practice of law until further order of the Court. In ~~its~~an order of suspension the Court ~~shall~~may direct the lawyer to ~~appear at a time certain~~file a statement, to show cause, if any ~~he~~the lawyer has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession.

Alternatively, upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why an order of immediate interim suspension from the practice of law should not be entered. Upon good cause shown, the Court may decline to enter an order of immediate interim suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession. If good cause is not shown, the Court may by order immediately suspend the lawyer from the practice of law until further order of the Court.

Exhibit "B"

Rules Governing Disciplinary Proceedings.
Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.3. Interim Suspension from Practice.

Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may by order immediately suspend the lawyer from the practice of law until further order of the Court. In an order of suspension the Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession.

Alternatively, upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why an order of immediate interim suspension from the practice of law should not be entered. Upon good cause shown, the Court may decline to enter an order of immediate interim suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession. If good cause is not shown, the Court may by order immediately suspend the lawyer from the practice of law until further order of the Court.

2017 OK 105

JOHN TRUEL et al., Plaintiffs/Appellees, v. A. AGUIRRE LLC et al., Defendants/Appellants. and GLADYS ERBAR and TOM ERBAR, individuals, Plaintiffs/Appellees, v. A. AGUIRRE LLC et al., Defendants/Appellants.

Case Number: 115,229; Consol. w/115,170
December 19, 2017

Petition for Certiorari to Review a Certified Interlocutory Order of the District Court of Canadian County, Gary E. Miller, District Judge.

¶0 The plaintiffs/respondents sued hundreds of defendants, whom the plaintiffs asserted had served them mixed drinks over a period of several years prior to filing the lawsuit. The plaintiffs claimed that the defendants had violated a tax statute, 37 O.S.2011, § 576(B)(2), that required a 13.5% tax on the gross receipts the holders of a license by the ABLE Commission for sale of a mixed beverage. They contended that the licensees who failed to combine the retail sale price with the tax in its advertised price had overcharged their cus-

tomers by 13.5%. The defendants/appellants appealed the trial judge's construction of the statute. This Court ordered that the cases involved would be reviewed as certified interlocutory orders by the district court.

REMANDED WITH ORDERS TO DISMISS.

Mark Hendricksen, Lanita Hendricksen, HENDRICKSEN & HENDRICKSON LAWYERS, INC., El Reno, Oklahoma, for Plaintiffs/Respondents.

FENTON R. RAMEY, Yukon, Oklahoma, for Gladys Erbar. Plaintiff/Respondent.

TOM ERBAR, *pro se,* Plaintiff/Respondent.

John N. Hermes, Zachary A.P. Oubre, McAFEE & TAFT, A Professional Corporation, Oklahoma City, Oklahoma, for various Defendants/Petitioners.

And Forty-five other separate law firms, for various Defendants/Petitioners.

Winchester, J.

¶1 The issue before us involves the construction of a subsection in a subsequently amended tax statute. The statute is codified in Title 37, entitled "Intoxicating Liquors", Chapter 3, entitled "Oklahoma Alcoholic Beverage Act, and Section 576, entitled "Tax on Gross Receipts of Certain Licensee Holders." Subsection A of the statute levies a tax of 13.5% on "the total gross receipts of a holder of a mixed beverage, caterer, public event or special event license, issued by the ABLE Commission." Section 576 provided:

> "A. A tax at the rate of thirteen and one-half percent (13.5%) is hereby levied and imposed on the total gross receipts of a holder of a mixed beverage, caterer, or special event license, issued by the ABLE Commission, from:
>
> "1. The sale, preparation or service of mixed beverages;
>
> "2. The total retail value of complimentary or discounted mixed beverages;
>
> "3. Ice or nonalcoholic beverages that are sold, prepared or served for the purpose of being mixed with alcoholic beverages and consumed on the premises where the sale, preparation or service occurs; and
>
> "4. Any charges for the privilege of admission to a mixed beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages.
>
> "B. For purposes of this section:
>
> "1. 'Mixed beverages' means mixed beverages as defined by Section 506 of this title;
>
> "2. 'Total gross receipts' means the total amount of consideration received as charges for admission to a mixed beverage establishment as provided in paragraph 4 of subsection A of this section and the total retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. The advertised price of a mixed beverage shall be the sum of the total retail sale price and the gross receipts tax levied thereon; and
>
> "3. 'Total retail value' means the total amount of consideration that would be required for the sale, preparation or service of mixed beverages.
>
> "C. The gross receipts tax levied by this section shall be in addition to the excise tax levied in Section 553 of this title, the sales tax levied in the Oklahoma Sales Tax Code, Section 1350 et seq. of Title 68 of the Oklahoma Statutes and to any municipal or county sales taxes.
>
> "D. The gross receipts tax levied by this section is hereby declared to be a direct tax upon the receipt of consideration for any charges for admission to a mixed beverage establishment as provided in paragraph 4 of subsection A of this section, for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages, and the total retail value of complimentary or discounted mixed beverages.
>
> "E. The total of the retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages shall be the total gross receipts for purposes of calculating the sales tax levied in the Oklahoma Sales Tax Code, Section 1350 et seq. of Title 68 of the Oklahoma Statutes."
>
> Amended by Laws 2001, SB 501, c. 78, § 8, eff. November 1, 2001, codified at 37 O.S. 2011, § 576.

¶2 That statute defines "total gross receipts" at § 576(B)(2). Included with that definition is a sentence which provides: "The advertised price of a mixed beverage shall be the sum of the total retail sale price and the gross receipts tax levied thereon. . . ." A subsequent amendment changed the "shall" to "may." 2013 Okla. Sess.Laws, c. 369, § 1.

¶3 In two different district court cases in Canadian County the Plaintiffs/Respondents, hereinafter "plaintiffs," have sued hundreds of defendants, who allegedly served the plaintiffs mixed drinks for a period of several years prior to filing these lawsuits. The plaintiffs sought a declaratory judgment ruling that the prices charged by the defendants for mixed alcoholic beverages violated § 576(B)(2). If the plaintiffs received a favorable ruling, a request for certification of class actions would follow. The theory for recovery would be based on contract, conversion, fraud, and consumer rights found within the Consumer Protection Act (15 O.S.2011, § 751 through § 764.1).

¶4 This cause comes before this Court on an Order Certifying Declaratory Rulings for Immediate Interlocutory Appeal, pursuant to 12 O.S.2011, § 952(b)(3).[1] The general declaratory rulings construe 37 O.S.2011, § 576(B)(2) as requiring those who sell mixed drinks to include the price of the drink and the 13.5% tax levied on it. The court concluded that separating the price of the drink and the mixed beverage tax on an invoice unlawfully violated the statute. Based on the court's rulings, the plaintiffs appear to presume that the tax was deemed included as a matter of law within all the drinks sold to the plaintiffs, and then the tax was added again by the defendants, thereby defrauding the plaintiffs of the benefit of their contract, unjustly enriching the defendants and converting and retaining the extra 13.5%. The trial court's legal ruling does not support the plaintiffs' inference from that decision.

¶5 The first paragraph of the plaintiffs' Answer Brief complains that the fundamental controversy is whether they should "get back monies which they were overcharged" and that they are entitled by Oklahoma's Constitution to a "certain remedy for every wrong." This Court, of course, agrees that the Constitution supports a remedy for every legal wrong. The emphasis should be whether the alleged violation constitutes a "legal" wrong. The trial court construed the statute and concluded that establishments selling mixed drinks must include the 13.5% tax in the advertised price. Even assuming the trial court was correct, that decision does not overcome the plaintiffs' burden to establish that such a violation entitles the plaintiffs to damages.

I. WHAT IS AN ADVERTISED OFFER?

¶6 The plaintiffs assert that all parties agree "that Defendants are on-premise retailers (Finding of Fact #5), who offered certain mixed drinks for sale to their customers at certain advertised prices." There are two terms within this asserted agreed finding of fact that are not factual conclusions. They are legal terms that must be construed by this Court. We begin our analysis of the law by discussing these two terms.

¶7 The Restatement of Contracts § 26 (1981) is entitled "Preliminary Negotiations." Section b, which is entitled "Advertising," provides the observation that "Business enterprises commonly secure general publicity for the goods or services they supply or purchase. Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell." Representations made in advertisements and price lists are treated as "invitations to negotiate."[2] Otherwise, if the seller advertises a product price, such as that of a mixed drink, and the supply of the product is insufficient to meet the demands of the patrons, each patron who did not receive the product, after "accepting the offer," could claim a breach of contract. If the advertisement is treated as an "invitation to negotiate," the seller could inform the patrons that the product has sold out, and no breach of contract occurs.

¶8 Who made the offers in the cause before this Court? The plaintiffs made the offers. The retailers accepted the offers and sold them for the amount offered by the buyers. Advertised prices are subject to offers by the customer that are lower than the advertised price. The sellers are then entitled to accept that offer if they wish to do so. If the retailers had surreptitiously charged a different price after the agreement was concluded, then the buyers would have a right to complain. But in this cause the plaintiffs did not allege that the defendants failed to serve the drinks at the price the plaintiffs each offered.

¶9 Advertisements, if sufficiently specific, such as "I will sell this drink to the first person to accept for $10," would be an offer that could

be accepted by the first to respond with the $10. *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957). But generally speaking, advertisements list prices of a finite number of products, which numbers are subject to offers to buy from a larger number of customers. A reasonable consumer understands that demand for a product from an advertiser may result in the depletion of the advertiser's stock.

¶10 Mr. Truel testified that he started his investigation by going to the Oklahoma Tax Commission and getting a list of those holding a Class A license to serve mixed beverages. He then went into these establishments of the defendants multiple times even after he had concluded that he had been overcharged for his mixed drink, according to his interpretation of § 576. Yet he did not protest to any of the retailers at the time he bought the mixed beverages, even when he knew the 13.5% tax was being added in separately on his bill. He admitted during his testimony that he had no evidence that any of the defendants failed to remit the mixed beverage tax to the Oklahoma Tax Commission.

¶11 Accordingly, the alleged violation of a tax law regarding advertising a mixed drink cannot result in a legal wrong to a patron. The patron made the offer. The patron agreed to pay the amount offered, at which point the seller accepted the offer. There is now a contract. There is no deception involved under these facts.

II. DOES THIS TAX STATUTE PROTECT CONSUMERS?

¶12 The subject of this statute, and accordingly its context, is the rate of taxes to be levied on "the total gross receipts of a holder of a mixed beverage, caterer, public event or special event license, issued by the ABLE Commission." There is nothing in this statute that implies it is written for the protection of consumers of mixed drinks. If it were to protect consumers, why not require all retailers to include sales taxes in the advertised prices of their products? Although the plaintiffs' arguments are creative, their assertions of consumer mistreatment do not reasonably consider the context of the sentence, which they have isolated from the statute as a whole.

¶13 The arguments in the briefs presented to this Court reveal that the Tax Commission had difficulty in determining how to enforce this statute, other than its obvious purpose of collecting a 13.5% tax on mixed alcoholic beverages. The Tax Commission testified to three methods used by that agency to collect the tax. The Legislature appears to have acknowledged the problem by changing the law to read that the advertised price of a mixed beverage "may," instead of "shall" be the sum of the total retail sale price and the gross receipts tax levied thereon. 2013 Okla.Sess.Laws, c. 369, § 1. The title of that amendment is "An Act relating to revenue and taxation; amending 37 O.S. Section 576, which relates to gross receipts tax on mixed beverages; making certain requirement permissive; prohibiting certification of a class for certain actions relating to mixed beverage, sales or use taxes; and providing for codification." In other words, it is a tax statute, not a consumer protection statute.

III. CONCLUSION

¶14 Although the briefs from the parties skillfully address other permutations of argument on both sides of this cause, we conclude that what we have chosen to address sufficiently resolves the main issue presented. The statute's ambiguities caused sufficient problems in collection of the tax that the Legislature amended the statute. We hold that the statute's purpose does not involve protecting consumers from having a tax separately listed from the price of a drink instead of including it in the price of a drink. Because the complaints of the plaintiffs against the defendants rest on the assumption that 37 O.S.2011, § 576(B)(2) protects consumers, and we have held that it is solely a tax statute, we order the trial court to dismiss these cases.

REMANDED WITH ORDERS TO DISMISS.

CONCUR: COMBS C.J., WATT, WINCHESTER, EDMONDSON, and REIF, JJ.

CONCUR IN JUDGMENT: GURICH, V.C.J.

CONCUR IN PART; DISSENT IN PART: KAUGER, COLBERT, JJ.

NOT PARTICIPATING: WYRICK, J.

Winchester, J.

1. Title 12 O.S.2011, § 952(b)(3) provides: "(b) The Supreme Court may reverse, vacate or modify any of the following orders of the district court, or a judge thereof: . . . 3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court, in its discretion, may refuse to hear the appeal. If the Supreme Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue."

2. Kenneth W. Clarkson, Roger LeRoy Miller & Frank B. Cross, *Business Law Text and Cases*, 233, (14th ed. 2018). "[I]f goods are advertised for sale at a certain price, it is generally not an offer, and no contract is formed by the statement of an intending purchaser that he or she will take a specified quantity of the goods at that price. [footnote omitted] Rather, the courts routinely hold that such advertisements or other expressions of intention are invitations to soliciting offers or to enter into a bargain rather than offers themselves." 1 Williston on Contracts § 4:10 (4th ed.) May 2017 Update.

2017 OK 106

JOHN DOE (a pseudonym for the Plaintiff), Plaintiff/Appellant, v. THE FIRST PRESBYTERIAN CHURCH U.S.A. OF TULSA, OKLAHOMA, and JAMES D. MILLER, Defendants/Appellees.

No. 115,182. December 19, 2017

ON APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY HONORABLE DAMAN H. CANTRELL DISTRICT JUDGE

¶0 Appellant filed suit against Appellees, a church and its minister, alleging torts and breach of contract after notice of his baptism was published on the internet. Appellant alleged he consented to baptism only after Appellees assured him his privacy would be maintained. Appellant alleged that Appellees' act of publishing the fact of his baptism to the world wide web resulted in his alleged kidnaping and subsequent torture by extremists while he traveled in Syria. The trial court sustained Appellees' motion to dismiss for lack of subject matter jurisdiction. Appellant appealed and this Court issued an Order granting Appellant's motion to retain this appeal.

REHEARING GRANTED; OPINION OF THE COURT ISSUED FEBRUARY 22, 2017, IS WITHDRAWN AND THIS OPINION ORDERED SUBSTITUTED THEREFOR.

ORDER OF THE TRIAL COURT IS REVERSED AND REMANDED WITH INSTRUCTIONS.

G. Steven Stidham, Tulsa, Oklahoma, for Plaintiff/Appellant,

John H. Tucker and Denelda Richardson, Tulsa, Oklahoma, for Defendants/Appellees.

OPINION

WATT, J.:

¶1 This Court retained this case to consider whether a motion to dismiss for lack of subject matter jurisdiction can be granted where factual determinations are required by the trial court on issues that are central to the plaintiff's claims. The district court considered evidence outside plaintiff's petition and determined the publication of plaintiff's baptism on the world wide web was within the ecclesiastical realm of the Appellees' church hierarchy thereby depriving the trial court of subject matter jurisdiction. We reverse the district court's order and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellant/Doe filed suit against The First Presbyterian Church U.S.A. ("FPC"), of Tulsa, Oklahoma and its minister, James D. Miller, ("Appellees"), based on theories of torts and breach of contract. Doe seeks damages arising out of alleged harm he incurred from Appellees' publishing notice of his baptism on the world wide web. Doe claimed that he advised Appellees of the need to keep his baptism private and as confidential as possible. Doe asserted that Appellees assured him that his conversion to Christianity would be held as confidential as possible. Doe alleged that because of Appellees' assurances, he proceeded with baptism by Appellees. Stated differently, Doe's allegation emphasized that he did not give consent to the FPC to publicize his baptism.

¶3 Doe and Appellees agreed that Doe did not become a member of Appellees' church and Doe ***did not consent to membership***. All parties agreed that Doe consented to baptism, however, Doe asserted his consent was conditioned on insuring his privacy concerns were honored by Appellees. Appellees urged that they had no knowledge of Doe's requests for confidentiality in baptism; and even if they had, church doctrine would have prohibited them from keeping matters private. The only record before us reflects that Doe simply (1) wanted to be baptized into the *Christian* faith, not to become a member of Appellees' church, and (2) only sought baptism if this process could be private and not publicized.

¶4 Doe was born in Syria and is of Muslim descent; he has permanent resident status in the United States. He has met all qualifications for citizenship and is waiting for the U.S. to schedule him to take the citizenship oath. While living in the United States, Doe became interested in converting to Christianity. Doe expressed concern about his safety if he became baptized. A FPC member, Mrs. Slick, sent a text to Doe and advised him:

> "I will call my pastor today and let you know how we will PRIVATELY work this out. Nobody will find out. We will make sure that your secret is safe."

He was baptized by Miller in a non-televised service. The day after Doe's baptism, Appellees published notice of the baptism on the world wide web. When Doe traveled to Syria, he was kidnapped and held against his will with threats of being murdered for his conversion. Doe escaped, but alleged in so doing he killed one of his captors. Doe claimed that he suffered significant physical and emotional harm from his kidnapping and escape. Doe alleged that his captors learned of his conversion from the internet publication announcing he had been baptized at the FPC.

¶5 This matter comes before this Court on appeal from the district court's granting Appellees' Motion to Dismiss for Lack of Subject Matter Jurisdiction. This was Appellees' *second* attempt at a motion to dismiss.

First Motion to Dismiss for Failure to State a Claim

¶6 Appellees urged in their first motion, that "all actions related to the baptism of Plaintiff are protected from judicial scrutiny under the Free Exercise Clause of the First Amendment of the U.S. Constitution."[1] In denying the first motion to dismiss, the trial court noted that the Appellees' act of publishing Doe's baptism on the world wide web "did not arguably occur as part of the baptismal service, nor has it been established that the publication of names of those that are baptized are part of the FPC's *ecclesiastical* practices."[2] The district court also noted:

> While recordation of such names appears to be part of the FPC's standard procedure, publication of those names for the general public via the internet has not been established in the record as a required ecclesiastical practice of the FPC. ***Additionally, as the Plaintiff has never been a member of the FPC, it has not been established that the Plaintiff consented to submission to the ecclesiastical practices of the FPC beyond the actual baptism ceremony and service***.[3]

It is undisputed that Doe *did not become a member of the Appellee church*. Appellees' initial motion to dismiss was denied by the trial court, noting that dismissals are disfavored by this Court;[4] and such motions are to be denied if a plaintiff's allegations contain any set of facts sufficient to support a cognizable legal theory. *Rogers v. Quiktrip Corp.*, 2010 OK 3, 230 P.3d 855.

Second Motion to Dismiss for Lack of Subject Matter Jurisdiction

¶7 The appeal before this Court relates to the Second Motion to Dismiss, wherein Appellees asserted the district court lacked subject matter jurisdiction under 12 O.S. 2011, § 2012 (b) (1). Doe's response to this motion was titled, "Plaintiff's Response to Defendants' Motion for Summary Judgment".

¶8 Appellees' argument in the second motion to dismiss, consists of essentially two themes: (1) they disputed having knowledge of Doe's need for privacy or special considerations regarding baptism; and (2) the Presbyterian church doctrine mandates that information identifying those who have been baptized be made public. Appellees argued that publishing to the internet is so intertwined with the baptismal requirements as to render it part of the church doctrinal policy; therefore the church immunity doctrine, rooted in the guarantees of the First amendment, prohibits any secular court from making inquires into anything relating to baptism. Accordingly, Appellees asserted the district court lacked subject matter jurisdiction to hear Doe's claims.

¶9 Doe alleged that conversion from Islam to Christianity can carry the grave consequence of death, which is often done by beheading. Doe alleged that when he discussed his desire to convert to Christianity, he advised Appellees of the potentially fatal consequences he could incur for conversion. Doe also alleged that he repeatedly expressed to Appellees his need for a private and confidential baptism. Appellees also disputed they had knowledge of Doe's concerns regarding the potential dangers for a conversion. They further denied that Mrs. Slick's representation constituted notice to the Appellees or a promise of confidentiality. **Appellees submitted the following additional evidence for the trial court to resolve disputed facts:** (1) excerpts from the Presbyterian 'Book of Order,'[5] (2) affidavits from governing church officials, and (3) deposition testimony, in support of Appellees' assertion that church doctrine would have prevented FPC from honoring Doe's request.

¶10 Although Appellees' arguments and supporting exhibits are difficult to follow and lack

defining clarity on this issue, it is not necessary for this Court to determine the Presbyterian Church (U.S.A.) doctrinal positions relating to baptism. **The foundational inquiry is to discern exactly what Doe asked Appellees to do with respect to baptism, what Appellees agreed to perform for Doe, and ultimately the nature and extent of Doe's consent surrounding baptism.** These fundamental factual inquiries to Doe's claims for relief are ***clearly disputed***.

¶11 The trial court struggled with resolution of these very fact issues stating:

> This Court does not hint at deciding whether something is sacramental, but rather must make a ***factual determination*** about the sincere representation of the Church as far as the sacramental nature of the act of baptism. Again, this has been a tricky issue to consider.

Order on Hearing Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 7. (Emphasis added).

The district court also noted the following key points:

> By admission of both parties, ***he did not ask to become a full member and otherwise be bound further by the numerous rules of the church and its denomination.*** Therefore***, it could be assumed he may not have understood fully the requirements of baptism by the [FPC]. It is unclear to this Court if Plaintiff had been exposed to the detailed Constitution of the Presbyterian Church (U.S.A.), which includes a Book of Order.*** Still, his baptism placed him squarely under the rules the Defendants have had for baptism.

Order on Hearing Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 6. (Emphasis added).

¶12 **The findings made by the district court are pivotal to Doe's claims and inextricably intertwined with the issue of subject matter jurisdiction.** Under these circumstances, Appellees' motion to dismiss for lack of subject matter jurisdiction should be treated as a motion for summary judgment. *Osage Nation v. Board of Commissioners of Osage County,* 2017 OK 34, 394 P.3d 1224. The trial court erred when it dismissed this matter finding it lacked subject matter jurisdiction.

Oklahoma District Courts Have Unlimited Jurisdiction Over All Justiciable Matters Unless Otherwise Provided by Law

¶13 We have previously recognized that the "state judiciary's subject matter jurisdiction is derived from the State Constitution which gives Oklahoma courts unlimited original jurisdiction over all justiciable matters unless otherwise provided by law." *Reeds v. Walker,* 2006 OK 43, ¶ 11, 157 P.3d 100, 107. By contrast, federal courts are courts of limited jurisdiction, and it is presumed that jurisdiction is lacking absent an adequate showing by the party invoking the federal court's jurisdiction. Id. The central theme of Appellees' second motion to dismiss is that the church autonomy doctrine deprives the district court of subject matter jurisdiction asserting that Doe's claims are rooted in the ecclesiastical practices of the church.

Motion to Dismiss For Lack of Subject Matter Jurisdiction to Motion for Summary Judgment And Consideration of Evidence Outside the Pleadings

¶14 A party is generally allowed to submit evidence outside the pleadings when making a challenge to the courts subject matter jurisdiction under 12 O.S. 2011, §2012 (b) (1), without converting the pleading into a motion for summary judgment. *Osage Nation v. Bd. of Commissioners of Osage County and Osage Nation v. Osage County Bd. Of Adjustment*, 2017 OK 34, ¶ 64, 394 P.3d 1224, 1245. But, **when this additional disputed evidence relates to an element of the cause of action pled by a party, the motion to dismiss for lack of subject matter jurisdiction is converted to one for summary judgment.** *Id.* at ¶ 64.[6] Under the Oklahoma pleading code, when evidence outside of the pleadings is attached to a motion to dismiss for failure to state a claim pursuant to 12 O.S. 2011 §2012 (b) (6), it is treated as a motion for summary judgment. This Court has routinely held where there are material disputed facts in a motion for summary judgment, the controversy at issue is not ripe for summary adjudication.[7]

¶15 In the matter before us, the trial court specifically stated it made a ***factual determination*** about the Appellees' "sincere representation" of the governing church body's policies regarding the sacramental nature of baptism. The trial court goes so far to say that Doe "***may not have understood fully the requirements of baptism by [FPC]***." Of equal concern, the trial court also noted that it was unclear if Doe had

even been exposed to the requirements set out in the Book of Order, contained in the Constitution of the Presbyterian Church (U.S.A.). **These types of factual considerations are essential components to Doe's claims for relief. As such, his motion to dismiss for lack of subject matter jurisdiction should have been treated as one for summary judgment**. Because of the disputed material facts, this matter was not ripe for summary adjudication and for this reason alone, should be remanded back to the trial court.

Church Autonomy Doctrine History from United States Supreme Court and Oklahoma: Ecclesiastical Jurisdiction of a Church is Limited to Those Who Consent to Church Governance

¶16 It is a fundamental principle in this country that all people have the "full right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights." *Watson v. Jones*, 80 US 679, 728 (1871). In this early opinion, SCOTUS explained it is unquestioned that religious institutions have a protected right to create tribunals to resolve controverted questions of faith and for "the ecclesiastical government of all the individual members, congregations and officers within the general association. However, this **ecclesiastical jurisdiction is limited: those who "unite themselves to such a body, do so with the implied consent to this government**. . .". *Watson*, 80 U.S. at 729.[8]

¶17 *Watson* involved a property dispute that arose between different factions within a certain Presbyterian church by an appointed internal tribunal. The SCOTUS found that the members had consented to the authority of the church and moreover that the church was part of a larger body within the Presbyterian church. Each church consented to the governance of the larger church. Because all were members within the church and the larger church organizational body and had consented to being part of this religious organization, the SCOTUS said secular courts should defer to the decision of the internal governing structure. The *Watson* decision was decided on common law grounds without explicit reliance on the First Amendment.

¶18 However, the pronouncements of *Watson* were further refined in *Kedroff v. St. Nicholas Cathedral*, where SCOTUS recognized the authority and autonomy of the church to be free from the secular control in matters of church government, faith and doctrine under the guarantees of the First Amendment to the U.S. Constitution. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 115-116, 73 S.Ct. 143, 154-155, 97 L.Ed. 120. (1952). In this context, a church's freedom from secular control is solely based on membership in the church. Generally speaking, a church should be free from secular control and interference by state courts for claims against a church brought by a ***member who has agreed and consented to the ecclesiastical practices of the church***. *Id*. This protection from secular courts as outlined by SCOTUS is directly tied to church membership and the consent of the member to enter under the control of the church.

¶19 This Court has refused to extend this application to shield a church from tort liability for claims brought by a plaintiff that arose after church membership ceased. *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, 775 P.2d 768. We clearly recognized that a church may be shielded from tort liability for church sanctioned disciplinary actions taken against a "member." *Id.* However, this shield from liability evaporates for claims that arise after a member has separated from the church and is no longer a church member. *Guinn* made clear, the foundation for a church to be entitled to this level of protection is rooted in the pronouncements by the SCOTUS in *Watson* and *Kedroff,* outlining that ecclesiastical protection for a church arises solely from ***membership*** and the consent by the person to be governed by the church. Under *Guinn*, a church has no defense of ecclesiastical jurisdiction for a claim brought by a non-member like Doe, where it is ***undisputed***, as noted by the district court that "***by admission of both parties, [Doe] did not ask to become a full member and otherwise be bound further by the numerous rules of the church and its denomination***"[9]

¶20 We have very clearly outlined the profound constitutional underpinnings of this limited protection to a church. It is deeply rooted in our federal constitutional heritage. This Court recognized that "[w]hen people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization." *Guinn, supra* ¶ 21, 775 P.2d 774. We spe-

cifically recognized that the First Amendment allows individuals to "freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them." *Id.* The key to the defense raised by Appellees stems from an agreement that arises between the church and the individual who has ***freely chosen to join in membership and agree and consent*** to that church's ecclesiastical jurisdiction. When that agreement occurs, "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."[10]

¶21 In *Guinn*, we made clear that the church could defend its claims by the plaintiff for disciplinary actions brought against her while she was still a church member. However, we were unequivocal, "[j]ust as freedom to worship is protected by the First Amendment, so also is the liberty to recede from one's religious allegiance." *Id* at ¶ 27, 775 P.2d 776. We went further: "The First Amendment clearly safeguards the freedom to worship ***as well as the freedom not to worship***." *Id.* In the record before us and as clearly outlined by the district court, Doe without question ***never became a member.*** Doe specifically made clear that he was not becoming a member of the Appellee's church. The record is void of any evidence that Doe ever consented to Appellees' ecclesiastical jurisdiction.

¶22 In a later decision, we again made clear that "the church has no power over those who live outside of the spiritual community." *Hadnot v. Shaw*, 1992 OK 21, ¶ 17, 826 P.2d 978, 988. We again recognized that the First Amendment protects the "jurisdiction of an ecclesiastical tribunal by the Free Exercise Clause's shield, [but] it also serves to protect the rights of an individual to worship or not to worship according to one's conscience." *Id*. In *Hadnot* we again considered the potential tort liability that could be imposed on a church by a member for disciplinary action taken against the member. Like in *Guinn*, there was a demarcated time when membership ceased. This Court without reservation recognized and honored the ecclesiastical jurisdiction of the Church for acts that arose during the time of membership. We likewise acknowledged that this defense is wholly tied to consent by the individual to the church's judicature which arises ***solely from membership***.

¶23 The *Hadnot* court unquestionably recognized that "when the church-member relationship is severed through an *affirmative act either* of a parishioner's withdrawal or *of excommunication* by the ecclesiastical body, a different situation arises." *Hadnot, supra* ¶ 19, 826 P.2d 989. Once membership ceases, from withdrawal or excommunication, "***the absolute privilege from tort liability no longer attaches***. *Id*. In the matter before this Court, ***all parties agree***, as so forthrightly noted by the district court, ***Doe never consented to membership***. The foundational underpinning of ecclesiastical jurisdiction, ***membership***, is simply missing. The one requirement that was originally recognized by SCOTUS and provided the basis for this Court's recognition of this exception, is wholly absent in this matter.

The Church Autonomy Doctrine is an Affirmative Defense and does not deprive the Court of Subject Matter Jurisdiction

¶24 Further, the United States Supreme Court and the 10th Circuit Court of Appeals have recognized that the ministerial exception or the church autonomy doctrine, grounded in the Religion clause of the First Amendment, "*operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S 171, 132 S.Ct. 694, 181 L.Ed.2d 650, fn. 4 (Emphasis added). Prior to *Hosanna*, there was a conflict among the federal circuit courts over whether the ministerial exception and the church autonomy doctrine should be treated as a jurisdictional bar or as a defense on the merits.[11] The SCOTUS noted that "the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.'" *Id*. at fn. 4, (internal citation omitted).

¶25 All parties agree Doe simply asked for baptism, but never to become a member subject to the Appellees' ecclesiastical hierarchy. Without this consent, Doe's religious freedom to ***not subject himself to the Appellees' judicature*** must be respected and honored under the longstanding and clear constitutional decisions from our Court and the Supreme Court of the United States. What Doe consented to and what the FPC communicated to Doe must be determined as a foundational inquiry regarding Doe's claims.

¶26 It was error for the district court to conclude that it had no subject matter jurisdiction to hear Doe's claims on the basis of ecclesiastical jurisdiction. The record below is replete with contested issues of fact which must be

resolved by the trier of fact in an adversarial hearing below. This matter is hereby remanded back to the trial court for proceedings consistent with this decision.

DISTRICT COURT'S JUDGMENT REVERSED; AND MATTER REMANDED FOR FURTHER PROCEEDINGS

Gurich, V.C.J., Kauger, Watt, Edmondson, Colbert, JJ. - Concur

Combs, C.J. (by separate writing), Winchester, (by separate writing), Reif (by separate writing), Wyrick, JJ. - Dissent

COMBS, C.J., with whom Winchester and Reif, JJ., join, dissenting:

¶1 For the following reasons, I disagree with the majority's decision to grant rehearing in this matter and issue a substitute opinion: 1) the requirements for rehearing have not been met; 2) the trial court properly granted Appellees' motion to dismiss for lack of subject matter jurisdiction, the conversion of which was not required; and 3) John Doe's lack of membership in First Presbyterian Church U.S.A. of Tulsa, Oklahoma, does not bar application of the church autonomy doctrine in this matter. Respectfully, I must dissent.

I.
THE REQUIREMENTS FOR REHEARING HAVE NOT BEEN SATISFIED

¶2 Generally, this Court grants rehearing: 1) to correct an error or omission; 2) to address an unresolved jurisdictional issue; or 3) to clarify the opinion. *Tomahawk Resources, Inc. v. Craven,* 2005 OK 82, Supp. Op. ¶1, 130 P.3d 222. Rehearing is not for rearguing a question which has been previously presented and fully considered by this Court. *Craven*, 2005 OK 82, Supp. Op. at ¶1. *See Draper v. State,* 1980 OK 117, Supp. Op. ¶¶1-2, 621 P.2d 1142. Likewise, rehearing is not for presenting points which the losing party overlooked, misapprehended, or failed to fully address. *Craven*, 2005 OK 82, Supp Op. at ¶1.

¶3 Appellant's Petition for Rehearing does not seek to correct an unresolved jurisdictional issue or clarify the opinion, nor does it allege a concrete legal error distinct from this Court's overall interpretation and application of the church autonomy doctrine. All issues raised in the petition for rehearing, as well as those considered by the Court sua sponte in its substituted opinion on rehearing, were addressed by this Court's prior opinion in a manner that was not erroneous.

II.
THE CHURCH AUTONOMY DOCTRINE AND MINISTERIAL EXCEPTION ARE NOT SYNONYMOUS, AND THE FORMER CONTINUES TO ACT AS A BAR TO SUBJECT MATTER JURISDICTION NOTWITHSTANDING THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. E.E.O.C.*, 565 U.S. 171, 132 S.CT. 694, 181 L.ED.2D 650 (2012).

¶4 In its original opinion in this matter, this Court concluded that the church autonomy doctrine is properly considered as a challenge to the subject matter jurisdiction of the secular Courts. Subject matter jurisdiction is the power and authority of a court to hear and determine causes of the kind in question, and to grant the relief sought. *Okla. Dept. of Securities ex. rel. Faught v. Blair,* 2010 OK 16, ¶19, 231 P.3d 645; *In re A.N.O.*, 2004 OK 33, ¶9, 91 P.3d 646. As the majority correctly notes, the state judiciary's subject matter jurisdiction is derived from the Oklahoma Constitution which gives Oklahoma courts unlimited original jurisdiction over all justiciable matters unless otherwise provided by law. *Reeds v. Walker,* 2006 OK 43, ¶11, 157 P.3d 100. However, a bar to state court subject matter jurisdiction based on the church autonomy doctrine, rooted as it is in U.S. Const. amend. I, qualifies under "unless otherwise provided by law." *See Reeds,* 2006 OK 43 at ¶11; U.S. Const. art. VI, cl. 2.[1]

¶5 This Court's prior decisions concerning the church autonomy doctrine, including those relied upon by the majority in the substitute opinion, support the notion that disputes properly covered by the church autonomy doctrine are outside of the power of the civil courts to consider because the doctrine operates as a bar to subject matter jurisdiction. *See Bladen v. First Presbyterian Church of Sallisaw*, 1993 OK 105, ¶28, 857 P.2d 789 ("The type of counseling (or its absence) a particular sect or denomination chooses to select and provide for its adherents in response to a minister having an affair with a parishioner is a matter of ecclesiastical concern, and **not within the jurisdiction** of a civil court to prescribe.") (emphasis added); *Fowler v. Bailey,* 1992 OK 160, ¶7 844 P.2d 141 (recognizing the courts have no jurisdiction over

ecclesiastical matters and "ecclesiastical relief is beyond the power of a civil court."); *Hadnot v. Shaw,* 1992 OK 21, ¶28, 826 P.2d 978 ("When the target of civil litigation is simply the church's implementation of its valid ecclesiastical judicature, the Free Exercise Clause of the First Amendment will afford a shield from interference by secular inquest."); *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, ¶¶17-18, 775 P.2d 766 (doctrinal disputes properly covered by the church autonomy doctrine are outside the purview of civil judicature).

¶6 The majority relies upon the decision of the Supreme Court of the United States in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, for the proposition that the church autonomy doctrine operates as an affirmative defense to an otherwise cognizable claim and is therefore not a jurisdictional bar. 565 U.S. 171, 195 n.4, 132 S.Ct. 694, 709, 181 L. Ed.2d 650 (2012). However, the majority's reliance on *Hosanna-Tabor* is incorrect because it conflates the church autonomy doctrine with the ministerial exception, which are distinct in certain ways.[2]

¶7 In *Hosanna-Tabor*, the Court revisited what is often called the "ministerial exception," the idea that it is impermissible for the Courts to challenge a church's determination of who can act as its ministers, even when such causes of action would otherwise be permitted by federal law. 565 U.S. at 185, 132 S.Ct. at 704.[3] In footnote 4 of *Hosanna-Tabor,* the Court resolved a conflict between the United States Courts of Appeals concerning whether the ministerial exception serves as a jurisdictional bar or merely as an affirmative defense to an otherwise cognizable claim. 565 U.S. at 195 n.4, 132 S.Ct. at 709. However, in contrast to the majority's claims in the substituted opinion of this Court, the *Hosanna-Tabor* Court did not extend its determination on subject matter jurisdiction beyond the ministerial exception to the broader church autonomy doctrine. Specifically, the Supreme Court stated:

> A conflict has arisen in the Courts of Appeals over whether the **ministerial exception** is a jurisdictional bar or a defense on the merits.... District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the **ministerial exception.**

Hosanna-Tabor, 565 U.S. at 195 n.4, 132 S.Ct. at 709.

¶8 This distinction is important, and has been noted by several courts in other jurisdictions since *Hosanna-Tabor* was decided. For example, this issue was considered directly by the Supreme Court of Tennessee in *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, --- S.W.3d. ---, 2017 WL 4183065 (Tenn. 2017) (rehearing denied October 10, 2017). Recognizing the important differences between the church autonomy doctrine[4] and the ministerial exception, the Supreme Court of Tennessee determined *Hosanna-Tabor* was not applicable, and where the church autonomy doctrine applies it functions as a bar to subject matter jurisdiction. *Church of God in Christ, Inc*. at *7-8.

¶9 The court noted that, like the ministerial exception, the church autonomy doctrine derives from the Religion Clauses of the First Amendment to the United States Constitution but is far older. *Church of God in Christ, Inc*. at *7. *Compare Watson v. Jones,* 80 U.S. 679, 733, 20 L.Ed. 666 (1871) (recognizing the church autonomy doctrine in 1871) *with Hosanna-Tabor*, 565 U.S. at 188, 132 S.Ct. at 705 (noting the ministerial exception has been recognized since the passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.). The court's analysis is worth providing in detail:

> [T]he Supreme Court did not address the ecclesiastical abstention doctrine in *Hosanna-Tabor*.... The Supreme Court itself has described the ecclesiastical abstention doctrine in a manner that suggests it constitutes a subject matter jurisdictional bar, where applicable. Specifically, the Supreme Court stated that civil courts exercise "no jurisdiction" over a matter "strictly and purely ecclesiastical in its character." *Watson,* 80 U.S. at 733. The Supreme Court defined ecclesiastical disputes as matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Id*. at 733; see also *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 713-14, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976) (quoting *Watson*, 80 U.S. at 733).
>
> ....
>
> No language in *Hosanna-Tabor* alters the well-established principle stated in *Watson* that civil courts have no jurisdiction over

> matters purely ecclesiastical in character. In the absence of any express language overruling *Watson*, and given that *Hosanna-Tabor* cites *Watson* with approval, we decline to interpret *Hosanna-Tabor* as abrogating *Watson*'s characterization of the ecclesiastical abstention doctrine as a subject matter jurisdictional bar. *Hosanna-Tabor,* 565 U.S. at 186-87, 132 S.Ct. 694. We therefore hold that, until and unless the United States Supreme Court declares otherwise, the ecclesiastical abstention doctrine, where it applies, functions as a subject matter jurisdictional bar that precludes civil courts from adjudicating disputes that are "strictly and purely ecclesiastical" in character and which concern "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733. As such, the ecclesiastical abstention doctrine may be raised at any time as a basis for dismissal of a lawsuit.

Church of God in Christ, Inc. at *7-8.

¶10 Tennessee is not the only jurisdiction to reach this conclusion. *See Wipf v. Hutterville Hutterian Brethern, Inc.*, 808 N.W.2d 678, 682 (S.D. 2012) (citing *Hosanna-Tabor*, but holding church autonomy doctrine remained a question of subject matter jurisdiction); *Kirby v. Lexington Theological Seminary,* 426 S.W.3d 597, 608 (Ky. 2014) (holding the ministerial exception is an affirmative defense, but is often conflated with the church autonomy doctrine which remains a jurisdictional bar); *Flynn v. Estevez*, 221 So.3d 1241 (Fla. Dist. Ct. App. 2017) (holding the church autonomy doctrine continues to serve as a jurisdictional bar in Florida, while citing *Hosanna-Tabor* with regard to the ministerial exception).

¶11 Lower federal courts have also considered the same question. The United States District Court for the District of Columbia held in *Gregorio v. Hoover*, 238 F.Supp.3d 37, 45-46 (D. D.C. 2017) (emphasis added):

> Although both of these doctrines can warrant dismissal of claims on First Amendment grounds, the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Accordingly, defendants' ministerial exception arguments are properly analyzed under a Rule 12(b)(6), rather than a Rule 12(b)(1), lens. *See Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 171 (5th Cir. 2012). However, without definitive guidance otherwise from the Supreme Court or the D.C. Circuit, the Court will analyze defendants' arguments under the ecclesiastical abstention doctrine – which is "related" to but "distinct" from the ministerial exception, *see Kavanagh v. Zwilling*, 997 F.Supp.2d 241, 248 n.7 (S.D.N.Y. 2014) – under a Rule 12(b)(1) lens, as **that approach is consistent with the long-standing practice of treating questions of ecclesiastical entanglement as jurisdictional.** *See id*.

See also Kavanagh v. Zwilling, 997 F.Supp.2d 241, 248 n.7 (D. S.D. 2014) (holding the church autonomy doctrine's status as a jurisdictional bar or affirmative defense is unclear after *Hosanna-Tabor,* but the question has been considered jurisdictional by most district courts).

¶12 The majority's conflation of the broader and older church autonomy doctrine with the ministerial exception and determination that the church autonomy doctrine is an affirmative defense is incorrect in light of: 1) this Court's long-standing treatment of the church autonomy doctrine as a jurisdictional issue; 2) the limited nature of *Hosanna-Tabor*; 3) *Hosanna-Tabor's* failure to expressly overrule *Watson's* determination that the church autonomy doctrine implicates jurisdiction; and 4) decisions of numerous other jurisdictions noting the limitations of *Hosanna-Tabor.*

III.
APPELLEES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS PROPER AND SHOULD NOT BE TREATED AS A MOTION FOR SUMMARY JUDGMENT.

¶13 As discussed in Part II, supra, the application of the church autonomy doctrine implicates the jurisdiction of the civil courts. Appellees' motion to dismiss for lack of subject jurisdiction filed pursuant to 12 O.S. 2011 § 2012(B)(1) was therefore proper. The majority, however, incorrectly asserts it should be converted to a motion for summary judgment due to Appellees' attachment of evidentiary materials. As the majority correctly notes, attachment of evidentiary materials does not generally require conversion of a motion to dismiss for lack of jurisdiction into a motion for summary judgment. *Osage Nation v.*

Bd. of Comm'rs of Osage County and Osage Nation v. Osage County Bd. of Adjustment, 2017 OK 34, ¶64, 394 P.3d 1224; *State ex rel. Bd. of Regents of Univ. of Okla. v. Lucas*, 2013 OK 14, ¶¶9-10 nn.9-10, 297 P.3d 378. However, conversion may be required based on the purpose and nature of the evidentiary materials submitted: when the facts are used to show a lack of jurisdiction conversion is unnecessary, but when the facts are part of an element to the cause of action pled by a party or a defense thereto, the motion should be converted to one for summary judgment. *Osage Nation*, 2017 OK 34 at ¶64; *Lucas*, 2013 OK 14 at ¶9 n.9; *Powers v. Dist. Ct. of Tulsa County*, 2009 OK 91, ¶6, 227 P.3d 1060.[5]

¶14 As the United States Court of Appeals for the Tenth Circuit has explained: "When deciding whether jurisdiction is intertwined with the merits of a particular dispute, 'the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.'" *Davis ex rel. Davis v. U.S.*, 343 F.3d 1282, 1296 (10th Cir. 2003) (quoting *Sizova v. Nat'l Inst. Of Standards and Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002)). *See Lucas*, 2013 OK 14 at ¶8 ("Federal courts have explained that a jurisdictional issue is intertwined with the merits when the subject matter jurisdiction is dependent upon a [sic] issue that is also an element to the merits of the cause of action, and the adjudication of the jurisdictional issue necessarily adjudicates a cause of action or defense thereto").

¶15 Contrary to the majority's assertion, the situation this Court is presented with is the opposite of the rule noted above. The resolution of the jurisdictional question presented in this cause – whether a dispute over the performance of the sacrament of baptism constitutes a dispute about discipline, faith, internal organization, or ecclesiastical rule, custom, or law that would entangle the courts in violation of the church autonomy doctrine – is a threshold question that must be answered prior to any consideration of the merits of John Doe's claims that Appellees promised him they would perform the sacrament in a certain way and then failed to deliver. To put it differently, there is no way to resolve the merits of John Doe's claims without first delving into questions of what the sacrament of baptism requires within the Presbyterian faith and whether the requirements could have or should have been altered to accomodate John Doe's request. In contrast, the trial court's order and this Court's initial opinion properly considered the submitted evidentiary materials for the purpose of determining if the church autonomy doctrine should apply – i.e., is there a jurisdictional issue because John Doe's claims necessitate court involvement in matters of faith and doctrine.

¶16 The jurisdictional issue in this matter does not require resolution of John Doe's substantive claims against Appellees. Appellees' motion to dismiss for lack of subject matter jurisdiction should not be treated as a motion for summary judgment. *See Davis ex rel. Davis*, 343 F.3d at 1296; *Lucas*, 2013 OK 14 at ¶8.

IV.
JOHN DOE'S STATUS AS A NONMEMBER OF THE FIRST PRESBYTERIAN CHURCH OF U.S.A. OF TULSA, OKLAHOMA, DOES NOT PREVENT APPLICATION OF THE CHURCH AUTONOMY DOCTRINE IN THIS CAUSE.

¶17 John Doe is not a member of the First Presbyterian Church of U.S.A. of Tulsa, Oklahoma, and never intended to become one. The parties agree on this issue. The majority uses this point as the foundation for its determination that the church autonomy doctrine is inapplicable in this matter, and discusses a long line of cases noting voluntary membership in a religious community is a foundational underpinning of the jurisdiction of ecclesiastical tribunals. *See Watson v. Jones*, 80 U.S. 679, 20 L.Ed. 666 (1871); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 115-116, 73 S.Ct. 143, 154-55, 97 L.Ed. 120 (1952); *Hadnot v. Shaw*, 1992 OK 21, ¶17, 826 P.2d 978; *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, 775 P.2d 768.

¶18 Insofar as many religious autonomy cases – and most of the ones previously considered by this Court – concern the actions of church disciplinary authorities or tribunals against congregation members, the majority's point is valid. However, disputes between churches and members, especially in a disciplinary context, are only a subset of the situations in which the broader church autonomy doctrine may attach. Membership in a church is not the issue. The issue, especially where claims that sound in tort and breach of contract are concerned, is whether the underlying dispute is a secular one, capable of review by a civil court, or an ecclesiastical one about discipline, faith, internal organization, or ecclesiastical rule, custom or law. *Bell v. Presbyterian*

Church (U.S.A.), 126 F.3d 328, 331 (4th Cir. 1997). *See Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017). States are free to adopt various approaches for settling disputes involving religious entities, so long as they involve no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith. *Jones v. Wolf*, 443 U.S. 595, 602, 99 S.Ct. 3020, 3025, 61 L.Ed.2d 775. When it is not possible to resolve such a dispute without consideration of doctrinal matters, even a seemingly secular dispute, the church autonomy doctrine is necessarily implicated. *See Puri*, 844 F.3d at 1165-67 (noting a preference that neutral principles be used to enforce secular rights **where possible**). The protections of the church autonomy doctrine do not apply only to disputes between religious institutions and their members, because the focus of the doctrine is on the nature of the controversy and how entangled it is with doctrinal issues, not on the relationship between the parties.

¶19 Since this Court has never been faced with a situation quite like this before, the decisions of other courts are illustrative. For example, the Tenth Circuit Court of Appeals in *Bryce v. Episcopal Church in the Diocese of Colorado* correctly noted that the doctrine is broader than merely providing protection for the decisions of ecclesiastical tribunals, and pointedly applied it to claims made by a non-member:

> Plaintiff Smith contends that, unlike Bryce, she had no relationship with St. Aidan's and must be considered a third party who is not subject to internal church disciplinary procedures. This argument misses the mark.
>
> The church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely. **The applicability of the doctrine does not focus upon the relationship between the church and Rev. Smith.** It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members and non-members. Rev. Smith voluntarily attended the four meetings and voluntarily became part of St. Aidan's internal dialogue on homosexuality and Bryce's employment.

289 F.3d 648, 658 (10th Cir. 2002) (emphasis added).

¶20 At the state level, the Court of Appeals of Kansas considered the question of consent and the church autonomy doctrine in a situation with some marked similarities to this one. *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013). In *Purdum*, the court considered a defamation suit made by an ex-husband against his ex-wife for statements made as part of a petition for the religious annulment of their marriage. 301 P.3d at 720. In that cause, the question of consent to the defamatory statements, made as part of the religious process, was considered by the court, which noted:

> As stated previously, Harcsar's petition for annulment is inextricably part of the Archdiocesan Tribunal. Purdum's suit would require discovery and depositions of employees of the Archdiocese and would require the civil courts to interpret canon law concerning Harcsar's consent defense. For instance, the consent to submit to the discipline or authority of the church, sect, or congregation is one of contract; therefore, it is between the person who has given his or her consent and the religious body. *Rosicrucian Fellow. v. Rosicrucian Etc. Ch.*, 39 Cal.2d 121, 132, 245 P.2d 481 (1952). Determining whether Harcsar's consent defense is valid and proper would clearly involve the courts in questions of religious doctrine. Thus, adjudication of Harcsar's consent defense would entail judicial intrusion into a matter that the Catholic Church is entitled to decide, free from government intrusion. There is no doubt that the First Amendment offers no protection to religious worshipers who make slanderous or libelous statements outside ecclesiastical tribunals, but that is not the case here.
>
> Harcsar asked for an annulment in a church forum as part of a church-approved, church-defined, and church-controlled process where the church would determine the validity of the church's marriage sacrament.

Purdum, 301 P.3d at 727.

The court felt it necessary to emphasize the point even more strongly:

> Moreover, how can the civil courts – and perhaps a jury – consider Harcsar's consent defense without entangling itself in the details of the administration and procedures of the Archdiocese's annulment proceedings? Indeed, Harcsar's consent defense would require the civil courts to interpret canon law. This is the sort of entanglement that the Establishment Clause forbids.

Purdum, 301 P.3d at 727-28.

The end result was the *Purdum* court determining it lacked subject matter jurisdiction over the matter pursuant to the church autonomy doctrine. 301 P.3d at 728.

¶21 This Court is faced with a similar problem to that confronted by the *Purdum* court. Contrary to the majority's assertion, issues surrounding exactly what John Doe consented to as far as the details of baptism do not bar application of the church autonomy doctrine, but instead require its application. John Doe unquestionably asked Appellees to baptize him into the Christian faith. He went to the church of his own volition, driven by his own faith, and was baptized in front of the congregation. His civil claims all stem from Appellees' allegedly not performing this religious sacrament in the manner he asked for, with Appellees' responding that due to faith and doctrine they were unable to perform it any other way. There is no way for a civil court to resolve John Doe's claims without involving itself deeply and impermissibly in how John Doe's baptism was performed and should have been performed; a "church-approved, church-defined, and church-controlled process" that the church must determine the parameters of for reasons of faith.

CONCLUSION

¶22 The trial court properly granted Appellees' motion to dismiss for lack of subject matter jurisdiction, which does not require conversion into a motion for summary judgment. By requesting Appellees baptize him and submitting to the same, John Doe subjected himself to Appellees' requirements for baptism, regardless of his lack of membership in the congregation itself. The church autonomy doctrine operates to bar the civil courts from considering John Doe's claims because those claims all derive from how his baptism was performed and publicized. Any consideration of John Doe's claims on the merits would require the trial court to analyze and determine: 1) the requirements for baptism in the Presbyterian Church; 2) how those requirements applied specifically to John Doe's baptism; and 3) whether the Appellee's should be civilly liable to John Doe for not performing his baptism in the manner he desired, despite their assertions their faith would not permit another result. These questions are ones of faith and doctrine, and squarely within the protection of the church autonomy doctrine. *Kedroff*, 344 U.S. at 116; Bryce, 289 F.3d at 655. "A secular court may not ... adjudicate matters that necessarily require it to decide among competing interpretations of church doctrine, or other matters of an essentially ecclesiastical nature, even if they also touch upon secular rights." *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999).

¶23 The issues raised by the Petition for Rehearing, and the separate issues reexamined sua sponte by the majority in its substituted opinion on rehearing, were fully considered and dealt with in this Court's original opinion, in a manner that was not erroneous. The requirements for granting rehearing in this matter have not been satisfied. *See Craven,* 2005 OK 82 Supp. Op. at ¶1. Accordingly, I dissent to the decision to grant rehearing in this matter and to the substituted opinion of the majority.

WINCHESTER, J., dissenting:

¶1 I join the dissent by the Chief Justice, and add my own observations to this matter. The majority opinion holds that because the defendant church published the fact of the plaintiff's Christian baptism on the World Wide Web, the church is forced to continue to defend a lawsuit and potentially be held responsible for criminal acts, specifically, his alleged kidnapping and torture, committed by third parties in a foreign country against the plaintiff. Our courts recognize a well-established principle of the First Amendment of the Constitution of the United States that the right to free exercise of religion includes the right to be free from governmental intervention unless a contravening compelling state interest in regulation is shown to exist. *Whitehorn v. State,* 1977 OK CR 65, ¶ 23, 561 P.2d 539, 544 (1977), citing *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Certainly subjecting the defendants to state court action is governmental intervention.

¶2 I would deny the motion to rehear this case. The majority opinion opines that this motion to dismiss for lack of subject matter jurisdiction should be treated as one for summary judgment. Then the majority opinion should do so. The 10th Circuit has done just that in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010).

¶3 In the Appellant's Petition for Rehearing he alleges that all of the defendants were aware of the danger of his being murdered by extremists and pledged strict confidentiality; that the appellees were aware the appellant was traveling to an ISIS stronghold in Syria immediately

after his baptism; that he was assured that his baptism would be private; and that the appellees chose to publicize the appellant's baptism through the World Wide Web, ensuring its greatest possible distribution and publication.

¶4 Mr. Doe searched out this church, and requested to be baptized, but insisted he would not be a member of that church. So, the baptism was done as a favor to Mr. Doe. There appears to be no direct legal benefit to the church. The act was simply a voluntary act of compassion by the minister. I fail to see how a breach of contract could occur when there is no consideration. 12 O.S.2011, § 2(4).

¶5 Additionally, I do not see how a tort could have occurred, when the plaintiff had a clear opportunity to avoid a risk that he knew was present. There is no contest of the fact he knew going back to Syria after becoming a Christian would be a great risk to him. He voluntarily exposed himself to the direct cause of his injury with the knowledge and appreciation of the danger and the risk involved.

¶6 Accordingly, Mr. Doe's motion for rehearing should be denied.

REIF, J., dissenting

¶1 John Doe seeks to hold the Presbyterian Church liable for harm that was perpetrated against him by the independent acts of third parties who oppose Christian teachings. He contends the Church is liable because it posted news of his baptism on the internet when he did not want that information disclosed. To be sure, the law does protect and enforce the confidentiality of religious communications "made privately and not intended for further disclosure." 12 O.S.2011, § 2505. However, John Doe's baptism was an act, not a communication, and sharing news of this act is part of the religious doctrine of the Presbyterian Church. If a societal need does exist to keep conversion to a religious faith confidential, it would be more appropriate for the Legislature to address this subject by general legislation like § 2505, rather than for this Court to create a new cause of action in response to extraordinary facts.

WATT, J.:

1. *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014.

2. *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014. (Emphasis added).

3. *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014, (Emphasis added).

4. *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, filed October 24, 2014, denying the Appellees' motion the court stated: "In the present case, the acts by the Defendants that are central to the Plaintiff's claims did not arguably occur as part of the baptismal service, nor has it been established that the publication of names of those that are baptized are part of FPC's ecclesiastical practices. While recordation of such names appears to be part of the FPC's standard procedure, publication of those names for the general public via the internet has not been established in the record as a required ecclesiastical practice of the FPC. Additionally, as the Plaintiff has never been a member of the FPC, it has not been established that the Plaintiff consented to submission to the ecclesiastical practices of the FPC beyond the actual baptism ceremony and service."

5. The Book of Order is a governing document of the Presbyterian Church (U.S.A.), and it is designated as Part 2 of its governing Constitution.

6. Also see, *Pringle v. U.S.*, 208 F.3d 1220, 1223, (10th Cir., 2000), *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, (Miss., 2005), when the resolution of the jurisdictional question requires resolution of an aspect of the substantive claim, courts are required to convert a motion to dismiss for subject matter jurisdiction into a motion to dismiss for failure to state a claim or a motion for summary judgment.

7. *Malson v. Palmer Broadcasting*, 1997 OK 42 ¶ 11, 936 P.2d 940, 942.

8. The Court specifically stated:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.
>
> Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. *Watson*, 80 U.S. at 729.

9. Order on Hearing Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 6. (Emphasis added).

10. *Guinn, supra* ¶ 21, 775 P.2d 774, citing *Watson v. Jones, supra* 80 U.S. at 728-729.

11. See, *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (2002), finding defendant's argument that the church autonomy doctrine deprived the court of subject matter jurisdiction under 12 (b) (1) is more appropriately treated as a challenge to the sufficiency of the plaintiffs' claims, under 12 (b) (6). Because the defendants in *Bryce* presented outside evidence, the motion to dismiss for failure to state a claim was instead treated as a motion for summary judgment. See also, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (2010), noting that the ministerial exception, much like the broader church autonomy doctrine may bar the success of a plaintiff's claims but neither doctrine affects the court's jurisdiction to hear the claims.

COMBS, C.J., with whom Winchester and Reif, JJ., join, dissenting:

1. U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The distinction between the two concepts was not emphasized in this Court's original opinion in this cause because the present matter concerns only the church autonomy doctrine, the older and broader of the two. *See discussion, infra*.

3. Hence the use of the term "exception." The ministerial exception, specifically, is an exception to the application of legislation like the Civil Rights Act of 1964 and other employment discrimination laws. *Hosanna-Tabor*, 565 U.S. at 188, 132 S.Ct. at 705.

4. The Supreme Court of Tennessee uses the term "ecclesiastical abstention doctrine," but notes it is also commonly known as the church autonomy doctrine. *Church of God in Christ, Inc.* at *7.

5. As explained in Section II, *supra*, the church autonomy doctrine is properly considered as a jurisdictional challenge and not as a defense to a plaintiff's claims, in contrast to the ministerial exception.

2017 OK 107

HONORABLE SODY CLEMENTS, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; LT. GENERAL (Ret.) RICHARD A. BURPEE, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; JAMES PROCTOR, an Individual and Kansas Resident on behalf of himself and others similarly situated; RODD A. MOESEL, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; RAY H. POTTS, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; BOB A. RICKS, an Individual and Oklahoma resident on behalf of himself and others similarly situated, Appellants/ Applicants v. SOUTHWESTERN BELL TELEPHONE d/b/a AT&T OKLAHOMA; STATE ex rel. OKLAHOMA CORPORATION COMMISSION, Appellees.

No. 115,334. December 19, 2017
As Corrected December 20, 2017

APPEAL FROM THE OKLAHOMA CORPORATION COMMISSION

¶0 Appellants appeal from the Oklahoma Corporation Commission's summary dismissal of their Application to reopen an Order entered in 1989 by the Oklahoma Corporation Commission.

AFFIRMED

Russell J. Walker, Oklahoma City, Oklahoma, for Appellant,

Andrew J. Waldron, Oklahoma City, Oklahoma, for Appellant,

Curtis M. Long, Tulsa, Oklahoma, for Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee,

Clyde A. Muchmore, Oklahoma City, Oklahoma, for Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee,

Richard C. Ford, Oklahoma City, Oklahoma, for Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee,

Melanie Wilson Rughani, Oklahoma City, Oklahoma, for Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, Appellee,

Robert J. Campbell, Jr., Oklahoma City, Oklahoma, for State ex rel. Oklahoma Corporation Commission, Appellee,

Abby Dillsaver, General Counsel for the Attorney General of the State of Oklahoma, Mike Hunter,

Dara M. Derryberry, Deputy Attorney General for the Attorney General of the State of Oklahoma, Mike Hunter,

Jared B. Haines, Assistant Attorney General for the Attorney General of the State of Oklahoma, Mike Hunter.

OPINION

WATT, J.:

¶1 Appellants[1] ("Customers") request this Court to reverse the Oklahoma Corporation Commission's ("Commission") Order Dismissing Cause[2] and to remand the underlying application to the Commission for a full hearing. Appellants are a group of six different individuals who were customers of the Defendant, Southwestern Bell Telephone d/b/a AT&T Oklahoma ("SWBT") during the periods of time relevant to the underlying proceeding.[3]

¶2 Customers appeal from the Commission's dismissal of their "Application to Vacate or Modify Order 341630 and Redetermine Issues."[4]. In their Application, Customers requested the Commission vacate or modify Order No. 341630 entered September 20, 1989 in Cause No. PUD 260, ("1989 Order") ***over 28 years ago*** and reconsider certain issues raised therein. Customers urged the subject Order was tainted when entered because one Oklahoma Corporation Commissioner, Robert E. Hopkins ("Hopkins") accepted a bribe in exchange for his vote to approve the 1989 Order.

¶3 SWBT filed a Motion to Dismiss asking the Commission to summarily dismiss Customers' application. SWBT argued that Customers lacked any legal basis for the requested

relief as this matter had been reconsidered and reaffirmed by the Commission on at least two separate times and presented multiple times to this Court.

¶4 The two issues before this Court with respect to the Commission's Order Dismissing Cause are simply: (1) whether the Commission acted within its authority, and (2) whether the findings and conclusions reflected in this Order are supported by the law and substantial evidence? We answer both questions affirmatively and uphold the decision by the Commission.

STANDARD OF REVIEW

¶5 Any person aggrieved by any action or order by the Commission "affecting the rates, charges, services, practices, rules or regulations of public utilities," may appeal the decision. Any such appeal ***shall be*** to the Oklahoma Supreme Court only. Okla. Const. art. IX, § 20. Under the state Constitution, Customers are entitled to a limited *judicial* review 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." *Id*.

FACTS AND PROCEDURAL HISTORY

¶6 Customers filed their Application on September 14, 2015, asking the Commission to vacate or modify PUD 260 ***entered in 1989*** in order "to redress the proven bribery and corruption perpetrated by Southwestern Bell Telephone Company [SWBT] that occurred in 1989 in relation to Oklahoma Corporation Commission's . . . Cause No. PUD (Public Utility Docket) 860000260 ("PUD 260")."[6] More than twenty-six (26) years ago, the then acting public utility division director for the Commission, initiated PUD 260 to determine how SWBT should distribute or utilize SWBT's surplus cash created by federal corporate tax reforms. Two of the three Commissioners approved the 1989 Order wherein it was determined that SWBT surplus revenue should not be refunded to its ratepayers. The 1989 Order outlined how SWBT was to use these funds which included converting multi-party lines to single-party service, updating a number of the SWBT's central offices as well as other provisions. Commissioner Anthony ("Anthony") did not vote in favor of the 1989 Order.

¶7 The 1989 Order was appealed to this Court urging that the Commission's Order was not supported by sufficient evidence and urged the surplus created by the tax changes should be treated as an overcharge under 17 O.S. 1981, § 121 and therefore required a refund to ratepayers. *Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305. We held that the surplus funds were solely created by federal tax changes and not as a result of an overcharge by SWBT and thus "§ 121 affords no authority for requiring the refund sought by AARP and the State." *Id*. ¶ 11, 825 P.2d at 1311. Although portions of the 1989 Order were remanded back to the Commission for further proceedings, we affirmed the order in part as discussed herein.

¶8 Commissioner Hopkins ("Hopkins"), was one of the two commissioners who voted in favor of the 1989 Order. Several years after the adoption of this Order, the public learned that Hopkins had accepted a bribe in exchange for assuring his favorable vote to the 1989 Order. Hopkins was indicted in 1993 and then later convicted for his criminal act.[6] Anthony announced in 1992 that he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and of SWBT. *Southwestern Bell Telephone Co. v. Oklahoma Corp. Comm.*, 1994 OK 38, ¶ 2, 873 P.2d 1001, 1003.

¶9 Following Hopkins' conviction, in March 1997, Anthony, *pro se*, filed a document titled "Suggestion to the Court," advising this Court of the criminal misconduct of Hopkins and asked this Court to recall its mandate issued in *Henry v. Southwestern Bell Telephone Co.*, 1991 OK 134, 825 P.2d 1305. This Court issued an Order wherein we concluded that the document filed by Anthony "[did] not invoke either the appellate or original jurisdiction of the Supreme Court."[7]

¶10 After this Court's Order, this matter was next considered on remand to the Commission in light of Hopkins accepting a bribe. On remand in 1997, the Commission issued an Order, ("Cause 260 Remand Order") and held that "rehearing of the entire cause [by the Commission] is neither warranted nor in the public interest . . . . [and t]here is no benefit to reopening a ten-year old case."[8] The Commission also noted that this Court had already finally determined that the surplus monies were not overcharges under 17 O.S. 1981 § 121, thus, ratepayers were not entitled to a refund as a matter of law. The Commission also noted that the evidence contained in PUD 260 reflected that the 1989 Order reflected "a position

originally proposed by Staff and there was no showing of wrongdoing on behalf of Staff."[9] The Commission concluded that the matter should be closed in its entirety. ***The Cause 260 Remand Order was not appealed.***

¶11 In January 2010, Anthony again filed a "Suggestion for *Sua Sponte* Recall of Mandate, Vacation of Opinion, and Remand of Cause to the Oklahoma Corporation Commission for Want of Appellate Jurisdiction with Brief in Support of Suggested Actions."[10] This Court noted that Anthony's "Suggestion for Sua Sponte Recall" was "substantially similar to the 'Suggestion' filed by Commissioner Anthony on March 27, 1997."[11] We noted in this Order that Anthony had "failed to advance any new factual or legal argument which would require a different result."[12] We also found that the 2010 "Suggestion" was barred by issue and claim preclusion.

LEGAL ANALYSIS

¶12 The Commission's Order granting SWBT's Motion to Dismiss the Customers' application must be upheld if: (1) the Commission has "regularly pursued its authority,"[13] and (2) the findings and conclusions of the Commission are sustained by the law and substantial evidence.[14] We find that the Commission acted within its authority in hearing and granting this Motion to Dismiss.[15] We also find the Commission's Order is supported by overwhelming evidence and law.

¶13 The Order from which Customers appeal contains ***nineteen pages*** meticulously outlining the long and protracted history of PUD 260, the 1989 Order and the crime committed by Hopkins. Anthony's tireless dissent to the 1989 Order is also well documented as are his repeated efforts to overturn it. The Commission carefully noted that prior to the adoption of the 1989 Order, the issues in PUD 260 were heard by a Hearing Officer based on testimony from Commission Staff and other evidence. The Hearing Officer issued a report that with few exceptions, was then incorporated into and became the 1989 Order.[16] Although Hopkins was found to have accepted a bribe in connection with the 1989 Order, there was no finding at anytime that the Hearing Officer or Commission staff ever engaged in any wrongdoing.

¶14 The Order Dismissing Cause also discussed in detail the Cause 260 Remand Order from 1997, noting that in 1997, the Commission found it had no jurisdiction over the Cause 260 Order and that rehearing was unwarranted and not in the public interest. The Commission also determined that it had no jurisdiction to modify or amend the issues that had already been affirmed by the Oklahoma Supreme Court, ie. that the surplus funds held by SWBT were not an overcharge within the meaning of 17 O.S. §121 and therefore ratepayers were not entitled to a mandatory refund.[17] In reviewing this 1997 history, the Commission stated in its Order Dismissing Cause:

> 28. The Cause 260 Remand Order, entered in 1997, provided closure to the 260 Cause, ordering "that the entire cause should not be reopened and that no further hearings, proceedings or orders are necessary with respect to this Cause." (citation omitted) This order was approved ***almost five years after the revelation of the bribery – and by two new Commissioners***.[18]

¶15 Customers urged that the dismissal of their application to reopen and vacate the 1989 Order involves a *constitutional* violation and thus requires a higher standard of review requiring this Court to "exercise its own independent judgment as to both the law and the facts." Okla. Const. art. IX, §20. We find Customers' assertion without merit. But even so, a full review and consideration of all facts in this matter and the law leads us to the same result.

¶16 The Commission is created by Article IX of our state Constitution and consists of three members elected by the people at a general election. A concurrence by a majority is required to exercise the authority of the state to "supervise, regulate and control public service corporations, and to that end it has been clothed with legislative, executive and judicial powers." *Southwestern Bell Telephone Co. v. Corp. Comm.*, 1994 OK 38, ¶ 5, 873 P.2d 1001, 1004.

¶17 The issues raised by Customers have already been considered on two separate occasions and ***the majority of the Commissioners*** concluded each time that it had no authority to grant the requested relief and it was not in the public's interest to reopen the 1989 matter. The Oklahoma Constitution granted the authority to the ***concurrence*** of Commissioners. Such decision shall stand if supported by the law and substantial evidence, both of which we find are satisfied in the matter before us.

¶18 Furthermore, issue preclusion bars this Court from reconsidering matters already litigated. We previously determined in *Henry,*

supra that ratepayers were not entitled as a matter of law to a mandatory refund of the surplus money held by SWBT created from federal tax changes. Customers sought a refund in its Application, the same relief previously denied by the Commission and this Court. This issue has long ago been decided and as such is barred for redetermination as a matter of law. *State of Okla. ex rel. Dep't of Transp. v. Little*, 2004 OK 74, 100 P.3d 707, *Nealis v. Baird*, 1999 OK 98, 996 P.2d 458.

¶19 By our state Constitutional directive, this Court is bound to uphold the findings and conclusion of the Commission where they are "sustained by the law and substantial evidence." Okla. Const. art. IX. §20. We find the Commission's Order Dismissing Cause contains overwhelming evidence and legal authority supporting its Order. The Order Dismissing Cause, Order No. 655899 is hereby affirmed.

AFFIRMED: ORDER 655899, BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

Kauger, Watt, Winchester, Edmondson, Colbert, Reif, Wyrick, JJ. - Concur

Gurich, V.C.J. - Concur by reason of *stare decisis*

Combs, C.J. - Dissent

WATT, J.:

1. Application to Vacate or Modify Order 341630 and Redetermine Issues, Cause PUD No. 201500344, filed September 14, 2015, Corporation Commission of the State of Oklahoma, by Applicants, Honorable Sody Clements, an Individual and Oklahoma Resident on behalf of herself and others similarly situated; Lt. General (Ret.) Richard a. Burpee, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; James Proctor, an Individual and Kansas Resident on behalf of himself and others similarly situated; Rodd A. Moesel, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; Ray H. Potts, an Individual and Oklahoma Resident on behalf of himself and others similarly situated; Bob A. Ricks, an Individual and Oklahoma Resident on behalf of himself and others similarly situated.

2. Order Dismissing Cause, September 7, 2016, Before the Corporation Commission of Oklahoma, Cause No. PUD 201500344, Order No. 655899.

3. Various motions have been filed by parties and interested parties to this litigation as follows: Appellants' Motion for Evidentiary Hearing and Discovery Pursuant to Oklahoma Constitution, Article 9, Section 22, Appellee Southwestern Bell Telephone Company d/b/s AT&T Oklahoma's Motion to Strike Extraneous Items from Appellate Record, and Application of Commissioner Bob Anthony, Pro se, to File Amicus Curiae Brief. These motions will not be issued a separate Order as all issues are resolved by this Opinion.

4. Application to Vacate or Modify Order 341630 and Redetermine Issues, September 14, 2015, Before the Corporation Commission of Oklahoma, Cause No. PUD 201500344.

5. Application to Vacate or Modify Order 341630 and Redetermine Issues, before the Corporation Commission of Oklahoma, Cause No. PUD 201500344. This Application related to the issuance of the 1989 Order in Cause PUD 260 matters arising from Cause PUD 260, culminating in the 1989 Order.

6. See, *United States v. Hopkins*, 77 F.3d (1996), unpublished decision; Robert E. "Bob" Hopkins was convicted for accepting a bribe while serving as a commissioner on the Oklahoma Corporation Commission. Hopkins was tried jointly with co-defendant William Anderson, an attorney who represented Southwestern Bell in Corporation Commission matters. Mr. Anderson was charged with paying the bribe.

7. Order, May 19, 1997, *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

8. Record on Appeal, pps. 2229-2230, Cause 260 Remand Order at 8-9, ¶ 7.

9. Record on Appeal, pps. 22229-2230, Cause 260 Remand Order at 8-9, ¶ 7.

10. *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

11. *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

12. *State of Oklahoma ex rel., Robert Henry, Attorney General, and the American Association of Retired Persons, Appellants v. Southwestern Bell Telephone Company, Appellees/Cross-Appellant, and The Oklahoma Corporation Commission*, In the Supreme Court of Oklahoma, No. 74,194.

13. Okla. Const. art. IX, §20

14. Okla. Const. art. IX, §20

15. Okla. Const. art. IX, §20

16. Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344, Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1509.

17. Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344, Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1516.

18. Record on Appeal, pps. 1507-1525, Cause No. PUD 2015000344, Order No. 655899, Order Dismissing Cause, September 7, 2016, p. 1516.

2017 OK 108

IN THE MATTER OF THE PETITION OF UNIVERSITY HOSPITALS AUTHORITY, an Agency of the State of Oklahoma, and UNIVERSITY HOSPITALS TRUST, a public trust, Petitioners.

No. 116,501. December 28, 2017

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY JUDGMENT

¶0 The University Hospitals Authority and University Hospitals Trust request this Court to assume original jurisdiction and enter a declaratory judgment, pursuant to 63 O.S. 2011 § 3225(B)(1), finding certain proposed agreements regarding the lease and operation of the University Hospitals are valid. We accepted original jurisdiction to determine the agreements' validity.

JURISDICTION ASSUMED AND RELIEF GRANTED PER OPINION

V. Glenn Coffee, Cara Rodriguez, Denise Lawson, Glenn Coffee & Associates, PLLC, Oklahoma City, Oklahoma, for Petitioners.

WINCHESTER, J.

FACTS AND PROCEDURAL BACKGROUND

¶1 This original action brought by Petitioners, University Hospitals Authority ("Authority") and University Hospitals Trust ("Trust"), seeks approval by this Court, in conformance with 63 O.S. 2011 § 3225,[1] of the validity of proposed agreements regarding the lease and operation of the University Hospitals.[2] Submitted with Petitioners' Application, the specific agreements to be approved include: (1) the First Amended and Restated Agreement and Plan of Merger dated October 11, 2017, between Oklahoma Holding Company, LLC, Hospital Development Properties, Inc., HCA Health Services of Oklahoma, Inc., the Trust, OU Medicine, Inc. ("OUMI"), and HTI Hospital Holdings, Inc.; (2) the Joint Operating Agreement ("JOA") between the Trust and OUMI; (3) the Sublease Agreement between the Trust and OUMI; and (4) all other documents executed or delivered pursuant to the proposed lease and operations of the University Hospitals.

¶2 In 1993, through the University Hospitals Authority Act (the "Act"), 63 O.S. 2011 §§ 3201 et seq., the Legislature transferred jurisdiction, supervision, management, and control of the University Hospitals from the Department of Human Services to the University Hospitals Authority. The Legislature amended the Act in 1997 to authorize the creation of a public trust to be called the University Hospitals Trust. *See* 63 O.S. 2011 § 3224. Under the terms of the Act, the Legislature found that the needs of Oklahoma citizens would best be served if the Authority were "charged with the mission of operating or leasing" the hospitals. 63 O.S. 2011 § 3203(B). However, before any agreement regarding the lease and operations of the University Hospitals could become effective, such agreement would need to be approved by the Contingency Review Board, the Attorney General, and this Court. *See* 63 O.S. 2011 §§ 3226(A) (provides for review and approval by the Attorney General) and 3225 (provides for review and approval by the Contingency Review Board and this Court.). In 1997, this Court first considered, with approval, contractual agreements for the lease (and sublease) and operation of the University Hospitals between the Authority and the Trust and HCA Health Services of Oklahoma, Inc. ("HCA"), a for-profit, private corporation that operated the hospitals together with its own healthcare facilities. *See Petition of University Hospitals Authority,* 1997 OK 162, 953 P.2d 314 ("University Hospitals I").

TODAY'S TRANSACTION

¶3 Today, the Authority and Trust have determined that a new arrangement is necessary and desirable to provide effective, efficient administration and to "ensure a dependable source of funding for continuing high quality and comprehensive healthcare services through hospitals and other medical facilities that meet the needs of indigent and nonindigent patients, that serve as teaching and training facilities for medical students, residents, fellows and other trainees enrolled at the University of Oklahoma and that provide a site for conducting medical and biomedical research by faculty members of the University of Oklahoma Health Sciences Center, including but not limited to constructing modern facilities." Pursuant to the Act, both the Attorney General and the Contingency Review Board provided their review and approval of the matter proposed herein. The Petitioners filed their Application to Assume Original Jurisdiction and Petition for Declaratory Judgment with this Court on October 31, 2017, and following the Petitioners' statutory fulfillment of the notice publication requirements, no protests to this process were filed with this Court.

¶4 The Petitioners submitted to the Court contractual agreements for the termination of the 1997 transaction approved by the Court in *University Hospitals I* and the implementation of a merger agreement between HCA, the Trust, and a newly formed, nonprofit corporation, OUMI (the "Transaction"). Pursuant to the Transaction, OUMI will pay HCA $750 million and will survive the merger as the new operator of the hospitals with the Trust performing its statutorily required management oversight. As it did with HCA, the University of Oklahoma Health Sciences Center will continue to contract with the new entity to provide clinical education, research, administrative, and other services, as well as facility leases.

DISCUSSION

¶5 This Court has exclusive, original jurisdiction to approve the validity of transactions entered into under the Act and to grant declaratory relief. 63 O.S. 2011 § 3225(B)(3); *Petition of University Hospitals Authority,* 1997 OK 162, ¶ 25, 953 P.2d 314, 321. The Petitioners have complied with the Act, have provided the requisite public notice of the pending agreements, and no

protest of said agreements was made. We find this matter properly invokes our jurisdiction.

¶6 After review of the materials in the record before us, we find, as did the Attorney General and the Contingency Review Board, the proposed Transaction is not in discord with the Act or Oklahoma law. Just as in *University Hospitals I*, "it is impossible to say what circumstances not evident from the record before us today might arise at some future time that would expose a critical infirmity" in the Transaction. 1997 OK 162, ¶ 25, 953 P.2d at 321. Nevertheless, based on the record presented, the parties to the Transaction may proceed as directed by the Act.

JURISDICTION ASSUMED AND RELIEF GRANTED PER OPINION

¶7 Gurich, V.C.J., Kauger, Watt, Winchester, Edmondson, JJ., concur.

¶8 Reif, J., not participating.

¶9 Combs, C.J., Colbert, Wyrick, JJ., recused.

1. 63 O.S. 2011 § 3225 provides:
A. Contingent upon the creation of the University Hospitals Trust as provided in Section 3224 of this title, the Trust, prior to acceptance, shall submit to the Contingency Review Board for review the proposed agreement regarding the lease and operations of the University Hospitals to any entity authorized to transact business in the state and an independent statement as to the fairness of said proposed agreement for the State of Oklahoma. The Contingency Review Board shall upon receipt of the proposed agreement meet within fifteen (15) business days to review the proposed agreement; and unless the Contingency Review Board disapproves the proposed agreement, the agreement may be executed but no lease of the University Hospitals shall become effective until after Supreme Court approval pursuant to subsection B of this section.
B. 1. If a proposed agreement is not disapproved by the Contingency Review Board pursuant to subsection A of this section, the University Hospitals Authority and University Hospitals Trust, within thirty (30) calendar days after the time for Contingency Review Board action has expired, may file a petition with the Supreme Court of Oklahoma for a declaratory judgement [sic] determining the validity of the proposed agreement. The review of the Court shall be based upon the exercise of any of the powers, rights, privileges, and functions conferred upon the authority or the University Hospitals Trust, as applicable, under the University Hospitals Authority Act and Oklahoma laws. Exclusive original jurisdiction is conferred upon the Supreme Court to hear and determine such petitions. The Supreme Court shall give such petitions precedence over other business of the Court except habeas corpus proceedings.
2. Notice of the hearing of such a petition shall be given by a notice published in a newspaper of general circulation in this state that on a day specified the Supreme Court will hear the petition to approve the proposed agreement and enter a declaratory judgment. The notice shall be published one time not less than ten (10) days prior the date specified for the hearing. The notice shall inform property owners, taxpayers, citizens and all persons having or claiming any right, title, or interest in the proposed agreement or properties or funds to be affected by the implementation of the proposed agreement, or affected in any way thereby, that they may file protests against the approval of the proposed agreement, and be present at the hearing to contest the legality of the proposed agreement. The hearing may be adjourned from time to time at the discretion of the Court.
3. If the Court is satisfied that the proposed agreement is in accordance with the University Hospitals Authority Act and Oklahoma laws, the Court shall enter a declaratory judgment approving and declaring the proposed agreement to be valid and conclusive as the Authority, the Trust, and all other parties to the proposed agreement; and, upon petition of the Authority, shall issue an order permanently enjoining all persons described in the notice required by this subsection from thereafter instituting any action or proceeding contesting the validity of the proposed agreement. A declaratory judgment rendered pursuant to this subsection shall have force and effect of a final judgment or decree and shall be incontestable in any court in this state.
4. As used in the University Hospitals Authority Act, "proposed agreement" means one or more contracts regarding the lease and operations of the University Hospitals and all other agreements contemplated by or referred to in the contract regarding such lease and operations.

2. The "University Hospitals" as identified in 63 O.S. 2011 § 3202(1) include Oklahoma Memorial Hospital (renamed "University Hospital"), the Children's Hospital of Oklahoma, the Child Study Center, and the O'Donoghue Rehabilitation Institute. The only property involved in these transactions is what was identified as "University Hospital" in the statutes, but now is known as Children's Hospital at OU Medical Center. The former Children's Hospital of Oklahoma, referenced in § 3201(1), the Child Study Center, and the O'Donoghue Rehabilitation Institute are not part of the transactions for which the Authority and the Trust seek this Court's approval.

January

15 **OBA Closed** – Martin Luther King Jr. Day

17 **OBA Indian Law Section meeting;** 10 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

18 **OBA Master Lawyers Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Ronald Main 918-742-1990

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

23 **OBA Board of Editors;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melissa DeLacerda 405-624-8383

25 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358

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

27 **OBA Legislative Reading Day;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

29 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Rob Ramana 405-524-9871

February

1 **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

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

6 **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

8 **OBA High School Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judy Spencer 405-755-1066

9 **OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Godfrey 405-525-6671 or Brady Henderson 405-524-8511

14 **OBA Women in Law Committee meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Cathy M. Christensen 405-752-5565 or Deborah A. Reheard 918-689-9281

16 **OBA Board of Governors meeting;** 8:30 a.m.; Oklahoma Bar Center; Oklahoma City; Contact John Morris Williams 405-416-7000

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

19 **OBA Closed** – Presidents Day

21 **OBA Indian Law Section meeting;** 10 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

22 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358


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2017 OK CIV APP 68

STATE OF OKLAHOMA, Plaintiff/Appellant, vs. DANIEL LEE SHADE, JR., Defendant/Appellee.

Case No. 115,523. November 16, 2017

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE TRACY SCHUMACHER, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

John Justin Wolf, ASSISTANT GENERAL COUNSEL, OKLAHOMA STATE BUREAU OF INVESTIGATION, Oklahoma City, Oklahoma, for Plaintiff/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 The Oklahoma State Bureau of Investigation (OSBI) seeks review of the trial court's order granting the motion to expunge certain criminal records of Daniel Lee Shade, Jr. Based on our review, we reverse and remand for further proceedings.

BACKGROUND

¶2 Shade was charged with the offenses of "Embezzlement by Employee" (Count I) and "Second Degree Burglary" (Count II) in Cleveland County, Case No. CRF-998-47, and "Larceny of Motor Vehicle" in Logan County, Case No. CRF-1997-10. In 2012, Shade received a full pardon for these offenses.

¶3 In June 2016, Shade filed a petition seeking to expunge all records pertaining to Case No. CRF-998-47. Shade pointed out that he had received a full pardon and also asserted "it has been more than ten (10) years since the completion of [my] sentence." Shade made no mention of the conviction for larceny of a motor vehicle in his petition.

¶4 A hearing was held in August 2016 at which counsel for OSBI appeared and objected to Shade's expungement request. The applicable statute in effect at the time of the hearing provided that, in order for one to be "authorized to file a motion for expungement," he/she "must be within" the following "categor[y]":

> The person was convicted of a nonviolent felony offense, not listed in Section 571 of Title 57 of the Oklahoma Statutes, the person has received a full pardon for the offense, the person has not been convicted of any other felony, the person has not been convicted of a separate misdemeanor in the last fifteen (15) years, no felony or misdemeanor charges are pending against the person, and at least ten (10) years have passed since the felony conviction[.]

22 O.S. Supp. 2015 § 18(A)(11).[1] In its order filed in October 2016, the trial court acknowledged the existence of the conviction in Logan County, but stated that, "given the circumstances, [Shade's] youth at the time of conviction, the fact that the Cleveland County case and the Logan County case were revoked at the same time, the sentences were run concurrently and [Shade] has received a pardon on all cases and all charges," Shade is "in the position envisioned by statute – to be able to work hard and wipe the slate clean."

¶5 From the trial court's order, OSBI seeks review.[2]

STANDARD OF REVIEW

¶6 The question presented on appeal is one of law, which we therefore review de novo. *Holder v. State*, 2009 OK CIV APP 1, ¶ 4, 219 P.3d 562.

ANALYSIS

¶7 OSBI points out that § 18(A)(11) requires, as quoted above, that "the person has not been convicted of any other felony" in order to be authorized to seek expungement. OSBI asserts that because Shade was convicted of at least two felonies, he is prevented by the plain language of the statute from qualifying for expungement. OSBI also acknowledges that the statute was subsequently amended in November 2016, and that the current version provides as follows:

> The person was convicted of not more than two nonviolent felony offenses, not listed in Section 571 of Title 57 of the Oklahoma Statutes, the person has received a full pardon for both of the nonviolent felony offenses, no felony or misdemeanor charges are

pending against the person, and at least twenty (20) years have passed since the last misdemeanor or felony conviction[.]

22 O.S. Supp. 2016 § 18(A)(13). OSBI asserts that even if this amended language applies to this case, "[Shade] still failed to meet his burden of proof to show that he qualified to file his petition for expungement because [Shade] failed to show that twenty years ha[ve] passed since his last misdemeanor or felony conviction."

I. The amended version of the statute applies to this case.

¶8 Generally, "a statute or its amendments will have only prospective effect unless [the statute] clearly provides otherwise." *Hammons v. Muskogee Med. Ctr. Auth.,* 1985 OK 22, ¶ 6, 697 P.2d 539 (footnote omitted). "However, remedial or procedural statutes which do not create, enlarge, diminish, or destroy vested rights may operate retrospectively, and apply to pending actions or proceedings." *Forest Oil Corp. v. Corp. Comm'n of Okla.*, 1990 OK 58, ¶ 11, 807 P.2d 774 (footnotes omitted). "A purely procedural change is one that affects the remedy only, and not the right." *Id.* (footnote omitted).

¶9 Both versions of the statute in question state that a person must "be within one" of the listed "categories" to be "authorized to file a motion for expungement[.]" Hence, § 18 merely sets forth who qualifies to file a motion for expungement. *See Holder,* 2009 OK CIV APP 1, ¶ 5 ("When an individual establishes that one of the § 18 circumstances is shown to exist, a *prima facie* showing of harm is made," and "[w]ith this showing, the burden shifts to the opposing party . . . to prove the public interest in keeping the records does not harm privacy interests and serves the ends of justice.") (internal quotation marks omitted) (citations omitted).[3]

¶10 Regardless, the 2016 amendment to what was previously § 18(A)(11) does not constitute a substantive change that alters any vested right, punishment, or obligation of Shade; rather, § 18 simply sets forth who qualifies to petition for the remedy, or privilege, of expungement. *Forest Oil,* 1990 OK 58, ¶ 11. *See State v. Heaton,* 669 N.E.2d 885, 887 (Ohio Ct. App. 1995) ("Expungement is a matter of privilege, never of right.") (citation omitted). *See also In re Dyer,* 163 S.W.3d 915, 919 (Mo. 2005) (en banc) ("[The petitioner] has never had a substantive or vested right in expungement of his arrest record[.]"); *People v. Link*, 570 N.W.2d 297, 299 (Mich. Ct. App. 1997) ("[W]e conclude that the expungement statute is remedial and that it does not create new or destroy existing rights."); *State v. T.P.M.*, 460 A.2d 167, 171-72 (N.J. Super. Ct. App. Div. 1983) ("[T]he expungement statute is a remedial, not a punitive statute," and "the possible availability of an expungement . . . relates to neither the form of sentence nor the extent of punishment"; rather, an "interest in expungement" is "only in obtaining a potential remedy, not retaining something which has already inured to [one's] benefit.").

¶11 The ability (or inability) of Shade to qualify under § 18 to petition to expunge certain of his criminal records (and thereby make a *prima facie* showing, as set forth above) was never a vested right. The 2016 statutory amendment does not create, enlarge, diminish, or destroy any vested rights of Shade, and it does not enlarge or decrease his punishment; rather, it is remedial or procedural. Therefore, it "may operate retrospectively, and apply to pending actions or proceedings," *Forest Oil,* 1990 OK 58, ¶ 11 (footnotes omitted), and we conclude it so operates and applies in this proceeding.[4] Relatedly, there is no potential ex post facto violation in this case because the 2016 amendment to what was previously § 18(A)(11) does not inflict a greater punishment on the accused.[5] For these reasons, we conclude the current version of § 18 – i.e., 22 O.S. Supp. 2016 § 18(A)(13) – applies to this case.

II. No first-instance determinations have been made, and it is unclear from the record, whether Shade was convicted of not more than two nonviolent felony offenses and whether twenty years have passed since the last misdemeanor or felony conviction.

¶12 In the current version of the statute, the Legislature changed the requirement that "[t]he person was convicted of a nonviolent felony offense" and "has not been convicted of any other felony," to the following: "The person was convicted of not more than two nonviolent felony offenses[.]" The Legislature also changed the requirement that "at least ten (10) years have passed since the felony conviction" – the current version now requires that "at least twenty (20) years have passed since the last misdemeanor or felony conviction[.]" Because no first-instance determinations have been made regarding these amended requirements, we remand this case to the trial court for further proceedings.[6]

CONCLUSION

¶13 We reverse the order granting Shade's petition to expunge, and we remand this case to the trial court for further proceedings to be held in a manner consistent with this Opinion.

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

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. OSBI asserts that "[Shade] met *none* of the statutorily proscribed requirements," but asserts that "[a]t the time of the hearing the subsection which most closely matched [Shade's] circumstances was [§] 18(A)(11)." Indeed, § 18(A)(11) is the basis of Shade's expungement request in his petition and is the only subsection cited therein.

2. Shade did not file an Answer Brief on appeal. Where a party fails to file an answer brief, and the failure to file such brief is not excused, then "we are under no obligation to search the record for some theory to sustain the trial court's judgment[.]" *William & Kelley Architects v. Independent Sch. Dist. No. 1, Okmulgee Cnty.*, 1994 OK CIV APP 113, ¶ 8, 885 P.2d 691. However, reversal is never automatic for failure to file an answer brief. *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496.

3. That is, 22 O.S. Supp. 2016 § 19(A) provides that "[a]ny person qualified under Section 18 of this title *may petition the district court* of the district in which the arrest information pertaining to the person is located for the sealing of all or any part of the record, except basic identification information." (Emphasis added.) Thus, qualifying under one of the categories listed in § 18 merely allows one to petition for expungement and, thereby, make a *prima facie* showing of harm. As set forth in § 19(B), the district court *must then* "set a date for a hearing" and provide notice of the hearing "to the prosecuting agency, the arresting agency, [OSBI], and any other person or agency whom the court has reason to believe may have relevant information related to the sealing of such record." *Moreover,* only "[u]pon a finding that the harm to privacy of the person in interest or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records," "may" the district court "order such records, or any part thereof except basic identification information, to be sealed." § 19(C).

4. The Oklahoma Supreme Court has repeatedly held over the years that "legislation which is general in its terms and affects only procedural matters is presumed to have been intended to be applicable to all actions, whether pending or not, absent any expressed intention to the contrary" and "unless such operation would affect substantive rights." *Thomas v. Cumberland Operating Co.*, 1977 OK 164, ¶ 4, 569 P.2d 974 (footnotes omitted). *See also Gray v. Gray,* 1969 OK 125, ¶ 19, 459 P.2d 181 ("Statutes relating only to remedies or modes of procedure generally are held to . . . apply to pending actions or proceedings unless operation or application would adversely affect substantive rights."); *Phillips v. H.A. Marr Grocery Co.,* 1956 OK 104, ¶ 0, 295 P.2d 765 (Syllabus by the Court) ("[R]emedial or procedural statutes which do not create, enlarge, diminish, or destroy vested or contractual rights but relate only to remedies or modes of procedure are generally held to operate retrospectively and to apply to pending actions or proceedings, unless such operation or application would adversely affect substantive rights."). In more recent cases, the Supreme Court has similarly stated as follows:

> Legislation that is general in its terms and impacts only matters of procedure is presumed to be applicable to all actions, even those that are pending. Statutes that relate solely to remedies and hence affect only modes of procedure – i.e., enactments which do not create, enlarge, diminish, or destroy accrued or contractual rights – are generally held to operate retroactively and apply to pending proceedings (unless their operation would affect substantive rights).

Cole v. Silverado Foods, Inc., 2003 OK 81, ¶ 8, 78 P.3d 542 (emphasis omitted) (footnotes omitted). Hence, "amendments relating solely to remedies and affecting modes of procedure do operate retrospectively and apply to pending proceedings. This exception cannot be invoked, however, if the amendment represents more than a mere procedural reform and intrudes upon substantive rights." *Am. Airlines Inc. v. Crabb*, 2009 OK 68, ¶ 12, 221 P.3d 1289 (citations omitted). We interpret these statements to mean that, so long as the legislative amendment is procedural or remedial and does not create, enlarge, diminish, or destroy accrued or contractual rights, it applies even when the amendment occurs during the pendency of an appeal. The Supreme Court of Alabama has addressed this issue directly:

> Remedial statutes are exemplified by those that impair no contract or vested right, . . . but preserve and enforce the right and heal defects in existing laws prescribing remedies. Such a statute may be applied on appeal, even if the effective date of that statute occurred while the appeal was pending, and even if the effective date of the statute was after the judgment in the trial court.

Ex parte Bonner, 676 So. 2d 925, 926-27 (Ala. 1995) (internal quotation marks omitted) (emphasis omitted) (citations omitted). *See also City of Clovis v. Cnty. of Fresno,* 166 Cal. Rptr. 3d 763, 775 (Cal. Ct. App. 2014) ("[W]hen statutes are remedial or procedural, courts consistently apply them in cases pending, including cases pending on appeal, when the statutes become effective, even though the underlying facts predate their effective dates. Courts apply new laws in that situation unless there is evidence of a legislative intent *not* to do so."). At least two jurisdictions have adopted a somewhat more restricted version of this rule. *See City Council of Waltham v. Vinciullo*, 307 N.E.2d 316, 319 (Mass. 1974) ("[S]tatutes which are remedial or procedural should be deemed to apply retroactively to those pending cases which, on the effective date of the statute, *have not yet gone beyond the procedural stage to which the statute pertains.*") (emphasis added); *Workplace Sys., Inc. v. CIGNA Prop. & Cas. Ins. Co.*, 723 A.2d 583, 584 (N.H. 1999). Although the more restricted rule does not appear to be unreasonable, it appears to be inconsistent with case law in Oklahoma, as demonstrated above, which prevents retroactive application of procedural or remedial legislation only where the Legislature has "expressed intention to the contrary" or where "such operation would affect substantive rights." *Thomas*, 1977 OK 164, ¶ 4. Because no contrary intention is expressed in the legislation at issue, and because operation of the 2016 amendment does not affect substantive rights, we conclude it applies to the present case.

5. Ex post facto laws or amendments are those that operate or are imposed "to the disadvantage of the accused." S*tarkey v. Okla. Dep't of Corr.,* 2013 OK 43, ¶ 37, 305 P.3d 1004 (citation omitted). "It has been the rule in Oklahoma that a law is within the protection of the provision when it inflicts a greater punishment than the law annexed to the crime at [the] time it was committed or alters [the] situation of accused to his disadvantage." *Id.* (internal quotation marks omitted) (citation omitted).

6. OSBI states that Shade "failed to meet his burden of proof" with regard to these requirements. The statute, however, was amended only after the filing of the trial court's order.

We note that OSBI does not appear to dispute the fact that Shade has not been convicted of more than two nonviolent felony offenses. OSBI asserts, for example, that "[Shade] was convicted of two separate felony offenses." Nevertheless, a petitioner must establish that "one of the § 18 circumstances is shown to exist," and only then is "a *prima facie* showing of harm . . . made." *Holder*, ¶ 5. The amended subsection, and especially the two amended requirements in that subsection, discussed above, have not yet been applied by the trial court to this case.

We note, finally, that "where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning." *Id.* ¶ 4 (citation omitted).

2017 OK CIV APP 69

MINDY MICHELLE SMITH, an individual, Plaintiff/Appellant, vs. TIFFANY ANGEL BARKER, an individual, Defendant/Appellee.

Case No. 114,851. August 7, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY FITZGERALD, TRIAL JUDGE

REVERSED AND REMANDED FOR NEW TRIAL

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

Aaron J. Goodman, LAWSON & SHELTON, P.L.L.C., Tulsa, Oklahoma, for Defendant/Appellee

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

¶1 Plaintiff, Mindy Michelle Smith, appeals from an adverse verdict in a personal injury action resulting from an automobile-bicycle collision at the intersection of South 109th East Avenue and East 71st Street in Tulsa. The jury found that Plaintiff was 80% at fault for her own injury and that Defendant, Tiffany Angel Barker, the driver of the pick-up truck that hit Plaintiff, was 20% at fault.

¶2 In this appeal, Plaintiff criticizes the court's failure to give the negligence per se instructions she submitted. Plaintiff claims that as a result the jury was, at best, uninformed, or at worst, misled, as to the law governing the duty of a motor vehicle to yield to a *pedestrian/bicyclist*[1] who was lawfully in a marked crosswalk protected by a control signal.

¶3 Plaintiff contends the questions of (1) which party had the right-of-way,[2] and (2) who had the duty to yield to the other in the case of a collision between a pedestrian/bicyclist and the operator of a vehicle in a traffic light-controlled crosswalk, were the main issues to be decided by the jury. She also argues that the failure of the court to provide appropriate instructions of law concerning the relative rights and responsibilities of the parties constituted reversible error.

¶4 Under the facts and circumstances of this case, for the reasons discussed at length below, we decline to hold that the trial court specifically erred by rejecting Plaintiff's proposed negligence per se instructions ***as submitted***. We find the existence of fundamental error, however, and return this case to the trial court for a new trial because there was a failure to instruct correctly on the law regulating the legal duties and rights of a "pedestrian/bicyclist" at a controlled crosswalk, as specifically dictated by 47 O.S.2011 § 11-203. If the trial judge does not accurately state the law, "'fundamental error' occurs." *Sellars v. McCullough*, 1989 OK 155, ¶ 9, 784 P.2d 1060.

BACKGROUND FACTS

¶5 In her petition, Plaintiff asserted a cause of action for negligence. She alleged that Defendant, who was driving a Ford Ranger pick-up truck, executed a right turn on red and collided with Plaintiff while Plaintiff was in a marked crosswalk. Plaintiff claimed she sustained a fractured ankle along with other injuries as a result.

¶6 Plaintiff specifically alleged that Defendant was negligent per se because she was in violation of 47 O.S.2011 § 11-202(3)(b), which requires that a driver of a vehicle that is turning right on a steady red light indication "**shall yield the right-of-way to pedestrians lawfully within an adjacent crosswalk** . . . ." (emphasis added). Plaintiff's claim of negligence per se and the theory of her case never changed as the case progressed to trial. The agreed pre-trial conference order entered by the court contains the clear claim that Plaintiff had proceeded into the crosswalk with a "walk" signal when Defendant, who was executing a right turn on red from South 109th East Avenue to 71st Street, collided with Plaintiff in the crosswalk. Plaintiff's listed theory of recovery included negligence per se pursuant to 47 O.S. § 11-202(3)(b).[3]

¶7 Defendant's affirmative defense of contributory negligence at trial was based on Plaintiff's alleged violation of 47 O.S.2011 § 11-203, which provides that pedestrians proceeding across a road at the direction of a signal indicating "walk" have the right-of-way in the direction of the signal, but may not proceed to cross the road if the light displays "wait" or "don't walk."[4] Defendant claimed that Plaintiff carelessly operated her bicycle in front of Defendant's vehicle before Plaintiff had an illuminated "walk" signal allowing her to safely cross South 71st Street.

¶8 The parties' respective theories of the case remained the same at trial. While the evidence was undisputed that Plaintiff was in the crosswalk when she was hit,[5] Defendant disputed whether Plaintiff had properly entered the crosswalk at the direction of the control light, thus contributing to her own injury. On July 26, 2017, this Court held oral argument on this case, which assisted in clarifying the issues for appeal.[6]

I. THE EVIDENCE AT TRIAL

¶9 In order to assess the adequacy of the jury instructions, we must examine the evidence

adduced at trial in some detail. Three witnesses gave fact testimony at trial concerning the circumstances of the accident itself: Plaintiff, Defendant, and a non-party, Tyran Parrish, who was identified as the driver of a vehicle waiting for the light to change just east of the subject intersection. Their testimony, set forth in the trial transcript, is summarized here:[7]

A. Testimony of Plaintiff

¶10 Plaintiff testified that on the morning of October 4, 2012, she had ridden her bicycle on the sidewalk along the north side of East 71st Street to an off-ramp at Highway 169, where she dismounted. Plaintiff then walked her bicycle on the sidewalk to the corner of 71st Street and South 109th East Avenue.

¶11 According to Plaintiff, when she arrived at the corner, a "do not walk" signal was illuminated, so she pushed the button for a "walk" signal located in a yellow box mounted on a light pole. While she was waiting for the crosswalk signal with her bicycle, Plaintiff testified that she observed Defendant, who was driving a white Ford Ranger pick-up truck, stopped at a red light waiting to make a right turn from the lane located in front of Plaintiff. Plaintiff said she and Defendant made eye contact with each other. Plaintiff testified she waited for the crosswalk light for between 30 to 60 seconds.

¶12 Plaintiff testified that, after the crosswalk light displayed a "little man walking" signal, she proceeded to get on her bicycle and was in the process of riding across 71st Street, in the crosswalk, when she was struck by Defendant, who was going very slowly, as though she had just started up.

B. Testimony of Defendant

¶13 Defendant did not dispute Plaintiff's description of where the accident occurred. Defendant admitted that she was proceeding south on 109th East Avenue when she stopped for a red light and then waited for up to a minute looking left waiting for traffic to clear so that she could make a right turn onto 71st Street. Defendant testified that when she first approached the intersection she looked right, didn't see anyone, and then looked left waiting for the traffic to clear. According to Defendant, when she got an opening in traffic she "let off my brake to merge into traffic, and t*hen that's when Ms. Smith appeared right in front of me*" (emphasis added).

¶14 Defendant admitted that the light facing her was showing steady red at the time she made her right turn, and that *she indeed struck Plaintiff with her vehicle while Plaintiff was in the crosswalk with her bicycle*. While admitting it was "not OK to hit somebody in a crosswalk," she testified she had no fault whatsoever for the occurrence because she never saw Plaintiff the one time she looked. Defendant testified, "*If I were to have looked to the right and saw Ms. Smith there I would have stopped*" (emphasis added).

C. Testimony of Tyran Parrish

¶15 Tyran Parrish, who was sponsored as a witness to the collision, was driving west on 71st Street when she stopped at the intersection, waiting for the red light to change. She testified that she thought she had been there about for about a minute before the accident occurred.

¶16 Parrish testified she had seen Plaintiff riding her bicycle on the sidewalk but not the roadway. Parrish testified she saw the bicycle stop within a foot or two of where Plaintiff entered the street, but was unable to testify that she saw the bicycle come off the curb into the crosswalk because Defendant's vehicle blocked Parrish's view.

¶17 Parrish testified that she did not know how long Plaintiff had stopped before the accident, because the next time she saw her, Plaintiff was in front of the Defendant's vehicle. While Parrish was unable to testify whether Plaintiff was in the crosswalk when she got hit, she did see Plaintiff lying in the street, screaming and grabbing her leg. Parrish did not know if Plaintiff pushed the "walk" signal, and she did not observe whether the "walk" signal was illuminated at the time of the occurrence.

II. THE ISSUES AT TRIAL

¶18 It is the duty of the parties to assure that the instructions given accurately reflect the issues tendered by the evidence adduced at trial. *Sellars*, 1989 OK 155 at ¶ 9. It is the trial court's duty "to state the law correctly, but not to frame the issues." *Id.; see also Mosley v. Truckstops Corp. of America*, 1993 OK 79, ¶ 9, 891 P.2d 577.

¶19 At the conclusion of Plaintiff's presentation of evidence, Defendant moved for a directed verdict, which the court overruled.[8] The recorded colloquy between counsel in their argument to the court is useful in understanding how the parties framed the issues in relationship to the testimony presented:

MR. GOODMAN [Defendant's counsel]: Your Honor, at this time Plaintiff, having rested, we would enter [sic] a directed verdict based upon the fact that the Plaintiff has failed to prove that my client breached her duty as a driver. Specifically the Plaintiff has failed to adduce evidence that at the time Ms. Smith crossed the crosswalk that my client was in the wrong for having proceeded forward by turning right. And, more specifically, the fact that at the time the Plaintiff was in the crosswalk that she had a walk sign versus my client's legal ability to make a right at the time. So with that, your Honor, we would enter [sic] a directed verdict.

THE COURT: Response, Mr. Rode?

MR. RODE [Plaintiff's counsel]: Your Honor, the testimony has been clear that the Defendant took a right on a red. The testimony has been clear that the Plaintiff was next to the button to push the walk sign and that she sat there for an extended period of time after pushing the walk sign. She got a walk sign and she crossed when she was struck by the Defendant entering the intersection on a red.

THE COURT: I believe there is sufficient evidence to go to the jury that there is a disputed fact and I will overrule the motion for directed verdict.

¶20 At the end of the presentation of the evidence, the record suggests that the question of fact (framed by the evidence), which the jury had to answer, was whether Plaintiff had entered the crosswalk before or after the walk signal illuminated. Defendant's other possible theory – that Plaintiff had ridden directly from the sidewalk into the crosswalk without stopping – was not supported by testimony.[9] There was simply no objective evidence to support the existence of any other disputed fact, because it was admitted by Defendant that Plaintiff was in the crosswalk when she was struck by Defendant, who was turning right on red at the time she began her turning maneuver.

III. THE REQUESTED NEGLIGENCE PER SE INSTRUCTIONS

¶21 Following the court's denial of Defendant's motion for directed verdict, the court made its record on the parties' requested instructions. Each of the parties had submitted instructions on negligence per se.

¶22 Defendant had requested a negligence per se instruction based upon a City of Tulsa ordinance on business districts, which Defendant argued made it unlawful for Plaintiff to ride her bicycle on a sidewalk at or near the location of the accident.[10] Plaintiff had requested various instructions in support of her negligence per se claim that Defendant had violated general state and municipal rules of the road, and specifically a state statute that required Defendant to yield the right-of-way to "pedestrians" within a crosswalk while turning right on a steady red light.[11]

¶23 The court declined to give a negligence per se instruction for either party, stating as follows:

THE COURT: . . . I have given some consideration to what the issues are in this case, and I am going to not give any negligence per se instruction either way. I believe there are issues of disputed fact about what the facts were leading up to this accident and where everyone was and what they did in this accident, and it's a jury question and . . . . would not be proper to give a negligence per se instruction.

In specifically addressing Plaintiff's requested per se negligence instructions, the court also noted:

THE COURT: Okay. And, Mr. Rode, your negligence per se had to do with various duties of drivers, pedestrians and bicyclists which I believe are covered in the general instructions, particularly the 10.1 and 10.2, etc., that I am including in the jury instructions.[12]

The trial transcript documents that Plaintiff preserved her objections on the record, and Defendant did not.[13]

STANDARD OF REVIEW

¶24 We review given or refused jury instructions to determine if there is a probability that the jurors were misled and reached a conclusion they would not have reached but for the questioned instruction, **or "if there was excluded from consideration a proper issue of the case**." *Lee v. Cotten*, 1990 OK CIV APP 48, ¶ 7, 793 P.2d 1369 (emphasis added) (citing *Ankney v. Hall*, 1988 OK 101, 764 P.2d 153; and *Woodall v. Chandler Material Co.*, 1986 OK 4, 716 P.2d 652).

¶25 In addressing alleged errors in jury instructions, we must consider whether the

instructions as a whole fairly and accurately state the applicable law. *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187. We may not set aside a verdict for misdirection of the jury unless the error has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. 20 O.S.2011 § 3001.1.[14]

ANALYSIS

I. NEGLIGENCE PER SE

¶26 Plaintiff contends the trial court erred by refusing to allow five negligence per se jury instructions that she had requested. These included instructions for violations of 47 O.S. 2011 § 11-901b (Full Time and Attention to Driving); 47 O.S. 11-504 (Drivers to Exercise Due Care); Tulsa Revised Traffic Code, Title 37 § 645 (Inattentive Driving); Tulsa Revised Traffic Code, Title 37 § 613 (Starting and Stopping); and 47 O.S.2011 § 11-202 (Traffic Control Signal Legend).

¶27 Negligence per se is a term used when a duty of care is based upon a violation of specifically prescribed conduct required by a statute. "When courts adopt the statutory standard for a cause of action for negligence . . . the violation of [the] statute constitutes negligence per se if the other elements of negligence are present." *Mansfield v. Circle K. Corp*., 1994 OK 80, ¶ 6, 877 P.2d 1130.

¶28 Plaintiff correctly points out that to establish negligence per se on the basis of a statutory violation, a party must show that (1) the injury was caused by the statute's violation; (2) the injury was of the type intended to be prevented by the statute, and (3) the injured party was a member of the class meant to be protected by the statute. *See Hamilton v. Allen*, 1993 OK 46, ¶ 9, 852 P.2d 697; *Ohio Cas. Ins. Co. v. Todd*, 1991 OK 54, ¶ 8, 813 P.2d 508.

¶29 As a general rule, the violation of a statutory duty imposed for the protection of person or property constitutes negligence per se. *Breno v. Weaver*, 1952 OK 407, 252 P.2d 487. **However, the standard of duty must be fixed and defined by law and be the same in all circumstances.** *Chicago R.I. & P. Ry. Co. v. Pitchford*, 1914 OK 79, 143 P. 1146 (Court Syllabus). A negligence per se instruction is not appropriate where the terms of the statute do not impose positive objective standards. Determination of whether conduct measures up to the standards of conduct enjoined by the statute depends on the conditions and circumstances proved, and requires evaluation of the evidence. The issue then is one of negligence, not negligence per se. *See Wade v. Reimer,* 1961 OK 44, ¶ 5, 359 P.2d 1071 (involving a statute requiring that a vehicle be operated at a careful and prudent speed not greater nor less than is reasonable and proper).

¶30 We have reviewed all five of Plaintiff's requested negligence per se instructions and find that four of them do not properly support the giving of a negligence per se instruction, because the statutory duties imposed upon the operator of a vehicle are undefined or defined only in abstract general terms.

¶31 We therefore find that the court's refusal to give the proposed negligence per se instructions, as submitted by the parties, is free from error.

II. PLAINTIFF'S "CROSSWALK" INSTRUCTION

¶32 Plaintiff contends that the evidence at trial mandated the giving of her proposed negligence per se Instruction No. 9.10-c-modified, based upon 47 O.S. § 11-202 (Traffic Control Signal Legend), since it was her theory that she had the right-of-way (the privilege to use the roadway) when she lawfully entered the light-controlled crosswalk, and that Defendant had the statutory duty to yield the right-of-way to Plaintiff. Plaintiff's argument here is not without some merit, since this was the only proposed instruction with specific application to the duty of a vehicle to yield the right-of-way, while turning right on a steady red light, to a **pedestrian** (and to other traffic) lawfully within an adjacent crosswalk.

¶33 Before we can conclude, however, that it was reversible error for the court to refuse to give this instruction, some extended analysis is required. In addition to being applicable to the issues framed, an instruction must be correct in form and in substance. *Mosley v. Truckstops Corp. of America*, 993 OK 79, ¶ 9, 891 P.2d 577; *Timmons v. Royal Globe Ins. Co*., 1982 OK 97, 653 P.2d 907.

¶34 We cannot ignore or overlook the fact that the instruction, as submitted, was not in the proper form because it did not directly address how Oklahoma traffic laws apply to a bicyclist, such as Plaintiff, who, after either riding her bike on a roadway occupied by vehicles, or on a sidewalk used by pedestrians, uses a pedestrian crosswalk to access an adjoining sidewalk or simply cross an intersection. Under

Oklahoma law, a bicycle is not a "pedestrian" and the term "other traffic lawfully using the intersection" as contemplated by the statute is ambiguous. This should have been sufficient to alert the parties and the trial court of the need to craft instructions that would allow the jury to properly assess Plaintiff's theory of the case: that it was the duty of Defendant, as operator of the vehicle turning right on a steady red light, to yield the right-of-way to a pedestrian/bicyclist lawfully in a crosswalk. Without modifying the proposed instruction, the jury could not know whether a bicyclist was entitled to the same protection under the statute as a pedestrian under similar circumstances.

¶35 Plaintiff, however, did not ask the court to further modify the instruction, and the court did not do so on its own initiative. Without the benefit of the court's direction, the question of whether Oklahoma law afforded Plaintiff, as a bicyclist, the same legal privilege possessed by a pedestrian while lawfully in the crosswalk, would remain unanswered.[15]

A. The Legal Status of a "Pedestrian-Bicyclist"

¶36 Assessing this question, we note that a bicyclist in a crosswalk is as vulnerable if struck by a vehicle as a pedestrian in the same situation, and, rationally, is in need of the same protection. As reasoned by the District of Columbia Court of Appeals:

> It would be contrary to public policy to read the statute so narrowly as to make it a crime for an operator of a motor vehicle to hit the person on foot using a crosswalk but not to hit the person in the wheelchair, or on the bicycle. All are equally vulnerable to a motor vehicle. Accordingly, we conclude that a strict construction of this statute would lead to an absurd result by denying protection, for persons utilizing crosswalks, against motor vehicles.

Belay v. D.C., 860 A.2d 365, 368 (D.C.Ct.App. 2004).

¶37 The Supreme Court of Washington noted a similar telling hypothetical involving a group of children, "some on foot, others on skateboards, roller blades and bicycles," who wait at a crosswalk until the walk signal shows:

> If such group were hit in the crosswalk, under [defendant's] interpretation, the vehicle driver would be liable to all children except those on bicycles. Such interpretation and result make no sense.

Pudmaroff v. Allen, 977 P.2d 574, 579 (Wash. 1999).[16]

¶38 In *Schallenberger v. Rudd*, 767 P.2d 841, 844 (Kan. 1989), the Kansas Supreme Court construed that state's crosswalk laws to hold that users of "bicycles, skateboards, tricycles, wheelchairs, baby carriages, toy wagons, and other human-powered conveyances" in crosswalks have "the same rights as pedestrians, to which a vehicle turning right on a red light after a complete stop must yield the right-of-way." More recently, in *Kendrick v. Manda,* 174 P.3d 432, 437 (Kan.Ct.App. 2008), the Court noted that *Schallenberger* was still good law, and that, although cyclists using the road are subject to the rules for vehicles, cyclists using a crosswalk are subject to the rules for pedestrians.

¶39 We find the rationale of these cases persuasive. The users of "bicycles, skateboards, tricycles, wheelchairs, baby carriages, toy wagons, and other human-powered conveyances" in a crosswalk are equally at risk and in need of protection from motor vehicles. We find that, in this case, Plaintiff had the same legal status, duties, and protections as a pedestrian using the crosswalk.

III. THE COURT INSTRUCTIONS INCORRECTLY STATED THE LAW REGARDING CONTROLLED CROSSWALKS

¶40 Title 47 O.S.2011 § 11-203 specifically addresses the duties and rights of a pedestrian attempting to use a controlled crosswalk as follows:

> Whenever special pedestrian-control signals exhibiting the words "Walk" or "Wait" or "Don't Walk" are in place, such signals shall indicate as follows:
>
> 1. Walk. Pedestrians facing such signal may proceed across the roadway in the direction of the signal and shall be given the right of way in the direction of the signal by the drivers of all vehicles.
>
> 2. Wait or Don't Walk. No pedestrian shall start to cross the roadway in the direction of such signal, but any pedestrian who has partially completed his crossing on the walk signal shall proceed to a sidewalk or safety island while the wait signal is showing.

¶41 The rights and duties set forth in this statute form the basic case theory of both Plaintiff and Defendant. Plaintiff claims that she entered the crosswalk pursuant to a "walk" signal. If so, Plaintiff had the legal right-of-way. The collision of a vehicle with a pedestrian in these circumstances is clearly the type of harm the statute seeks to avoid, and Plaintiff is within the class of persons intended to be protected by the statute. Thus, failure to grant Plaintiff the right-of-way may constitute negligence per se.[17]

¶42 Defendant's theory was that Plaintiff entered the crosswalk while the signal displayed "don't walk." The statute specifically forbids such actions, and its purpose is clearly to prevent a collision between a vehicle and a pedestrian by limiting the times the pedestrian may cross. Thus, Plaintiff entering the crosswalk while the light signaled "don't walk" may also constitute negligence per se. We find it clear that Oklahoma's statutory law creates a regime governing the behavior of vehicles and pedestrians at a controlled crosswalk that is different, and more specific, than the general duties of vehicles and pedestrians in an open-road situation.

¶43 Plaintiff, in addition to complaining that the court erred in excluding her proposed negligence per se instructions, asserts that the instructions as given were inadequate and thereby misled the jury because they failed to inform the jury of the statutory duty imposed upon a driver to yield the right-of-way to a person operating a bicycle lawfully within a crosswalk. We agree. The key instructions given by the court in this case were Instruction Nos. 4, 13, 14, 15 and 16:

> INSTRUCTION NO. 4
>
> The Parties admit:
>
> On or about October 4, 2012, the Plaintiff was attempting to ride her bicycle across the northwest side of the intersection of 71st Street and 109th East Avenue, in the City of Tulsa, Tulsa County, going eastbound [sic] when she was struck by the Defendant who was attempting to turn right on a red light. The Defendant's vehicle was moving at the time the collision occurred. The Defendant did not see the Plaintiff before the collision. . . .
>
> INSTRUCTION NO. 13
>
> It is the duty of the driver of a motor vehicle and a pedestrian to use ordinary care to prevent injury to themselves or other persons.
>
> INSTRUCTION NO. 14
>
> It is the duty of every operator of a vehicle to exercise ordinary care in keeping a lookout consistent with the safety of other vehicles/persons.
>
> INSTRUCTION NO. 15
>
> The driver of an automobile having the right-of-way must exercise ordinary care and operate her vehicle with due regard to existing conditions. She is entitled to assume that her right-of-way will be respected, until she has warning, notice or knowledge to the contrary. If the situation is such as to indicate to a reasonably careful person in her position that to proceed would probably result in a collision, then she should exercise ordinary care to prevent an accident, even to the extent of yielding her right of way.
>
> INSTRUCTION NO. 16
>
> A bicycle operator having the right-of-way must exercise ordinary care and operate her bicycle with due regard to the existing conditions.

¶44 Instructions are explanations of the law of a case which enable a jury to arrive at a correct conclusion. The instructions need not be ideal, but they must reflect the Oklahoma law regarding the subject at issue. *Mosley*, 1993 OK 79 at ¶ 18. Title 12 O.S. §§ 577 and 577.2 place an affirmative duty upon the court to give instructions accurately reflecting the law as to the issues presented.

A. The Instructions Were Legally Incorrect

¶45 We note, first, that the court's introductory statement of the issues in the case, Instruction No. 4, does not advise the jury that the parties were in agreement that Plaintiff was in a crosswalk when she was struck by Defendant, or indeed even that the accident occurred in a crosswalk. Further, and most crucially, the jury was never instructed on the specific statutory law regarding controlled crosswalks. The basic issue in both parties' arguments was whether Plaintiff did or did not have a "walk" light when she entered the crosswalk.

¶46 After our review of the evidence at trial, we find the instructions given to the jury, as a

whole, failed to accurately state the law regarding the crucial issue of who had the right-of-way. The four "general duty" instructions given by the court, Nos. 13, 14, 15, and 16, made no mention of the central fact that the right-of-way of each party was dependent upon the status of the "walk" or "don't walk" light. It is entirely probable that the jury as instructed would conclude that the parties had equal rights-of-way, which is not the case pursuant to 47 O.S.2011 § 11-203. The instructions as a whole did not fairly present the law applicable to the issues raised by Plaintiff, or the law set out in § 11-203. As such, the matter must be returned to the trial court for a new trial.

B. Jury Instructions on Remand

¶47 Given that the issue presented here is not currently covered by an existing uniform jury instruction, we make the following observations for the assistance of the trial court on remand regarding potential instructions. As previously noted, the current law refers separately to pedestrians, bicyclists, and motor vehicles, but this case involves what has been described as a "pedestrian/bicyclist." We have held that, in this situation, a bicyclist has the same status as a pedestrian when using the crosswalk, and the jury should be so instructed if necessary.

¶48 The situation here is that of a controlled crossing with illuminated signals indicating when it is proper to walk or not walk. As we have previously noted, the Oklahoma statutes were amended to address the relative rights of pedestrians and vehicles at a controlled crosswalk in a 1961 addition to Title 47, quoted above in § 11-203. Title 47 O.S. § 11-502 further provides, "(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield."

¶49 Using these clear statutory principles as a guide, the court must first determine if there is a question of fact as to the status of the walk signal in this case. If a question of fact exists, the jury must first determine whether the light signal for "walk" was illuminated when Plaintiff entered the crosswalk. If the court finds there is a question as to whether the "walk" signal was illuminated when Plaintiff entered the crosswalk, a jury instruction pursuant to 47 O.S. § 11-203(1) (modified) would be appropriate. If the court finds that a question exists as to whether a "wait" or "don't walk" signal was illuminated at the time Plaintiff entered the crosswalk, an instruction pursuant to 47 O.S. § 11-203(2) would be appropriate, as would any other combination of instructions modified to reflect these statutory principles. If there is any evidence to support a defense that Plaintiff departed the curb in a manner that made it impossible for Defendant to comply with her duty to yield pursuant to § 11-203, an instruction based on 47 O.S. § 11-502(b) (modified) would also be appropriate.

CONCLUSION

¶50 The decisive questions of fact presented for the jury's determination in this matter were (1) which party had the right-of-way and (2) which party had the duty to yield in the case of a collision between a vehicle and a pedestrian/bicyclist in a signal-controlled crosswalk. While the trial court did not err in rejecting the specific negligence per se instructions submitted by Plaintiff, there was nonetheless a failure to give the jury an instruction on the central theory of the case. The instructions thus did not properly present the law applicable to the issues raised by the parties. As a result, the jury was likely misled and reached a different result than it would have if it had been properly instructed. Accordingly, the trial court's judgment is reversed, and this matter is remanded for a new trial.

¶51 **REVERSED AND REMANDED FOR NEW TRIAL.**

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

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

1. The term "pedestrian-bicyclist," which appears in the parties' briefing and in this opinion, is not defined in Oklahoma statutes nor are there any reported Oklahoma cases which would aid the trial court in instructing on the rights and duties of a "pedestrian-bicyclist" while in a marked cross-walk. Oklahoma statutes do, however, define the terms, "bicycle" and "pedestrian," as follows:

– Title 47 O.S.2011 § 1-104 defines bicycle as "a device upon which any person or persons may ride, propelled solely by human power through a belt, chain, or gears, and having two or more wheels, excluding mopeds."

– Title 47 O.S.2011 § 1-143 defines pedestrian as "[a]ny person afoot."

2. Title 47 O.S.2011 § 1-156 defines right-of-way as "[t]he privilege of the immediate use of the roadway."

3. *See* Pre-trial Conference Order filed August 4, 2015. Record at 62-75.

4. The City Ordinance cited as authority by Defendant also provided that any pedestrian who has partially completed his/her crossing shall be allowed to proceed.

5. Defendant agreed that when her vehicle struck Plaintiff, Plaintiff was in the crosswalk.

6. At oral argument, Defendant made clear that the sole theory of defense argued at trial was that Plaintiff entered the crosswalk with her bicycle before the "Walk" light was illuminated.

7. The transcript does not include the testimony of two other witnesses who presumably testified as to Plaintiff's injury; and it does not include closing statements which are often useful to a reviewing court in measuring the full degree of possible prejudice to Plaintiff in light of the entire trial, including the allegations of the petition, conflict in the evidence on critical issues, and arguments of counsel.

8. This is not an issue on appeal.

9. Defendant had no evidence to offer on this point, other than an inference that the reason she did not see Plaintiff on the corner was because Plaintiff was not there.

10. Throughout the case, Defendant argued the accident had occurred in a "business district" and that City of Tulsa Municipal Code, Chapter 10, Section 1009 prohibited the operation of a "bicycle, rickshaw or motorized scooter upon a sidewalk within a business district." *See* Defendant's Exhibit 2, Record at p. 55. There was no evidence at trial that the location in question was a business district as defined by the ordinance. Defendant did not object to the court's refusal to give the instruction at trial.

11. Plaintiff objected to the court's failure to give her proposed instructions, including requested Instruction No. 9.10-c, setting forth 47 O.S. § 11-202 (3)(b), requiring vehicular traffic turning right on a steady red to yield the right of way to pedestrians lawfully within an adjacent crosswalk.

12. It is this finding in particular that leads to our discussion later in this opinion that the parties' conflicting testimony required a specific instruction about the legal duties of each party under the circumstances. *See Lindemann v. Randolph*, 1965 OK 211, 414 P.2d 257.

13. Failure of a defendant to object at trial results in a waiver of any specific objection thereto. *See Sellars v. McCullough* at ¶ 1.

14. Title 20 O.S.2011 § 3001.1 provides:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case . . . on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

15. *See, e.g., Williams v. State*, 1976 OK CR 225, 554 P.2d 842.

16. *See also Nish v. Schaefer,* 138 P.3d 1134, 1140 (Wyo. 2006) (bicyclists have the same rights as pedestrians to use crosswalks at intersections); and *Lakewood v. El–Hayek*, 872 N.E.2d 1005 (Ohio Mun. 2006) (a person's mere use of a wheeled device for transportation does not exclude that person from being a pedestrian when crossing from one sidewalk to another in a crosswalk).

17. We note that a finding of per se negligence does not preclude the application of comparative/contributory negligence principles as a defense. Simply put, a party charged with per se negligence for failure to erect barriers around a hole in the pavement may still argue that a pedestrian who fell in the hole did so because of the pedestrian's own negligence in looking at a handheld device while walking rather than looking ahead.

2018 OK CIV APP 1

ONLINE OIL, INC., an Oklahoma corporation and REALTY DEVELOPERS, LLC, an Oklahoma Limited Liability Company, Plaintiffs, vs. CO&G PRODUCTION GROUP, LLC, an Oklahoma Limited Liability Company, Defendant/ Third-Party Plaintiff/Appellee, and JERRY PARENT, an individual, Defendant, vs. KRIS AGRAWAL, an individual, Third-Party Defendant/Appellant, and COAL GAS USA, LLC, an Oklahoma Limited Liability Company, COAL GAS MART, LLC, an Oklahoma Limited Liability Company, REALTY MANAGEMENT ASSOCIATES, LLC, an Oklahoma Limited Liability Company, VIMALA AGRAWAL, an individual and NEWTON AGRAWAL, an individual, Third-Party Defendants, and KENSLEY PETROLEUM, LLC, an Oklahoma Limited Liability Company, Plaintiff, vs. CO&G PRODUCTION, LLC, Defendant.

Case Number: 112681; Consol. w/112904
August 29, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARK BARCUS, TRIAL JUDGE

AFFIRMED IN PART, VACATED IN PART, MODIFIED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

Phillip P. Owens II, OWENS LAW OFFICE, PC, Oklahoma City, Oklahoma and

James O. Goodwin, GOODWIN & GOODWIN, Tulsa, Oklahoma, for Plaintiffs Online Oil, Inc.; and Realty Developers, LLC; and for Third-Party Defendants Coal Gas USA, LLC; Coal Gas Mart, LLC; and Realty Management Associates, LLC

CO&G PRODUCTION GROUP, LLC, an Oklahoma Limited Liability Company, Currently unrepresented

Jerry Parent, Porum, Oklahoma, *Pro Se*

Kris Agrawal, Oklahoma City, Oklahoma, *Pro Se*

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Kris Agrawal, Online Oil, Inc., Realty Developers, LLC, Coal Gas USA, LLC, Coal Gas Mart, LLC and Realty Management Associates, LLC,[1] (Agrawal defendants) appeal the district court's December 5, 2013 Final Journal Entry of Judgment in favor of CO&G Production Group, LLC and the May 14, 2014 order denying their motion for new trial. This case arose from a contract dispute concerning the purchase of oil and gas interests previously owned by some of the Agrawal defendants and the transfer of operations for the producing wells on those leases. After this appeal was filed, the United States Bankruptcy Court for the Western District of Oklahoma granted a petition for involuntary bankruptcy naming Kris Agrawal as the debtor and stayed further proceedings in this appeal. On April 24, 2017, that court granted Agrawal's request for relief from the automatic stay, permitting this appeal to proceed. The Agrawal defendants have failed to preserve certain issues for appellate review and shown no error by the district court with respect to all but two of the issues pre-

served for review. The award of actual damages on CO&G's tortious interference claim is modified by this Court to $13,500 and the award of punitive damages on CO&G's two tort claims is vacated. In all other respects, the December 5, 2013 Final Journal Entry of Judgment is affirmed, and this case is remanded for further proceedings consistent with this Opinion regarding the punitive damages issue. The district court's May 14, 2014 order denying the Agrawal defendants' motion for new trial is affirmed in part and reversed in part consistent with this Opinion.

BACKGROUND

¶2 This dispute concerns an August 21, 2007 Contract for Sale of Lease Rights and Appointment of Operator in what the parties refer to as the Hill Top Redfork Sands Units 1, 2 and 3 located in Tulsa County, Oklahoma. At that time, Online was the operator of the wells in the Hill Top Units and Realty Developers owned oil and gas leases in those units. Online and Realty Developers are companies owned and operated by Kris Agrawal. The contract was signed by Jerry Parent on behalf of CO&G and by Gregory Williams on behalf of Realty Developers. The contract states that the operation of the Hill Top Units wells was transferred to CO&G and that CO&G was purchasing the Hill Top Units oil and gas leases previously owned by Realty Developers.

¶3 After CO&G assumed operations of the Hill Top Units, Realty Developers and Online filed suit challenging the sale of the Hill Top Units leases alleging that the person who signed the contract on behalf of Realty Developers did not have authority to do so. CO&G filed a counterclaim and third-party claim joining the remaining Agrawal defendants in the litigation. CO&G sued to establish and foreclose its operator's lien on the interest in the Hill Top Units owned by the Agrawal defendants, and for fraud, tortious interference, breach of contract, unjust enrichment, quiet title, reformation and declaratory relief.

¶4 Pursuant to an order filed May 25, 2011, the district court granted CO&G's motion for partial summary judgment on its lien foreclosure claim and request for declaratory relief. In summary, the district court found that the Agrawal defendants had been "duly served" with the motion for partial summary judgment, that CO&G was the operator of the Hill Top Units, and that CO&G had a statutory and contractual lien in the amount of $3,282,218.37 for unpaid operating expenses against any interest owned by any of the Agrawal defendants in the Hill Top Units. The May 2011 order also authorized the sheriff to "levy upon and sell/auction any interest that the Agrawal defendants may now have or may ever acquire in the mineral leasehold underlying the Hilltop [sic] Units . . . ." The findings, conclusions and partial judgment in favor of CO&G on its lien theory contained in this order were incorporated into the district court's December 5, 2013 Final Journal Entry of Judgment.

¶5 The December 2013 judgment also granted judgment against Online and Realty Developers as to all claims asserted by those plaintiffs against CO&G. In addition, judgment was granted in favor of CO&G and against the Agrawal defendants on CO&G's remaining theories for fraud, intentional interference, breach of contract, unjust enrichment, quiet title, reformation and declaratory relief. This aspect of the judgment was imposed as a sanction for failing to participate in the discovery process and for failing to comply with the court's discovery and pretrial conference orders. The judgment recites the Agrawal defendants' "repeated history" of "failing to cooperate in the discovery process, abusing the discovery process and violating this Court's orders which warranted sanctions by this Court pursuant to 12 O.S. § 3237(B)(2)."[2] The matter was then set for hearing on the amount of damages. At the conclusion of that hearing, the district court found that CO&G's damages for unpaid operating expenses on its lien theory had increased to $5,508,689.89 and reformed its previous judgment to reflect that amount. The district court entered judgment for this amount of actual damages on CO&G's breach of contract, fraudulent inducement and tortious interference claims. The court also found that CO&G was entitled to punitive damages on CO&G's two tort theories in the amount of $5,508,689.89 and included that amount in its December 2013 judgment.

¶6 Within ten days, the Agrawal defendants filed a motion seeking reconsideration of the December 5, 2013 judgment. That motion was denied by order filed May 14, 2014. The Agrawal defendants appeal both the December 2013 Judgment and the May 2014 order denying their motion for reconsideration.[3]

STANDARD OF REVIEW

¶7 "A motion seeking reconsideration, re-examination, rehearing or vacation of a judgment . . . which is filed within 10 days of the day such decision was rendered, may be regarded as the functional equivalent of a new trial motion, no matter what its title." *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, ¶ 4, 681 P.2d 757. The Agrawal defendants' motion for reconsideration is properly treated as a motion for new trial. The district court is vested with wide discretion in ruling on a motion for new trial, and its order will be reversed only if the court is deemed to have erred with respect to a pure, simple and unmixed question of law. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger,* 2002 OK 31, ¶ 5, 46 P.3d 698. A trial court's denial of a motion for new trial is reviewed for abuse of discretion. *Head v. McCracken*, 2004 OK 84, ¶ 2, 102 P.3d 670.

¶8 The December 2013 judgment also granted judgment in favor of CO&G on its remaining claims as a sanction pursuant to 12 O.S.2011 § 3227, based on the Agrawal defendants' failure to cooperate in discovery and violation of the court's orders regarding the production of documents. The standard of review for a district court's sanction order entered pursuant to section 3227 is also abuse of discretion. *Payne v. DeWitt,* 1999 OK 93, ¶ 9, 995 P.2d 1088 ("[T]he trial court's discretion, while broad, is not unbridled. The sanction must be both fair and related to the particular claim (or defense) at issue in the discovery order.").

¶9 "An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, ¶ 13, 171 P.3d 890 (emphasis omitted) (footnote omitted).

¶10 The amount of the December 2013 judgment was determined after a nonjury trial on the issue of damages. "The proper standard of review in an action at law is that the findings of the trial court are as binding on appeal as the verdict of a jury, and if there is competent evidence to support the findings, they will not be disturbed on appeal." *Dismuke v. Cseh*, 1992 OK 50, ¶ 7, 830 P.2d 188.

¶11 Finally, the December 2013 judgment also included an award of punitive damages. Punitive damages may be imposed in actions for the breach of obligations not arising out of contract, and the proceedings are governed by 23 O.S.2011 § 9.1. *Lierly v. Tidewater Petroleum Corp.,* 2006 OK 47, ¶ 30, 139 P.3d 897. Punitive damages are now authorized where the trier of fact finds "by clear and convincing evidence" that a party "has been guilty of reckless disregard for the rights of others" (Category I), or that a party "has acted intentionally and with malice towards others" (Category II). 23 O.S. 2011 § 9.1. In this case tried to the district court, we review the district court's findings of fact to determine if there is clear and convincing evidence in the record to support the award of punitive damages. *See Wilspec Techs., Inc. v. Dunan Holding Group Co. Ltd.*, 2009 OK 12, 204 P.3d 69 (holding that plaintiff seeking punitive damages for tortious interference must prove by clear and convincing evidence that the defendant acted either recklessly, or intentionally and maliciously). *Cf., In re S.B.C.*, 2002 OK 83, ¶ 7, 64 P.3d 1080 (noting that "use on review of anything less than the very same standard as that which is required in the trial courts" would water down the heightened standard and render it "meaningless"). *See also State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418, 123 S. Ct. 1513,1520 (2003) (punitive damage awards are subject to "exacting" de novo appellate review).

ANALYSIS

I. The Motion for New Trial

¶12 Although Kris Agrawal appears pro se in this appeal, the motion for new trial was filed in the district court on his behalf and on behalf of all of the Agrawal defendants by their counsel at the time.[4] That motion argued four propositions: (1) the "harsh sanction" of default judgment was improper because only Online and Realty were served with discovery requests, and the Agrawal defendants' conduct was not malicious because the material not produced was privileged; (2) default judgment was unjust because of the defendants' "meritorious claims and defenses;" (3) the award of punitive damages was unsupported by the law or the facts; and (4) irregularity in the proceedings and the excessive amount of damages warrant a new trial.

¶13 It is important to examine these arguments in detail. "If a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted." 12 O.S.2011 § 991(b). The

Supreme Court has consistently invoked this statute to restrict the appellate issues to those raised in a motion for new trial. *See, e.g., Slagell v. Slagell,* 2000 OK 5, 995 P.2d 1141; *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, 681 P.2d 757. A "motion for new trial . . . acts to limit the issues reviewed on appeal to those raised by that motion." *City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, ¶ 11, 250 P.3d 305. Consequently, we address only those issues raised in the Agrawal defendants' motion for new trial and preserved for review in their appellate briefing. Okla. Sup. Ct. R. 1.11(k)(1), 12 O.S.2011 and Supp. 2013, ch. 15, app. 1. *See also Walker v. Walker*, 1985 OK 2, ¶ 4, 695 P.2d 1 (noting that issues not supported by argument and authority in a party's brief may be deemed waived).

A. Judgment Imposed as a Sanction

¶14 The foundation of the discovery dispute concerns CO&G's 2009 request for production of documents and the redacted copies of emails to and from Kris Agrawal produced in response to that request. CO&G's discovery requests were served on Online and Realty Developers on January 16, 2009. Only ninety pages of documents have been produced, even though Kris Agrawal testified that he had a "room full" of documents relating to those companies and the Hill Top Units. The ninety pages of documents were produced by Kris Agrawal as the designated representative of Online in response to a 2009 notice to take deposition. Included in those documents are copies of emails to or from Kris Agrawal with material appearing in the margins that had been redacted. Kris Agrawal's original counsel stated that the redacted material contained notes made by Kris Agrawal and comments on the substance of the emails. She stated she redacted this material because she believed the notes were subject to the attorney/client privilege. That action eventually resulted in two sanctions orders, a November 13, 2012 order sanctioning Online and Realty Developers, and an August 26, 2013 order sanctioning the remaining Agrawal defendants.

¶15 As stated in CO&G's first motion to compel, counsel for Online and Realty Developers agreed in an August 31, 2012 conversation that he would produce unredacted copies of those emails. Online and Realty Developers did not file a response to CO&G's first motion to compel. On October 29, 2012, the district court granted CO&G's motion and ordered Online and Realty Developers to produce the requested documents within ten days, including unredacted copies of the emails. Neither Online nor Realty Developers produced any documents. On November 13, 2012, the district court granted CO&G's motion for sanctions finding Online and Realty Developers had failed to comply with the court's October 29, 2012 order.

¶16 Citing section 3234 of the Oklahoma Discovery Code (12 O.S.2011 §§ 3224 to 3237), the Agrawal defendants point out that any party is authorized to serve a request for the production of documents on any other party. However, the Agrawal defendants argue that no discovery requests were ever served by CO&G on any party other than the plaintiffs, Online and Realty Developers. From this, they conclude that the third-party defendants could not have failed to produce documents because no request for the production of documents was served on them. Therefore, they maintain that the third-party defendants cannot be sanctioned pursuant to section 3237 for failure to comply with a discovery request.

¶17 First, this argument concedes the propriety of sanctioning Online and Realty Developers for failing to comply with the district court's October 29, 2012 order. Second, this argument ignores undisputed facts that are dispositive of the other Agrawal defendants' argument.

¶18 Even though discovery requests were not served on all of the Agrawal defendants, the district court "has inherent authority to impose sanctions for abuse of the discovery process. That is, the trial court has the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made." *Barnett v. Simmons*, 2008 OK 100, ¶ 14, 197 P.3d 12. And, although the district court found that the other Agrawal defendants had a repeated history of abusing the discovery process, reliance on the court's inherent authority is not necessary in this case.

¶19 The pretrial conference order was filed May 29, 2013. That order states: "Third Party Defendants are ordered to produce unredacted, emails requested by CO&G, by July 1, 2013." When no documents were produced, CO&G filed its second motion for sanctions, this time against Kris Agrawal, Coal Gas USA, Coal Gas Mart and Realty Management on July 26, 2013. These parties also failed to file a

response to CO&G's motion for sanctions, and the district court granted that motion on August 26, 2013. The fact that these parties were not served with discovery requests is, therefore, immaterial. The district court "is empowered by Oklahoma's discovery code to sanction parties or attorneys who violate discovery orders. [Section] 3237(B)(2) provides for sanctions to be imposed by the court for failure to obey an order to provide or permit discovery." *Barnett*, 2008 OK 100, ¶ 14 (footnote omitted).

¶20 The pretrial conference order required Kris Agrawal, Coal Gas USA, Coal Gas Mart and Realty Management to produce the unredacted emails. These defendants do not claim that the district court lacked the power to order them to produce those documents. These parties' failure to comply with the pretrial order is clearly sanctionable. Okla. Dist. Ct. R. 5(J), 12 O.S.2011, ch. 2, app.

¶21 Kris Agrawal also argues that he did not willfully refuse to comply with the district court's discovery orders because: "Kris Agrawal never knew of the Court's Orders compelling . . . production [of the unredacted emails]." The only evidentiary support in the motion for new trial for this statement comes from Kris Agrawal's previous counsel, Larry Stewart. Attached to the motion for new trial is Stewart's affidavit in which he states that his "clients were unaware of the specific Orders from the Court regarding such [discovery] issues." What "specific Orders" Stewart is referring to is not made clear in his affidavit. What is clear is that Stewart attended the pretrial conference during which the district court ordered Kris Agrawal, among others, to produce the unredacted emails by July 1, 2013. In his affidavit, Stewart denies being timely served with CO&G's motions to compel but he does not deny receiving a copy of the pretrial order. In fact, in his affidavit, Stewart states that at the end of June and the beginning of July 2013, he "worked with [his] clients to resolve all outstanding [discovery] issues," including the production of documents "required by the Court's Pretrial Conference Order." Nonetheless, the unredacted copies of the emails were not produced by July 1, 2013, as ordered by the district court.

¶22 In fact, the unredacted emails were not produced until December of 2013, and then only to the district court, under seal, pursuant to a claim of attorney-client privilege that the Agrawal defendants raised for the first time in their motion for new trial. We find this argument disingenuous, at best, and ultimately unpersuasive. As the district court found, on July 2, 2013, the day after the district court ordered that the emails be produced, the Agrawal defendants asserted that the unredacted copies of the emails had been "lost." Later they claimed that the emails had been "destroyed." Only after judgment had been entered against them were they able to find the unredacted emails and offer them to the district court under a claim of privilege. The Agrawal defendants were a day late and a dollar short with their discovery response. *Cf., Hayes v. Central States Orthopedic Specialists, Inc.*, 2002 OK 30, 51 P.3d 562 (delay in asserting a privilege may result in waiver of the privilege). We hold that by failing to assert their claim of attorney/client privilege, at least by the time of the pretrial conference, the Agrawal defendants waived their right to later assert that claim. The district court did not err in granting judgment against the Agrawal defendants as a sanction on CO&G's breach of contract, fraudulent inducement and tortious interference theories of liability and that aspect of the December 2013 judgment is affirmed.

B. The Agrawal Defendants' Claim of "Meritorious" Defenses

¶23 In their second proposition of error, the Agrawal defendants rely on the general principle that default judgments are disfavored and that a trial on the merits is preferred. That law is not disputed. The Agrawal defendants then argue that the default judgment should be set aside because they have meritorious defenses worthy of a trial. Specifically, they argue that Gregory Williams, the person signing the August 2007 contract on behalf of Realty Developers to sell its oil and gas leases to CO&G, did not have authority to do so. Attached to their motion for new trial are documents supporting this contention. However, determining the materiality of that "defense" requires context.

¶24 First, the Agrawal defendants' argument addresses only the ownership of the oil and gas leases in the Hill Top Units. On February 28, 2007, Kris Agrawal executed Corporation Commission forms transferring operation of the Hill Top Units to CO&G, and the district court found and entered a judgment declaring that CO&G was the operator of the Hill Top Units.

¶25 Second, CO&G's motion for partial summary judgment sought only three rulings: (1) a

declaration that it was the operator of the Hill Top Units; (2) a determination that it had a valid and enforceable operator's lien for the expenses it had incurred while operating the wells in the Hill Top Units; and (3) a ruling that CO&G was entitled to enforce its lien against any interest in the Hill Top Units owned by the Agrawal defendants. Ownership of the Hill Top Units leases by virtue of the August 2007 contract was not at issue in the partial summary judgment proceeding.

¶26 Third, the three facts CO&G sought to establish in the partial summary judgment proceeding are conclusively established by the May 2011 partial judgment and confirmed by the December 2013 final judgment. As a result, the $5,508,689.89 judgment in favor of CO&G is not attributable to the district court's sanctions orders but is based solely on the expenses CO&G incurred while operating the wells in the Hill Top Units. That judgment is enforceable regardless of who owns the leases in the Hill Top Units. Consequently, even if the Agrawal defendants were to prevail on their claim of ownership of the Hill Top Units leases, they would still be subject to CO&G's lien. In its May 2011 partial summary judgment, the district court foreclosed CO&G's operator's lien, thereby transferring ownership of the Hill Top Units to CO&G independent of any interest it did or did not acquire pursuant to the August 2007 contract. Therefore, the argument that Gregory Williams did not have authority to sign the August 2007 contract fails to raise an issue of fact precluding the partial summary judgment in favor of CO&G on its lien foreclosure claim.

¶27 The only other challenge the Agrawal defendants raise addressing the merits of the judgment in favor of CO&G is contained in footnote 6 to their motion for new trial, in which they purport to incorporate "the specific evidence previously submitted in Plaintiffs' filing of February 7, 2011, as the basis for error in the Journal Entry of Judgment filed May 25, 2011 in this case." The February 7, 2011 objection to CO&G's motion for partial summary judgment was filed by Kris Agrawal at a time when he and the other Agrawal defendants were represented by counsel. When CO&G moved to strike that filing because Kris Agrawal was not permitted to represent the other Agrawal defendants, counsel for all of the Agrawal defendants, including Kris, filed a notice with the district court on March 14, 2011, withdrawing the February 7, 2011 filing. Subsequently, Kris Agrawal's February 7, 2011 filing was stricken by the district court. Consequently, footnote 6 to the Agrawal defendants' motion for new trial incorporates nothing.

¶28 In their effort to demonstrate the alleged need for a trial on the merits of their defense to CO&G's claim, the Agrawal defendants have failed to show that any facts material to CO&G's lien foreclosure claim are in dispute. That aspect of the district court's December 2013 judgment was not granted as a sanction because the Agrawal defendants refused to comply with the district court's discovery and pretrial conference orders. That judgment was based on the undisputable fact that CO&G is the operator of the wells in the Hill Top Units and the unchallengeable law that CO&G has and is entitled to enforce its operator's lien against any interest in the Hill Top Units leases owned by any of the Agrawal defendants.

¶29 Consequently, the Agrawal defendants' motion for new trial does not preserve for appellate review any issue regarding the judgment in favor of CO&G on its lien foreclosure claim. The liability imposed as a sanction regarding CO&G's other claims only duplicates, in essence, the liability imposed by the foreclosure judgment. As a result, the Agrawal defendants have not shown that the district court erred in granting judgment in favor of CO&G for actual damages on CO&G's lien foreclosure, breach of contract, fraudulent inducement and tortious interference claims.[5]

III. Punitive Damages

¶30 The Agrawal defendants argue that the award of punitive damages is not supported by law or fact. In addition, they contend that the punitive damage award is "shockingly excessive and flagrantly outrageous." CO&G presented two theories of liability on which the district court granted punitive damages: (1) it was fraudulently induced to sign the August 2007 contract; and (2) after the sale, the Agrawal defendants tortiously interfered with CO&G's business operations. Liability on both theories was imposed as a sanction based on the Agrawal defendants' willful and bad faith refusal to comply with the court's discovery and pretrial conference orders. After the September 26, 2013 hearing on damages, the district court awarded actual damages in the amount of $5,508,689.89 on CO&G's lien foreclosure, breach of contract, fraudulent inducement and inten-

tional interference with business relations theories of liability. In addition, the district court awarded punitive damages on each of CO&G's two tort theories in an amount equal to the amount of actual damages.

A. Notice

¶31 The Agrawal defendants first complain that they were not served with notice of the September 26, 2013 hearing on damages during which punitive damages were awarded. Nonetheless, the Agrawal defendants' counsel appeared at the hearing and requested a continuance claiming he had just found out about the hearing by accident because CO&G's motion was mailed to the wrong address. The district court conducted a hearing on that motion before proceeding with the damage issue. The court found that although the Agrawal defendants' counsel had apparently changed his address, CO&G had mailed the notice of hearing to the address listed on his entry of appearance. The district court recited into the record various recent occasions on which the Agrawal defendants' counsel had appeared on various matters after receiving notice mailed to the same address. The court also noted that the September hearing had been set for six weeks. We find no error in the district court's denial of the motion for continuance and its finding that the Agrawal defendants had adequate notice of the September hearing.

B. Procedure

¶32 The Agrawal defendants next argue that the September 26 hearing did not provide the meaningful review of the damages issue required by *Payne v. DeWitt*, 1999 OK 93, 995 P.2d 1088 (holding that the district court must conduct a meaningful inquiry into the amount of actual and punitive damages, allowing the party in default to cross-examine witnesses and present evidence). At the hearing on damages, CO&G introduced evidence supporting the actual damages it incurred as operator of the wells in the Hill Top Units. Ron Walker testified on behalf of CO&G that the operating expenses of $3,282,218.37 previously awarded had increased to $5,508,689.89 since the partial summary judgment was granted. Walker testified that amount included most but not all of the operating expenses it had incurred. He testified that he did not have time before the hearing to properly identify and support another $50,000 he estimated CO&G had incurred. The Agrawal defendants' counsel was given the opportunity to cross-examine Walker and did so. The Agrawal defendants' counsel was given the opportunity to offer any evidence during the hearing, but did not do so. Nonetheless, at the conclusion of the hearing the district court gave the parties until October 11, 2013, to file proposed findings of fact and conclusions of law. On that date, CO&G filed its proposed findings and conclusions, but the Agrawal defendants requested an additional ten days to file their proposed findings and conclusions. On October 24, 2013, when no findings and conclusions had been filed by the Agrawal defendants, the district court adopted the findings and conclusions filed by CO&G and later incorporated those findings and conclusions into its December 2013 judgment. We find no procedural or due process error in the manner in which the district court conducted the September 26, 2013 hearing.

C. The Tortious Interference Claim

¶33 The district court also granted judgment in favor of CO&G on its tortious interference with business theory of liability for both actual and punitive damages. This is a separate cause of action and arose after execution of the August 2007 contract. In support of this claim, the district court found that the Agrawal defendants "recorded various legal instruments which purport to convey or burden [CO&G's] leasehold interests in the Hilltop [sic] Units," that those actions "were designed to undermine CO&G's ownership of oil and gas leasehold interest in the Hilltop [sic] Units," and that the Agrawal defendants made "false representations to Scissortail Energy which caused Scissortail Energy to cease doing business with CO&G."

> Presently, Oklahoma recognizes a tortious interference claim with a contractual or business relationship if the plaintiff can prove (1) the interference was with an existing contractual or business right; (2) such interference was malicious and wrongful; (3) the interference was neither justified, privileged nor excusable; and (4) the interference proximately caused damage.

Wilspec Techs., Inc. v. Dunan Holding Group Co., Ltd., 2009 OK 12, ¶ 15, 204 P.3d 69. Even though the district court imposed liability on this claim as a sanction, the evidence in this record fully supports CO&G's claim that the Agrawal de-

fendants tortiously interfered with CO&G's business operations.

¶34 The district court awarded CO&G actual damages on this claim in the amount of its operating expenses, $5,508,689.89. This was error. At the September 2013 hearing on damages, Ron Walker testified that as a result of Kris Agrawal's misrepresentations to Scissortail Energy, that company stopped purchasing oil and gas from CO&G. However, the only damage Walker attributed to Agrawal's wrongful interference with CO&G's business was the expense of hiring a lawyer to "address [Agrawal's] misrepresentations" to Scissortail Energy. The exhibit introduced by CO&G at the hearing shows those legal fees to be $13,500 and that this amount was excluded from the $5,508,689.89. The December 5, 2013 judgment is modified to award actual damages to CO&G on its tortious interference with business theory in the amount of $13,500, which is in addition to the $5,508,689.89 in actual damages awarded on CO&G's other theories of liability.

D. Punitive Damages

¶35 Finally, the Agrawal defendants argue that the punitive damages award was excessive and that there is insufficient evidence to support what they refer to as a "default judgment" of punitive damages. Although the judgment in this case did not result from the entry of a default, the problem is that liability for punitive damages was imposed as a sanction for violating the district court's discovery and pretrial orders. Although punitive damages may be awarded as a sanction, section 9.1 specifies the factors on which a finder-of-fact must base an award of punitive damages:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;

2. The profitability of the misconduct to the defendant;

3. The duration of the misconduct and any concealment of it;

4. The degree of the defendant's awareness of the hazard and of its excessiveness;

5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;

6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and

7. The financial condition of the defendant.

23 O.S.2011 § 9.1(A). When punitive damages are awarded as a sanction, consideration of the relevant factors must appear on the record to permit meaningful appellate de novo review. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S. Ct. 1678, 1685 (2001).

¶36 We recognize that the Oklahoma Supreme Court affirmed, in principle, an award of punitive damages entered as a discovery sanction in *Payne v. DeWitt*, 1999 OK 93, ¶ 10, 995 P.2d 1088. However, since *Payne* was decided section 9.1 has been the subject of significant amendments and the United States Supreme Court has issued two opinions concerning punitive damages relevant to this case. In *Cooper Industries*, the Court held that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of "grossly excessive" or arbitrary punishments on a tortfeasor. *Cooper Indus.*, 532 U.S. at 434, 121 S. Ct. at 1684. In *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, the Court reiterated that punitive damage awards must be based on the three "guideposts" announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). The *Gore* factors concern the reprehensibility of the conduct, the ratio of the punitive damages to the actual damages and the amount of awards for comparable misconduct. *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520 (citing *Gore*, 517 U.S. at 575, 116 S. Ct. at 1589). Regardless of the impetus for an award of punitive damages in this case, it is now clear that section 9.1 and the United States Constitution require evidence in the record that addresses the *Gore* guideposts.

1. The Fraudulent Inducement Claim

¶37 The district court found that the Agrawal defendants made "material fraudulent and/or negligent misrepresentations" including that they: (1) owned the entire oil and gas leasehold in the Hill Top Units, (2) overstated the productivity of the Hill Top Units wells, and (3) exaggerated the condition of the equipment and infrastructure associated with the Hill Top Units wells. That is essentially the same conduct that the court found resulted in the Agrawal defendants' breach of the August 2007 contract. The findings of the district court clearly support the award of actual damages on CO&G's breach of contract theory of liability even if liability on that theory had not been imposed as a sanction. Those findings also sup-

port the award of actual damages on CO& G's fraudulent inducement theory. And, the Agrawal defendants do not argue otherwise.

¶38 It is well settled in Oklahoma that "punitive damages may be recovered where the breach of a contractual obligation amounts to an independent tort with elements of malice, actual or presumed." *LeFlore v. Reflections of Tulsa, Inc.*, 1985 OK 72, ¶ 39, 708 P.2d 1068 (decided pursuant to the predecessor to section 9.1). The issue is whether this record supports the award of $5,508,689.89 in punitive damages.

¶39 Punitive damages are an element of the recovery in the underlying tort action and are based on the proof of the underlying claim. *Rodebush v. Okla. Nursing Homes, Inc.*, 1993 OK 160, ¶ 21, 867 P.2d 1241. The elements of fraud are: (1) a material representation; (2) that was false; (3) known to be false by the maker or made recklessly, without any knowledge of its truth and as a positive assertion; (4) made with the intention that it should be relied on; (5) the plaintiff acted in reliance upon it; and (6) thereby suffered injury. *State ex rel. Southwestern Bell Tel. Co. v. Brown,* 1974 OK 19, ¶ 19, 519 P.2d 491. Fraud must be proved by "clear and convincing evidence." OUJI-CIV No. 18.1; *Brown v. Founders Bank and Trust Co.*, 1994 OK 130, n.17, 890 P.2d 855. Consequently, to affirm the award of punitive damages, the record must contain not only sufficient proof of the elements of fraud, but also "clear and convincing evidence" that the Agrawal defendants have "been guilty of reckless disregard for the rights of others" or that they "acted intentionally and with malice towards others." 23 O.S.2011 § 9.1. *See also Wilspec Techs., Inc. v. Dunan Holding Group Co. Ltd.*, 2009 OK 12, ¶ 18, 204 P.3d 69 (holding that the plaintiff seeking punitive damages for tortious interference must prove by clear and convincing evidence that the defendant acted recklessly or maliciously in addition to proving the elements of the tort).

¶40 Further, the type of conduct described in section 9.1 as essential to an award of punitive damages concerns facts giving rise to the underlying claim, not a party's litigation conduct. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell*, 538 U.S. at 422-23, 123 S. Ct. at 1523. The conduct that harmed CO&G was the material misrepresentations that induced CO&G to sign the August 2007 contract. However, the district court did not quantify the degree to which those misrepresentations were material. Nonetheless, that evidence is relevant to the reprehensibility analysis. For example, did the Agrawal defendants overstate production from the Hill Top wells by ten percent or ninety percent? If the former, the misrepresentation would likely be sufficiently material to be fraudulent. But that does not necessarily mean that it was sufficiently reprehensible to warrant the imposition of punitive damages.

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 419, 123 S. Ct. at 1521.

¶41 Further, the punitive damage award must also be based on the section 9.1 factors and satisfy review considering the three *Gore* guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the penalties authorized or imposed in comparable cases. *Id.* at 418, 123 S. Ct. at 1520. And, "the conduct that harmed [the party seeking punitive damages] is the only conduct relevant to the reprehensibility analysis." *Id.* at 424, 123 S. Ct. at 1524.

¶42 Therefore, to warrant the imposition of more than just actual damages, CO&G was required to prove that the Agrawal defendants' fraudulent misrepresentations resulted from reckless or malicious conduct. Not all tortious conduct is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 576, 116 S. Ct. 1589, 1599. Further, reckless disregard for the rights of others or intentional malice are not elements of a fraudulent inducement claim. *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 1974 OK 19, 519 P.2d 491. However, CO&G introduced no evidence of

any conduct in connection with its fraud theory other than the facts it relied on to prove its breach of contract claim.

> To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Gore, 517 U.S. at 576, 116 S. Ct. at 1599.

¶43 The only reckless or malicious conduct the district court found that the Agrawal defendants committed was their obstructive, bad faith refusal to comply with the district court's discovery and pretrial conference orders.[6] Although, as we have previously held, that conduct justifies the imposition of liability as a sanction, even liability on a claim permitting punitive damages, it does not address the reprehensibility issue and is insufficient to support the amount of punitive damages awarded in this case. Further, because CO&G received all of the actual damages it proved that it had incurred, punitive damages should only be awarded "if the [Agrawal] defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. The Agrawal defendants' litigation conduct is not proof of reckless or malicious conduct in the commission of the fraud sufficient to support a finding that their conduct was "reprehensible."

¶44 The second *Gore* guidepost examines the ratio of the punitive damage award to the actual damages. Even though a ratio of one-to-one is generally recognized as being within constitutional limits, and the punitive damage award in this case was equal to the $5,508,689.89 amount of actual damages, when compensatory damages are substantial, exemplary damages of an equal amount may violate due process. *Id.* at 425, 123 S. Ct. at 1524. Regardless of the ratio, "the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 2721 (1993) (emphasis omitted) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045). Ron Walker testified at the hearing on damages that if the Agrawal defendants' representations had been true, "it would have been a very worthwhile venture," and that he and his partners "would have recovered our money in the first 24 to 36 months and had an ongoing substantial income." Walker did not testify that they would never recover their money. CO&G now owns all of the Hill Top Units and continues to operate the wells in the Units and collect the revenue generated from those operations. It is, however, still responsible for future plugging and environmental costs. Therefore, measuring the harm likely to result from the Agrawal defendants' conduct remains to be determined.

¶45 Finally, the third *Gore* guidepost examines the difference between the punitive damages awarded and the penalties authorized or imposed in comparable cases. CO&G introduced no evidence at the hearing on damages comparing the punitive damages awarded here with the sanctions imposed in other cases for similar misconduct.

¶46 Consequently, we vacate that part of the district court's December 5, 2013 judgment awarding punitive damages in the amount of $5,508,689.89 together with any associated interest and costs to the extent that award is based on CO&G's fraudulent inducement theory of liability.

2. The Tortious Interference Claim

¶47 CO&G's tortious interference claim is a separate cause of action capable of supporting an award of punitive damages in the appropriate case. *Wilspec Techs., Inc. v. Dunan Holding Group Co.* Ltd., 2009 OK 12, 204 P.3d 69. We have affirmed the judgment in favor of CO&G for actual damages on this claim, but that does not resolve CO&G's entitlement to punitive damages. Liability for this claim was established as a sanction. Although malicious and wrongful interference is an element of the tort, tortious interference need only be shown "by the weight of the evidence." OUJI-CIV No. 24.1. Further, intentional interference may result from "malice in the law without personal hatred, ill will, or spite." *Del State Bank v. Salmon*, 1976 OK 42, ¶ 9, 548 P.2d 1024. However, "the plaintiff seeking punitive damages for tortious interference with a contract obligation must prove that the defendant acted either recklessly, intention-

ally, or maliciously by clear and convincing evidence." *Wilspec Techs.*, 2009 OK 12, ¶ 18. The sanctions order on which the December 2013 judgment was based establishes that Kris Agrawal tortiously interfered with CO&G's business relations and particularly its business relationship with Scissortail Energy. However, at the hearing on damages, CO&G did not prove that Kris Agrawal's tortious conduct resulted from a reckless disregard for the rights of others or a malicious intent to harm.

¶48 Because de novo review of the record fails to show clear and convincing evidence of conduct warranting the imposition of a substantial award of punitive damages, the award of $5,508,689.89 in punitive damages is vacated. However, the record is not devoid of evidence that might support the award of some amount of punitive damages. Therefore, further consideration of this issue is required. This case is remanded for further hearing on CO&G's demand for punitive damages not inconsistent with this Opinion.

CONCLUSION

¶49 The award of $5,508,689.89 in punitive damages in the December 5, 2013 Final Journal Entry of Judgment is vacated. The award of actual damages based on CO&G's intentional interference with business relations theory of liability is modified to $13,500. In all other respects, the December 5, 2013 Final Journal Entry of Judgment is affirmed.[7] The district court's May 14, 2014 order denying the Agrawal defendants' motion for new trial is affirmed in part and reversed in part consistent with this Opinion. This case is remanded for further proceedings regarding CO&G's claim for punitive damages consistent with this Opinion.

¶50 **AFFIRMED IN PART, VACATED IN PART, MODIFIED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.**

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

1. Vimala Agrawal and Newton Agrawal were dismissed from this action by CO&G on May 21, 2014, and are not parties to this appeal. Likewise, CO&G and Kensley Petroleum, LLC have previously resolved their dispute and Kensley is no longer a party in this case.

2. "If . . . a party, in response to a request for inspection and copying submitted under Section 3234 of this title, fails to respond that the inspection or copying will be permitted as requested or fails to permit the inspection or copying as requested . . . the discovering party may move for an order compelling . . . inspection and copying in accordance with the request . . . ." 12 O.S.2011 § 3237(A)(2).

3. Kris Agrawal's petition in error was filed before the order denying the motion for reconsideration was filed and sought review of only the December 2013 judgment. Because the Supreme Court treated the petition in error filed by the other Agrawal defendants as an amended petition in error, we will consider Kris Agrawal as having preserved appellate review of the May 2014 order denying the motion for new trial.

4. This appeal was commenced on March 25, 2014, when Kris Agrawal filed his petition in error pro se (Case No. 112,681). On June 4, 2014, attorney Andrew Waldron filed appeal number 112,904 as counsel of record for Online, Realty Developers, Realty Management, Coal Gas and Coal Gas Mart. That appeal was consolidated with appeal 112,681, and the petition in error was treated as an amended petition in error. After attorney Waldron was permitted to withdraw, attorney Phillip Owen filed an entry of appearance on behalf of Online, Realty Developers, Realty Management, Coal Gas and Coal Gas Mart. The next day, attorney James Goodwin filed an entry of appearance on behalf of the same entities. Kris Agrawal has filed his appellate briefs pro se. The brief-in-chief of Online, Realty Developers, Realty Management, Coal Gas and Coal Gas Mart was filed by attorney Goodwin. The reply brief of Online, Realty Developers, Realty Management, Coal Gas and Coal Gas Mart was filed by attorney Owens.

5. Even if we were to reverse the judgment against the Agrawal defendants as to all but the lien foreclosure claim for some error in the sanctions proceedings, only the quiet title aspect of the December 2013 judgment would potentially be at issue. However, because we affirm the judgment on CO&G's lien foreclosure claim, CO&G is entitled to have title to the oil and gas leases in the Hill Top Units quieted in its name. "Where the trial court reaches the correct result for the wrong reasons or on incorrect theories, it will not be reversed." *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 58, 148 P.3d 842.

6. The district court also found that Kris Agrawal, if not others, had engaged in spoliation of evidence. This finding is premised on the representation in July of 2013 that unredacted copies of the emails had been "lost" or "destroyed." The record now establishes that unredacted copies of the emails were not destroyed or lost and no longer supports the finding of spoliation of evidence.

7. All pending motions filed by any party to this appeal which have not been previously decided are denied.

2018 OK CIV APP 2

WINSTON O. WATKINS, JR., and LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, on behalf of themselves and all others similarly situated, Plaintiffs/Appellants, vs. HAROLD G. HAMM, JEFFREY B. HUME and WHEATLAND OIL, INC., Defendants/Appellees.

Case No. 115,047. July 31, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROGER H. STUART, TRIAL JUDGE

AFFIRMED

Derrick L. Morton, NELSON TERRY MORTON DEWITT & PARUOLO, Edmond, Oklahoma, and J. Daniel Albert, Lee D. Rudy, Leah Heifetz, KESSLER TOPAZ MELTZER, & CHECK, LLP, Radnor, Pennsylvania, for Plaintiffs/Appellants

Michael Burrage, WHITTEN BURRAGE, Oklahoma City, Oklahoma, and

Jay P. Walters, GABLEGOTWALS, Oklahoma City, Oklahoma, for Defendants/Appellees

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 The plaintiffs Winston O. Watkins, Jr., and Laborers District Council Construction Industry Pension Fund, on behalf of themselves and all others similarly situated, appeal a May 2, 2016 order granting defendants Harold G. Hamm's, Jeffrey B. Hume's, and Wheatland Oil, Inc.'s motion to dismiss their amended petition with prejudice. The plaintiffs' petition purports to assert a direct action on behalf of Continental Resources, Inc.'s, shareholders against Hamm, Hume and Wheatland regarding a transaction in which Continental acquired the assets of Wheatland. Oklahoma has not previously recognized a direct action by shareholders against corporate officers and directors. We decline to do so here.

BACKGROUND

¶2 In this litigation, the plaintiffs challenge a 2012 transaction whereby Continental acquired one hundred percent of the assets of Wheatland. Pursuant to a preexisting contract with Continental, Wheatland had the right to participate in wells being drilled by Continental in certain areas. Wheatland had exercised that option in the past and owned a five percent working interest in certain wells. And, Continental was obligated to allow Wheatland to participate in future wells being drilled in Continental's lucrative Balkan Field. Harold Hamm, Continental's founder, Chairman of the Board and Chief Executive Officer, owned seventy-five percent of Wheatland and sixty-eight percent of Continental. Jeffery Hume, Continental's Vice-Chairman of Strategic Growth Initiatives, owned the other twenty-five percent of Wheatland as well as stock in Continental.

¶3 Hamm and Hume approached Continental about purchasing Wheatland's assets, including its contract right to participate in future wells. The Continental Board of Directors formed a Special Committee chaired by Mark Monroe, Continental's former President and Chief Operating Officer, to evaluate the transaction. After the analysis was complete, Continental filed a proxy statement with the Securities and Exchange Commission explaining the Wheatland transaction and soliciting the approval of Continental's stockholders to complete the acquisition. A majority of Continental's stockholders voted to approve the transaction, including eighty percent of the Company's disinterested minority stockholders, like the plaintiffs. As a result, Continental issued approximately $313 million of stock to Hamm and Hume in exchange for Wheatland's assets. Hamm's ownership percentage in Continental increased from 68.04% to 68.2%, and the interest of the minority stockholders decreased from 23.1% to 22.6%.

¶4 On July 18, 2012, the plaintiffs filed a direct and a derivative action against Continental and the Special Committee of Continental's Board of Directors, asserting breach of fiduciary duty, unjust enrichment, and aiding and abetting, as well as class action claims for breach of fiduciary duty and for aiding and abetting. The plaintiffs alleged that demand on Continental's Board of Directors was futile and therefore unnecessary. The plaintiffs alleged that the Wheatland acquisition was a conflicted insider transaction between Continental and its controlling stockholder, Hamm. The plaintiffs also alleged that Continental overpaid Hamm and Hume by at least $100 million in Continental stock, thereby diluting the minority stockholders' economic and voting interests in Continental.

¶5 The defendants moved to dismiss the petition pursuant to 12 O.S.2011 §§ 2012(B)(6) and 2023.1. The defendants argued that the plaintiffs lacked standing to sue because they failed to make a pre-suit demand on Continental's Board of Directors or plead with particularity why such demand would have been futile. The defendants relied on section 2023.1 of the Oklahoma Pleading Code and *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).[1] The plaintiffs responded, arguing that in controlling-shareholder transactions, the transaction is subject to Oklahoma's "entire fairness" standard and not Delaware's "valid exercise of business judgment" standard.[2] The district court ultimately denied the defendants' motion on January 8, 2013, citing an order in *Louisiana Municipal Police Employees Retirement System v. Continental Resources, Inc*., arising out of the same transaction and filed in the Western District of Oklahoma, Case No. 12-CV-667. The district court stayed further proceedings in the case pending a ruling by the federal court on the defendants' motion to dismiss in the *Louisiana Municipal Police* case. On May 16, 2013, the federal court granted the defendants' motion and dismissed the action in its entirety.

¶6 On June 20, 2013, the plaintiffs in this case filed a motion to lift the stay. The defendants also filed a motion to lift the stay and further requested that the court dismiss the action. By order entered on September 30, 2013, the district court granted the plaintiffs' motion to lift

the stay. In addition, the court denied the defendants' motion to dismiss with regards to the derivative action, finding the current status of the law required application of the "entire fairness" standard in controlling shareholder transactions. The court, however, granted the defendants' motion to dismiss with regard to the class action claim based on alleged misleading proxy statements, finding this theory of recovery had been asserted and fully adjudicated in the federal court litigation.

¶7 On June 5, 2014, the defendants filed a motion for reconsideration in light of a recent Delaware Supreme Court case, *Kahn v. M&F Worldwide Corporation*, 88 A.3d 635 (Del. 2014), which upheld the business judgment standard as the applicable standard of review in controlling shareholder transactions. The defendants requested that the trial court review the adequacy of the plaintiffs' demand-futility allegations in the derivative claim pursuant to *Aronson.* After additional briefing, the plaintiffs ultimately sought to dismiss their derivative claims without prejudice. By order entered on March 6, 2015, the district court permitted the plaintiffs to dismiss their derivative claims without prejudice.[3]

¶8 Subsequently, the defendants moved to dismiss the plaintiffs' remaining class action and breach of fiduciary duty claims. After a hearing on that motion, the district court permitted the plaintiffs to amend their petition, which they filed on December 1, 2015. The amended petition asserted a direct action on behalf of Continental's minority shareholders for breach of fiduciary duty based on the alleged unlawful dilution of their shares as a result of the Wheatland transaction.

¶9 The defendants filed a motion to dismiss the plaintiffs' amended petition and/or to strike dismissed claims. The defendants asserted that Oklahoma does not recognize a direct cause of action against corporate officers and directors, that the plaintiffs were barred from attempting to re-plead the disclosure claims previously dismissed, and that the transaction's approval by the independent Special Committee and a majority vote of the minority shareholders reinstated the business judgment presumption, requiring dismissal on the pleadings. The plaintiffs responded, arguing that the district court should follow Oklahoma's "intrinsic fairness" test, which requires those asserting the validity of the challenged transaction to prove, with evidence, that a challenged transaction is intrinsically fair. Relying on Oklahoma law, the plaintiffs argued that dismissal was inappropriate at this stage of the proceedings because the intrinsic fairness issue had not been resolved. *See Warren v. Cent. Bankcorporation, Inc.*, 1987 OK 14, 741 P.2d 846, and *Beard v. Love,* 2007 OK CIV APP 118, 173 P.3d 796. The district court granted the defendants' motion to dismiss, finding that the plaintiffs had failed to state a claim upon which relief may be granted because their claim must be pursued as a derivative action.

STANDARD OF REVIEW

¶10 The purpose of a motion to dismiss for failure to state a claim is to test the law that governs the claim rather than the facts asserted in support of that claim. *Kirby v. Jean's Plumbing Heat & Air,* 2009 OK 65, ¶ 5, 222 P.3d 21 (citing *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957)); *Groce v. Foster*, 1994 OK 88, ¶ 12, 880 P.2d 902. "On review of an order dismissing a petition all allegations in the petition are taken as true." *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565. Appellate review of a motion to dismiss involves a de novo consideration of whether the petition is legally sufficient. *Indiana Nat'l Bank v. Dep't of Human Servs.*, 1994 OK 98, ¶ 2, 880 P.2d 371. De novo review involves a plenary, independent, and non-deferential examination of the district court's rulings of law. *In re Estate of Bell-Levine,* 2012 OK 112, ¶ 5, 293 P.3d 964.

ANALYSIS

¶11 The sole issue in this appeal is whether Oklahoma recognizes a direct action by shareholders against corporate officers and directors based on the facts alleged in the plaintiffs' amended petition. Oklahoma's corporate law is derived from the corporate law of Delaware. *Woolf v. Universal Fidelity Life Ins. Co.*, 1992 OK CIV APP 129, ¶ 6, 849 P.2d 1093. Delaware law recognizes a direct action against corporate officers and directors in certain circumstances. *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006). "It is a settled rule that when one state adopts a statute from another, it is presumed to adopt the construction placed upon the statute by the highest court of the other state." *Bank of the Lakes v. First State Bank,* 1985 OK 81, ¶ 9, 708 P.2d 1089. However, Oklahoma has not previously recognized a direct action by shareholders. The only statutory action authorized is the stockholders' derivative action. 18 O.S. Supp. 2014 § 1126. *See Beard v. Love*, 2007 OK CIV APP 118, ¶ 19, 173 P.3d 796 ("The rights of share-

holders to redress wrongs against the corporation resulting from the acts or omissions of its officers and directors are derivative.") (citing *Weston v. Acme Tool Inc.*, 1968 OK 7, ¶ 12, 441 P.2d 959). The plaintiffs originally filed this case as a derivative action. They have since amended their petition to dismiss their derivative claim. They now attempt to assert a direct action on behalf of themselves and a class of minority shareholders.

I. The Plaintiffs' Allegations

¶12 The plaintiffs' eighty-page amended petition describes the Wheatland transaction and the plaintiffs' understanding of the events leading to that transaction. The petition closely tracks the allegations of their original petition, except that it no longer asserts a derivative action. The plaintiffs allege in Count I that Hamm and Hume, as officers and/or directors of Continental, breached their fiduciary duties to Continental and the minority shareholders by causing Continental "to pay an unfair price for the Wheatland Assets . . . ." They did this, according to the plaintiffs, by: (1) including assets Wheatland did not own in the acquisition; (2) manipulating Continental's projected production estimates to artificially inflate the value of the assets Wheatland did own; and (3) providing misleading information about the value of Wheatland's assets to the financial advisors and the independent committee evaluating the transaction.

¶13 The plaintiffs next allege that Hamm and Hume breached their fiduciary duties by establishing an "unfair process" for Continental to evaluate the Wheatland transaction. The plaintiffs allege that Hamm and Hume accomplished this by selecting Monroe as the chair of the Special Committee to serve their interests rather than Continental's interests by allowing the Hamm children's voting trusts to vote with other minority shareholders, and by approving a proxy statement that concealed material information about the transaction. The plaintiffs allege that Hamm and Hume caused Continental to "issue excessive shares" for the Wheatland assets "causing an unlawful dilution of the percentage of Company stock owned by the Company's minority shareholders." Count II alleges that Hume and Wheatland aided and abetted Hamm in his breach of fiduciary duty. The success of that claim necessarily depends on the viability of the claim stated in Count I.

¶14 In essence, the plaintiffs allege that Hamm and Hume caused Continental to overpay for the Wheatland assets by $100,000,000 in company stock, diluting the value of Continental and the minority stockholders' interest in the company. The plaintiffs seek damages, measured by the excessive amount paid for Wheatland assets by Continental, and rescission of all of the Continental stock issued in excess of the value of the Wheatland assets. The minority interest that the plaintiffs seek to represent accounts for approximately $20,000,000 of the alleged overpayment. According to the plaintiffs' theory of the case, Hamm agreed that he would voluntarily reduce the value of his personal Continental stock by $68,000,000 in exchange for the $75,000,000 worth of Continental stock he received for his share of the Wheatland assets.

¶15 If the plaintiffs are successful, $20,000,000 in value will be restored to their interest. Likewise, $68,000,000 in value will be restored to Hamm's interest and the value of the company would be increased by $100,000,000. The damages the plaintiffs seek, therefore, would flow to Continental and indirectly inure to the benefit of all Continental shareholders. "Where all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008). The plaintiffs correctly pled this claim as a derivative action in their original petition. And the fact that Delaware law appears to recognize a direct action by stockholders in certain circumstances does not change the "nature of the wrong alleged and the relief requested" by the plaintiffs in this case. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) (establishing the test for determining whether a stockholder's claim is direct or derivative). The plaintiffs chose to dismiss their derivative claim. That decision does not necessarily convert their claim into a direct action.

II. Direct Actions under Delaware Law

¶16 Delaware has recognized the theoretical possibility of a direct action since at least 1953. *See Elster v. American Airlines, Inc.*, 100 A.2d 219 (Del. Ch. 1953) (holding that a stockholder's dilution action to enjoin the issuance of stock options was derivative, not direct, because it was essentially a claim of mismanagement of corporate assets). In 1986, the Delaware Su-

preme Court found that a minority stockholder had stated a direct claim for breach of fiduciary duty against corporate directors. The stockholder alleged that the directors manipulated the sale of stock to a friendly buyer to avoid their removal from office causing a "special injury" to a minority stockholder who was attempting to acquire control of the company. *Lipton v. News Int'l, Plc,* 514 A.2d 1075, 1078 (Del. 1986).

¶17 In *Tooley,* the Delaware Supreme Court rejected the "special injury" test used in *Lipton* for determining when an action was direct rather than derivative.[4]

> We set forth in this Opinion the law to be applied henceforth in determining whether a stockholder's claim is derivative or direct. That issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?

Tooley, 845 A.2d at 1033. That is the same test currently applied by the Delaware courts.

> Under *Tooley,* whether a claim is solely derivative or may continue as a dual-natured claim "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" In addition, to prove that a claim is direct, a plaintiff "must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff, 152 A.3d 1248, 1260 (Del. 2016) (footnotes omitted).

¶18 The leading case recognizing direct claims is *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006). In that case, the majority stockholder, one of only two directors, caused the company to issue stock in exchange for the debt the company owed him. The stock was issued at an extremely favorable exchange rate and in breach of the credit agreement between the company and the majority stockholder.[5] As a result, the majority's interest in the company went from 61% to 93% and the minority interest was reduced from 39% to 7%. The majority stockholder then negotiated a merger with the company's primary competitor whereby the company's stockholders received stock in the acquiring company in exchange for their company stock. However, the majority stockholder negotiated a separate agreement with the acquiring company whereby it agreed to purchase over 80% of his stock one year after the merger. The majority stockholder testified that he would not have consented to the merger absent that concession. This purchase obligation was not disclosed to any of the company's minority stockholders. The acquiring company filed for bankruptcy within eighteen months after the merger was complete and after the company repurchased the majority shareholder's stock. *Id.* at 95-96.

¶19 The minority stockholders in *Gentile* filed a breach of fiduciary duty claim challenging the majority stockholder's conversion of debt to company stock and his solicitation of the purchase commitment he obtained as an inducement to vote for the merger. On appeal, only the debt conversion claim was addressed. The Delaware Supreme Court reversed summary judgment in favor of the majority stockholder on the debt conversion claim. The Court discussed the two separate harms that resulted from the majority stockholder's action, overpayment for the debt and a significant reduction in the value and voting power of the minority interest:

> In the typical corporate overpayment case, a claim against the corporation's fiduciaries for redress is regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock. Such claims are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction. In the eyes of the law, such equal "injury" to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually.

Id. at 99. The Court then discussed and contrasted the harm to the corporation with the separate harm to the minority stockholders in that case.

> There is, however, at least one transactional paradigm – species of corporate overpayment claim – that Delaware case law recognizes as being both derivative and direct in character. A breach of fiduciary duty claim having this dual character arises where: (1) a stockholder having majority or effective control causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders. Because the means used to achieve that result is an overpayment (or "over-issuance") of shares to the controlling stockholder, the corporation is harmed and has a claim to compel the restoration of the value of the overpayment. That claim, by definition, is derivative. But, the public (or minority) stockholders also have a separate, and direct, claim arising out of that same transaction. Because the shares representing the "overpayment" embody both economic value and voting power, the end result of this type of transaction is an improper transfer – or expropriation – of economic value and voting power from the public shareholders to the majority or controlling stockholder. For that reason, the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares. A separate harm also results: an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence, the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited. In such circumstances, the public shareholders are entitled to recover the value represented by that overpayment – an entitlement that may be claimed by the public shareholders directly and without regard to any claim the corporation may have.

Id. at 99-100. The *Gentile* Court then applied the Tooley analysis to determine if the minority's claim was direct or derivative and found that, after the corporate existence of the company had been extinguished by the merger and the acquiring firm had been liquidated, "the sole relief that is presently available would benefit only the minority shareholders." *Id.* at 103.

¶20 However, reliance on *Gentile* to find a direct claim is problematic. Delaware courts have "struggled with how to interpret *Gentile* and its potential to undercut the traditional characterization of stock dilution claims as derivative." *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 657 (Del. Ch. 2013). "[D]ecisions in which the Delaware Supreme Court has recognized dual-natured claims have been controversial and stand in tension with other decisions that have characterized similar claims as purely derivative." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1262 (Del. 2016) (footnote omitted). "*Gentile v. Rossette* is a confusing decision, which muddies the clarity of our law in an important context." *Id.* at 1265 (Strine, C.J., concurring). And, according to Chief Justice Strine:

> *[Gentile]* cannot be reconciled with the strong weight of our precedent and it **ought to be overruled**, to the extent that it allows for a direct claim in the dilution context when the issuance of stock does not involve subjecting an entity whose voting power was held by a diversified group of public equity holders to the control of a particular interest.[6]

Id. at 1266 (emphasis added).

¶21 The *El Paso* Court refused to extend *Gentile* to limited partnership cases, even after observing that *Tooley's* direct/derivative test is "'substantially the same' for claims involving limited partnerships." *Id.* at 1260. Further, the Court stated:

> We decline the invitation to further expand the universe of claims that can be asserted "dually" to hold here that the extraction of solely economic value from the minority by a controlling stockholder constitutes direct injury. To do so would deviate from the *Tooley* framework and "largely swallow the rule that claims of corporate overpayment are derivative" by permitting stockholders to "maintain a suit directly whenever the corporation transacts with a controller on allegedly unfair terms.

Id. at 1264 (footnote omitted) (citing *Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592 at *5 (Del. Ch. Sept. 28, 2015) ("*Gentile*

cannot stand for the proposition that . . . a direct claim arises whenever a controlling stockholder extracts and expropriates economic value from a company to its benefit and the minority stockholders' detriment.").

¶22 Not only has *Gentile* been the subject of confusion and criticism in the courts of Delaware, but also that case may be on the verge of being abrogated or, at least, significantly limited. If Oklahoma is to follow Delaware law in recognizing direct claims by corporate stockholders because Oklahoma's corporate law is patterned after Delaware law, we should wait until Delaware decides what its law is. In the eleven years since *Gentile* was decided, Oklahoma has yet to recognize the direct action theory of liability in shareholder litigation. This is not the case to do so, particularly given the current state of Delaware law.

III. This Case Is Not the Same as *Gentile*

¶23 Even if we were to recognize a direct action in shareholder litigation, the plaintiffs have failed to state a *Gentile*-type claim. In its current state, *Gentile* appears to stand for the general proposition that, subject to the *Tooley* test, minority stockholders can pursue a direct claim against the majority stockholder for breach of a fiduciary duty to the minority resulting in the transfer of value and voting interest from the minority to the majority.[7] The plaintiffs' allegations fit this general fact pattern. In both cases, assets belonging to a majority stockholder were sold to the corporation he controlled, and the minority stockholders claimed the corporation paid too much for those assets, diluting their interest in the company. But that is where the similarity ends. What the plaintiffs have not done is satisfy the *Tooley* test for stating a direct claim. For that reason, *Gentile* is distinguishable.

¶24 The first prong of the *Tooley* test asks "who suffered the alleged harm (the corporation or the suing stockholders, individually)." *El Paso,* 152 A.3d at 1260. These plaintiffs allege harm suffered by Continental issuing $100,000,000 worth of unnecessary shares for the Wheatland assets. Dilution claims are generally treated as derivative "because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008) (footnote omitted) (citing *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)). As one Chancellor analyzed the issue: "Although there are now more [company] shares outstanding and a greater number of stockholders, control of the corporation remains unchanged. Thus, . . . 'injury to voting interests' . . . is absent." *In re J.P. Morgan Chase & Co. S'holder Litig*., 906 A.2d 766, 774 (Del. 2006) (citing with approval the Chancellor's opinion in *In re J.P.Morgan Chase & Co.*, 2005 WL 1076069).

¶25 The second requirement for a direct action pursuant to *Tooley* requires proof that the minority stockholders, not the corporation, would receive any recovery. *El Paso,* 152 A.3d at 1260. In *Gentile*, the original corporation had been acquired in a merger and no longer existed. The acquiring firm filed for bankruptcy and was liquidated. Consequently, "the sole relief that is presently available would benefit only the minority shareholders." *Gentile*, 906 A.2d at 103. Continental still exists; it was not absorbed in a merger or liquidated in a bankruptcy. Therefore, the relief presently available would not just benefit the minority stockholders. Although the *Gentile* plaintiffs were able to satisfy the second prong of the *Tooley* test, the plaintiffs in this case cannot.

¶26 The final *Tooley* element requires proof that the plaintiffs "can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031, 1036 (Del. 2004). The fundamental factual claim of the plaintiffs' direct action is that Continental issued too much stock for the Wheatland assets. That is exactly the same harm plaintiffs alleged in their derivative action, now dismissed. If the damages alleged in the direct claim are the same as those suffered by the corporation, the injury is "properly regarded" as derivative. *Feldman*, 951 A.2d at 733. The plaintiffs in *Gentile* were able to satisfy this requirement by arguing that that the company was insolvent at the time the debt conversion occurred. Therefore, the stock issued to the majority stockholder had no value but for the exclusive purchase agreement he was able to negotiate with the acquiring company. There is no allegation that Continental is insolvent, and Hamm is not alleged to have received any undisclosed, much less preferential, terms in this transaction. If the value of the plaintiffs' stock was diluted as a result of this transaction, it is because Continental issued too much stock for Wheatland's assets.

¶27 For these reasons, even if the plaintiffs' amended petition can be viewed as fitting the general fact pattern of a *Gentile*-type direct action, that pleading does not state a claim. The plaintiffs cannot show that rescission of the alleged excessive shares issued by Continental would be a benefit flowing only to them. They cannot show, without demonstrating harm to Continental, that they can prevail. The harm alleged by the plaintiffs is fully recoverable in a derivative action. While that remedy remains available, the plaintiffs cannot satisfy any of the three prongs of the *Tooley* test to establish a direct claim.

CONCLUSION

¶28 Derivative suits are subject to certain procedural requirements to prevent interference with the proper management of a corporation. *Branzan Alternative Invest. Fund, LLP v. Bank of New York Mellon Trust Co., N.A.*, 677 Fed. Appx. 496, 497, 2017 WL 655408 (10th Cir. 2017). "The purpose of requiring a precomplaint demand is to protect the directors' prerogative to take over the litigation or to oppose it." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101, 111 S. Ct. 1711, 1719 (1991). Oklahoma law requires no less. "The petition shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . and the reasons for his failure to obtain the action or for not making the effort." 12 O.S.2011 § 2023.1. In this case, the plaintiffs chose to abandon their derivative claim. Were we to recognize a direct action in this case, that theory of recovery would "'largely swallow the rule that claims of corporate overpayment are derivative.'" *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (quoting *Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *5 (Del. Ch. Sept. 28, 2015)).

¶29 Although recognized by Delaware law, we decline to adopt, in this case, the direct cause of action in shareholder litigation. Plaintiffs' amended petition in this case does no more than state a derivative claim, a theory of liability abandoned by the plaintiffs. The judgment of the district court is affirmed, and the plaintiffs' petition is dismissed with prejudice.[8]

¶30 **AFFIRMED**.

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

JOHN F. FISCHER, PRESIDING JUDGE:

1. *Aronson* requires a plaintiff to plead particularized facts creating a reasonable doubt that either (1) a majority of directors are disinterested and independent; or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

2. *See Warren v. Cent. Bankcorporation, Inc.*, 1987 OK 14, ¶¶ 6-7, 741 P.2d 846; *Beard v. Love*, 2007 OK CIV APP 118, ¶¶ 28-29, 173 P.3d 796.

3. The Special Committee defendants were also dismissed without prejudice and are not parties to this appeal.

4. For this reason, the *Tooley* Court specifically disapproved of the Delaware courts' use of the discarded "special injury" test in the holdings and/or analysis in *Elster v. American Airlines, Inc.*, 100 A.2d 219 (Del. Ch. 1953); *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970); *Moran v. Household Int'l Inc.*, 490 A.2d 1059 (Del. Ch. 1985); *Lipton v. News Int'l, Plc.*, 514 A.2d 1075 (Del. 1986), and *In re Tri-Star Pictures, Inc. Litigation*, 634 A.2d 319 (Del. 1993).

5. The debt conversion rate had been established by contract, but the controlling shareholder breached that contract using a much more favorable conversion rate. The plaintiffs in this case do not allege that Continental breached some preexisting contract with Wheatland, Hamm and Hume that had previously determined the price at which Wheatland assets would be purchased.

6. It is undisputed that the plaintiffs held only a minority interest before the Wheatland transaction and that their interest was diminished by .5%.

7. This description does not include direct claims where the rights being pursued are contract rights belonging to the stockholders and not the corporation. *See, e.g., Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996) (recognizing as direct, a minority stockholder action seeking to invalidate certain employment contracts that the plaintiffs claimed abrogated the board of directors' responsibility to the shareholders). Further, a *Gentile*-type direct action is not necessarily limited to breach of fiduciary duty claims. *See Branzan Alternative Invest. Fund, LLLP v. Bank of New York Mellon Trust Co., N.A.*, 677 Fed. Appx. 496, 2017 WL 655408 (10th Cir. 2017).

8. This Opinion does not address any right the plaintiffs may have to revive their derivative claim.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, December 7, 2017

F-2015-937 — Isaiah Jamil Walker, Appellant, was tried by jury in Case No. CF-2014-584, in the District Court of Cleveland County, for the crimes of Count 1: First Degree Felony Murder; Count 2: Robbery, After Former Conviction of Two or More Felonies; Count 3: Burglary in the First Degree, After Former Conviction of Two or More Felonies; and Count 4: Possession of a Firearm, After Former Felony Conviction. The jury returned a verdict of guilty and recommended as punishment on Count 1: life imprisonment; Count 2: twenty years imprisonment; Count 3: twenty years imprisonment; and Count 4: three years imprisonment. The Honorable Lori Walkley, District Judge, sentenced Walker in accordance with the jury's verdicts and ordered the terms of confinement for all four counts to run concurrently with credit for time served. From this judgment and sentence Isaiah Jamil Walker has perfected his appeal. The Judgments and Sentences on Counts 1, 2, and 4 are AFFIRMED. The Judgment and Sentence on Count 3, Burglary in the First Degree, is REVERSED with instructions to DISMISS. Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur.

F-2017-278 — William Olive Hobbs, Appellant, was convicted after a bench trial for the crime of Lewd Acts with a Child Under Sixteen in Case No. CF-2015-398 in the District Court of Lincoln County. The trial court found Appellant guilty and sentenced him to 20 years imprisonment. From this judgment and sentence William Olive Hobbs has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.: Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur.

C-2016-877 — Charles David Miller, Petitioner, entered a negotiated guilty plea in Muskogee County District Court, Case No. CF-2014-804, before the Honorable Norman Thygesen, Associate District Judge, to Count 1: Stalking in Violation of Court Order; Count 2: Possession of a Firearm During Commission of a Felony; Count 3: Violation of a Protective Order (misdemeanor); and Count 4: Reckless Conduct with a Firearm (misdemeanor). In accordance with the plea agreement, Miller was sentenced to a ten year deferred sentence each on Counts 1 and 2, and a one year suspended sentence for each of Counts 3 and 4. The district court also imposed a $500.00 fine each on Counts 1-4 along with various court costs. The State filed an application to accelerate Miller's deferred sentences and revoke his suspended sentences. At the conclusion of the hearing on the State's application, Judge Thygesen accelerated Miller's deferred sentences to ten years imprisonment with all but the first six years suspended for each of Counts 1 and 2, and revoked in full his suspended sentences for both Counts 3 and 4. Judge Thygesen further ordered all four sentences to run concurrently with credit for time served. Miller filed an application to withdraw his guilty plea. After a hearing, Judge Thygesen denied Miller's application. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is GRANTED. The Judgment of the District Court on Count 1, and the Judgments and Sentences of the District Court on Counts 2 and 3, are AFFIRMED. The Sentence of the District Court on Count 1 is REVERSED AND REMANDED FOR RESENTENCING. The Judgment and Sentence of the District Court on Count 4 is REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs.

F-2016-1027 — Andrew Thomas Simms, Appellant, was tried by jury for the crime of Leaving the Scene of a Fatality Collision in Case No. CF-2014-2372 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at eight years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Andrew Thomas Simms has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Per Curiam; Lump-

kin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2016-132 — Jonathan Ray Thomas, Appellant, was tried by jury for the crimes of Assault and Battery with a Deadly Weapon (Count 1) and Possession of a Firearm After Former Conviction of a Felony (Count 2) in Case No. CF-2015-4530 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment on Count 1 and ten years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Jonathan Ray Thomas 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 part and dissents in part; Hudson, J., concurs; Kuehn, J., concurs in results.

Thursday, December 14, 2017

F-2016-1181 — Joe Louis Stevenson, III, Appellant, was tried and convicted at a bench trial in Carter County District Court, Case No. CF-2016-47B, of Robbery in the First Degree (Count 1), and Knowingly Concealing Stolen Property (Count 2). The Honorable Thomas K. Baldwin, Associate District Judge, sentenced Appellant to fifteen years imprisonment on Count 1 and five years imprisonment on Count 2. Judge Baldwin ordered the sentences be served concurrently and ordered credit for time served. From this judgment and sentence Joe Louis Stevenson, III has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2016-0913 — Appellant, Stephen Charles Swanson, Jr., pled guilty February 23, 2010, in Ottawa County District Court Case No. CF-2009-193, to Count 1 – Placing Body Fluids on Police Officer, After Former Conviction of a Felony; Count 2 – Assault, a misdemeanor; and Count 3 – Public Intoxication, a misdemeanor. He was sentenced on Count 1 to twenty years, suspended with all but the first 30 days to be served in the Ottawa County Jail, with rules and conditions of probation and with credit for time served. He was also fined $1,000.00 on Count 1, $250.00 on Count 2 and $50.00 on Count 3. The State filed an application to revoke Appellant's suspended sentence on June 17, 2016. At the revocation hearing on September 28, 2016, Appellant stipulated to the State's allegations in the application to revoke. Based upon the stipulation, the Honorable William Culver, Special Judge, found Appellant violated the rules and conditions of probation and revoked Appellant's suspended sentence in full, with credit for time served. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

RE-2016-1101 — Richard Leroy Felton, Appellant, appeals from the revocation in full of his consecutive suspended sentences of one year on Count 2, and six months on Count 3, in Case No. CF-2015-396 in the District Court of Okmulgee County, by the Honorable Pandee Ramirez, Special Judge. AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, S., Concur.

C-2017-271 — Petitioner Juston Dean Cox was charged in the District Court of McIntosh County on August 23, 2005, with Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies, Case No. CF-2005-152A. An Amended Information filed November 28, 2005, added ten additional counts of Knowingly Concealing Stolen Property. Pursuant to the November 30th Preliminary Hearing, Petitioner was bound over for trial on five counts, specifically Counts 1, 2, 3, 4 and 8 of the Amended Information. Trial was set for April 17, 2006. On September 19, 2005, Petitioner was charged with Escape from a County Jail (Count I) and Destruction of a Public Building (Count II), Case No. CF-2005-172A. On January 5, 2006, Petitioner was charged with Escape from a Penal Institution, Case No. CF-2006-04. On January 26, 2006, the State filed a second charge of Escape from a Penal Institution, Case No. CF-2006-14. Also on January 26, 2006, Petitioner entered negotiated pleas of guilty in all four cases. Pursuant to the plea agreement, Petitioner was to be sentenced to thirty (30) years in each case, to run concurrently with each other and with sentences imposed in cases in Cleveland and McClain counties, and all but one count of Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies in CF-2005- 152A was to be dismissed. The Honorable Thomas M. Bartheld, District Judge, accepted the pleas and sentenced Petitioner according to the plea agreement. On February 6, 2006, Petitioner faxed the McIntosh County District Attorney's Office

stating, "I, Justin Cox, wish to withdraw my plea in all McIntosh County cases". The document was signed by Petitioner and filed in the District Court on February 16, 2006. On March 23, 2006, a hearing was held on Petitioner's request to withdraw his pleas. After hearing argument and testimony, the request to withdraw was denied. From this judgment and sentence Juston Dean Cox has perfected his appeal. Certiorari is granted in part as the order of the district court denying Petitioner's motion to withdraw guilty plea is REVERSED and the case is REMANDED TO THE DISTRICT COURT FOR APPOINTMENT OF COUNSEL TO DETERMINE WHETHER PETITIONER WISHES TO PROCEED WITH THE WITHDRAWAL OF THE GUILTY PLEAS. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Result; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-843 — David Ruble, II, Appellant, was tried by jury for the crimes of Count I - Felony Murder with the predicate Attempted Robbery by Firearm, and Count III - Conspiracy to Commit Robbery with a Firearm in Case No. CF-2014-2691 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count I and 10 years on Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence David Ruble, II, has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, December 21, 2017

F-2016-902 — Appellant Leandra M. Jackson-Hubbs was tried by jury and convicted of First Degree Robbery with a Firearm (Counts I and II); Possession of a Firearm After Former Conviction of a Felony (Count III); Feloniously Pointing a Weapon (Counts IV and V) in the District Court of Tulsa County, Case No. CF-2015-6871. The jury recommended as punishment imprisonment for ten (10) years in each of Counts I and II, one (1) year in Count III, and two (2) years in each of Counts IV and V. The trial court sentenced accordingly, ordering all sentences to be served concurrently with each other. From this judgment and sentence Leandra M. Jackson-Hubbs AKA Leandra Davis has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-997 — Appellant Jimmie Lee Lovell was tried by jury and convicted of First Degree Manslaughter (Count I) and Driving Under the Influence (Count II) in the District Court of Sequoyah County, Case No. CF-2014-612. The jury recommended as punishment imprisonment for four (4) years in Count I and ten (10) days in the county jail and a $1,000.00 fine in Count II. In Count I, the trial court sentenced according to the jury's recommendation, but ordered the sentence suspended. In Count II, the court sentenced Appellant to a term of one year, to run concurrent with Count I. The trial court sentenced accordingly. From this judgment and sentence Jimmie Lee Lovell has perfected his appeal. The Judgment and Sentence in Count I is AFFIRMED. The Judgment in Count II is AFFIRMED. The case is REMANDED to the District Court with directions to correct the Judgment and Sentence in Count II to conform with the jury's sentence recommendation. Appellant's Objection to Order Granting Motion to Supplement the Record on Appeal is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

ACCELERATED DOCKET
Thursday, December 21, 2017

JS-2017-0909 — Appellee, K.G.O., born January 29, 2001, was charged August 25, 2016, as an adult in Craig County District Court Case No. CF-2016-174 with Murder in the First Degree, 21 O.S. § 701.7(A). Appellee's motion for certification as a Youthful Offender was granted by the Honorable Rebecca J. Gore, Special Judge, on August 25, 2017. The State appeals. The order of the District Court granting Appellee's motion for certification as a Youthful Offender is REVERSED and REMANDED to the District Court. Opinion by: Hudson, J.; Lumpkin, P.J.: Concurs; Lewi, V.P.J.: Dissents; Kuehn, J.: Concurs; Rowland, J.: Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, December 7, 2017

116,058 — University Multispectral Laboratories, L.L.C., Plaintiff/Appellee, and Oklahoma State University, Plaintiff, vs. Daniel Webster Keogh, Ph.D., Danielle Keogh, Keogh Group, L.L.C., Erays L.L.C., Erays, LLC, Atria Defense Group, L.L.C., Triari Scientific, L.L.C., Red Source Global, L.L.C., Dinfiniti Power Corpo-

ration, EMB Energy, Inc., Defendants/Appellants, and Jay Moore, Denbert, Denbert, L.L.C., Christopher Seferis, Corvus Strategies, L.L.C., The Receivables Exchange, L.L.C., and GBSM, Inc., Defendants, and Squire Sanders (US) L.L.P., and Patrick E. O'Donnell, Third-Party Defendants/Appellees, and Patrick Neman, Charalambos Mokeski, Lopes Holdings, Lmtd. New Treasure Tourist and Investment Holdings, Lmtd., Third-Party Defendants. Appeal from the District Court of Kay County, Oklahoma. Honorable Philip A. Ross, Trial Judge. Defendants/Third-Party Plaintiffs/Appellants, Daniel Webster Keogh, Keogh Group, L.L.C., and other affiliated entities, seek review of the trial court's orders granting the motions for summary judgment filed by Plaintiff/Appellee, University Multispectral Laboratories, L.L.C. (UML), and Third-Party Defendants/Appellees, Squire Sanders (U.S.) L.L.P. and Patrick E. O'Donnell, based primarily on Keogh's lack of standing. We hold that Keogh, Keogh Group, and their affiliated entities have established standing and contested issues of fact as to their claims against O'Donnell and their claim against Squire Sanders based on respondeat superior. We reverse the trial court's orders except to the extent the court granted summary judgment in favor of Squire Sanders on Keogh's claim that the firm was negligent in failing to protect the public from O'Donnell. We remand for further proceedings consistent with this order. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Opinion by Goree, P.J.; Bell, J., and Swinton, J. (sitting by designation), concur.

Wednesday, December 13, 2017

116,166 — Gordon Keith Lively, Petitioner, vs. University of Oklahoma Health Science Center, Own Risk, and The Workers' Compensation Court of Existing Claims, Respondent. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Respondent. Gordon Keith Lively (Claimant) sustained a work-related injury to his right knee while employed by the University of Oklahoma Health Science Center, Respondent. Claimant appeals an order of the Court En Banc vacating the trial court's order authorizing medical maintenance to replace a polyethylene spacer in his artificial knee joint. An earlier order awarded Claimant continuing medical maintenance in the form of annual physician visits. We hold that an order for continued medical maintenance in the form of office visits may not, after it becomes final, be subsequently expanded to include a surgical procedure without reopening the claim for a change of condition for the worse. SUSTAINED. Opinion by Goree, P.J.; Joplin, J., and Bell, J., concur.

116,456 — James Patrick Lesley, Jr., Plaintiff/Appellant, vs. David Prater, District Attorney of Oklahoma County, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Roger H. Stuart, Trial Judge. Appellant, James Patrick Lesley, Jr., an inmate incarcerated at the Oklahoma State Penitentiary, sued Appellee, David Prater, District Attorney of Oklahoma County, to recover damages for libel and slander arising from a report the District Attorney made to the Pardon and Parole Board. The communication was absolutely privileged because it was made in a proceeding authorized by law pursuant to 12 O.S. 2011 §1443.1(A). The petition fails to state a claim for which relief can be granted and the trial court's order granting the motion to dismiss is AFFIRMED. Opinion by Goree, P.J.; Joplin, J., and Bell, J., concur.

Monday, December 18, 2017

114,671 — Brandy Siebert, Plaintiff/Appellee, vs. John Adams, an individual, and Debi Young, d/b/a A-OK Bail Bonds, an individual, Defendants/Appellants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson Sellers, Judge. Defendants seek review of the trial court's order denying their motion for new trial after entry of a judgment on a jury's verdict for Plaintiff on Plaintiff's claims to damages for personal injury as the result of the negligence of, and an alleged assault by, Defendant John Adams, a bail bondsman employed by Defendant Debi Young, sustained when Adams attempted to take Plaintiff into custody. The evidence showed Adams was seeking a man when he attempted to arrest Plaintiff, a woman. There is competent evidence to support the jury's verdict for Plaintiff and the award of damages. The trial court did not err in denying the motion for new trial. AFFIRMED. Opinion by Joplin, J.; Goree, P.J., and Bell, J., concur.

114,928 — (Cons. w/114,932) In Re the Marriage of Don Lockhart and Lonna Lockhart: Don Lockhart, Petitioner/Appellee, vs. Lonna Lockhart, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable James W. Keeley, Trial Judge. Wife argues

the trial court abused its discretion in failing to award her that portion of the value of Mathey, Husband's separately owned company, which was enhanced during their marriage. Wife did not produce evidence that Husband made direct, personal and substantial efforts which contributed to the increased value of the business. In order for the enhanced value of the property to become a divisible asset, the spouse must make direct, personal, and substantial efforts which contribute to the enhanced value of the separately owned asset. Wife did not meet her burden of proof in this regard. The order that the proceeds from the sale of the business represent Husband's separate property is not against the weight of the evidence and not an abuse of discretion. *Teel v. Teel*, 1988 OK 151, ¶7. Wife argues the trial court abused its discretion in failing to award her certain property. Because Wife did not demonstrate that she provided any effort in acquiring property during the marriage, this Court cannot say the trial court abused its discretion in declining to award her any share in the marital estate. In his counter-appeal, Husband urges the trial court abused its discretion in awarding Wife an excessive amount of support alimony. He points out that for a marriage of such short duration, the amount of support alimony awarded to Wife was excessive. Husband and Wife were married for only 5 years and 7 months, and during the course of their 5 year separation, he paid over $1,100,000.00 to Wife. While the trial court awarded Wife support alimony in the sum of $999,960.00 to be paid in equal installments over 120 months in the sum of $8,333.00, Husband requests that the support alimony award be modified to award Wife the aggregate amount of $199,992.00 to be paid at the rate of $8,333.00 per month for 24 consecutive months. Because of her paraplegia which occurred during the marriage, Wife has substantial monetary needs which will continue for the remainder of her life, and she has no means to meet these needs absent support alimony. Husband is a multimillionaire with substantial means and has the ability to pay. Therefore, the trial court did not abuse its discretion in awarding $999,960.00 in support alimony to be paid out over 10 years. Wife claims that the trial court abused its discretion in awarding her insufficient attorney fees. However, she makes no argument nor cites any authority supporting her claim for additional trial court attorney fees. This Court cannot render a decision for a party who fails to brief or argue her asserted position. Wife also seeks an award of appeal-related attorney fees. Okla. Sup.Ct.R. 1.14(B) provides that a motion for an appeal-related attorney's fee must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate. Because Wife did not file a separate motion seeking attorney fees, her request of an award of appeal-related attorney fees is denied without prejudice to file a timely motion. AFFIRMED. Opinion by Goree, P.J.; Joplin, J., and Bell, J., concur.

114,933 — In Re the Marriage of Christopher Wayne Myers and Cassidy Ann Myers: Christopher Wayne Myers, Petitioner/Appellee, vs. Cassidy Ann Myers, Respondent/Appellant. Appeal from the District Court of Stephens County, Oklahoma. Honorable Russell G. Brent. In this child custody proceeding, Respondent/Appellant, Cassidy Ann Myers (Mother), appeals from the trial court's order terminating joint custody and awarding sole and exclusive custody of the parties' two minor children to Petitioner/Appellee, Christopher Wayne Myers. The court awarded Mother visitation. Mother appeals claiming the trial court exceeded its jurisdiction by entering a temporary custody order during the pendency of the proceeding. She also asserts the trial court's findings of fact are against the clear weight of the evidence. We hold the trial court did not exceed its jurisdiction, abuse its discretion or hold contrary to the weight of the evidence when it entered either the temporary order or the final custody order. Accordingly, the trial court's order is AFFIRMED. Opinion by Bell, J.; Goree, P.J., and Joplin, J., concur.

115,389 — In the Matter of the Estate of John Payne, Deceased: Brian Alan Robinson and Brandon Dale Robinson, Appellants, vs. Sonja Payne, Jeremiah Payne and Jason Payne, Appellees. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Marion D. Fry, Judge. Appellants, Brian Alan Robinson and Brandon Dale Robinson (Proponents), appeal from the trial court's order denying their petition to admit a purported will to probate. Proponents petitioned to admit into evidence a photocopy of a will executed by decedent, John Payne, on December 8, 1992, and a first codicil to that will executed on October 31, 1994. Proponents sought to admit the photocopy of the will and codicil as evidence to establish decedent's testamentary intent to bequeath a portion of his estate to Proponents. Title 58 O.S. 2011 §82 provides, in part, "No will shall be

proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." The trial court determined Proponents failed to prove the purported will existed at the time of decedent's death and denied their request. We cannot find the trial court's decision is clearly contrary to the weight of the evidence or a governing principle of law. Accordingly, the trial court's order is affirmed. AFFIRMED. Opinion by Bell, J.; Goree, P.J., and Joplin, J., concur.

115,801 — (Comp w/114,822) Candace Joan Brown, Plaintiff/Appellee, vs. Scott Douglas Thompson, an Individual, Defendant/Appellant, and Mary C. Thompson and Gary S. Thompson, as Individuals, and Drakestone Farms, LLC, and Westminster Farms, LLC, and as Oklahoma Limited Liability Companies, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. This appeal from a finding of indirect contempt of court emanates from a trial court's decision dissolving a partnership between Plaintiff/Appellee, Candace Joan Brown, and Defendant/Appellant, Scott Douglas Thompson, and dividing the partnership assets. The journal entry in the underlying case obligated Appellant and other defendants to convey to Appellee properties having a value of approximately 50% of the total value of the subject properties. Appellant was found in indirect contempt of court after he quit claimed his alleged interest in a property he never owned to Appellee. After Appellant filed his brief in chief on appeal, Appellee confessed the appeal. Premises considered, we hereby reverse the trial court's order finding Appellant in indirect contempt of court. REVERSED. Opinion by Bell, J.; Goree, P.J., concurs in result, and Joplin, J., concurs.

116,172 — Mark LeFebvre, Plaintiff/Appellant, vs. The City of The Village, a political subdivision, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. The Honorable Patricia G. Parrish, Trial Judge. Plaintiff/Appellant, Mark Lefebvre, appeals from the trial court's order granting summary judgment to Defendant/Appellee, The City of The Village (City) in this action brought pursuant to the Governmental Tort Claims Act, 51 O.S. 2011 §151 et seq. Plaintiff alleges that his property flooded as the result of faulty repairs City made to the storm water system. Within one year of the incident, Plaintiff filed a Notice of Tort Claim (Notice) with City's clerk. The Notice was in writing and included all required information with the exception of a telephone number because Plaintiff did not possess a telephone at the time he submitted the claim. The City's insurer drafted a letter to Plaintiff stating that Insurer was "not opening a file on this matter" because the form did not include a telephone number and the one year window had closed for filing. Plaintiff then acquired a telephone and resubmitted his claim form, with the telephone number included. City did not respond to the resubmitted claim form. City maintains letter from its insurer to Plaintiff was an express denial of Plaintiff's tort claim, and Plaintiff failed to file his lawsuit within 180 days of that date. Plaintiff's initial Notice included all the required information set forth in §156(E) except a telephone number, because he did not own a telephone. The Notice fully apprised City of Plaintiff's claim, and the lack of a telephone number in no way prejudiced City or prevented it from preparing a defense. We conclude the insurer's letter should be treated as a request by City that Plaintiff supply additional information necessary to evaluate his claim. The instant lawsuit was filed within 180 days following the "deemed denied" date. Accordingly, the judgment of the trial court is REVERSED and this matter is REMANDED for further proceedings. REVERSED AND REMANDED. Opinion by Bell, J.; Goree, P.J., and Joplin, J., concur.

(Division No. 2)
Thursday, December 14, 2017

115,393 — State of Oklahoma, Plaintiff/Appellee, v. Jeremy Glenn Roberts, Defendant, and Jason D. May, Appellant. Appeal from an Order of the District Court of Murray County, Hon. Aaron Duck, Trial Judge. This is an appeal by attorney Jason D. May (May) from a Corrected Court Order (Order) of the District Court of Murray County, Oklahoma (trial court), imposing a monetary sanction for his failure to appear on behalf of a client in a criminal proceeding. The Office of the District Attorney of Murray County, Oklahoma has filed a response to the petition-in-error, but has not filed a Brief. And there is no appellate Brief responding to or opposing May's Brief. The fact that May did not appear for a plea in the

Roberts criminal action on August 2, 2016 is undisputed. However, the Record does not establish that May received the Order setting that hearing notwithstanding it was mailed to May. The Corrected Court Order does not specify the legal basis for the trial court's sanction action or include other facts necessary to support imposition of sanctions. The "Corrected Court Order" is reversed. This Court's Opinion is based on the Record presented. This Opinion in no manner approves or condones the action of attorney May in his disrespectful letter to the trial court. REVERSED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, P.J., and Goodman, J., concur.

Monday, December 18, 2017

115,338 — Wanda Grant Wynn and Michael Wynn, as Surviving Parents of Morgan Wynn, Deceased Infant, Plaintiffs/Appellants, v. Southwestern Medical Center, LLC, d/b/a Southwestern Medical Center, Defendant/Appellee, and Martin K. Jones, M.D., and Martin K. Jones, M.D., Inc., an Oklahoma Corporation, Defendants. Appeal from an order of the District Court of Comanche County, Hon. Gerald F. Neuwirth, Trial Judge, entered on a jury verdict, granting judgment to Defendants. The single issue raised is whether the trial court erred when it refused to disqualify a juror. Plaintiffs filed suit for negligence arising from events surrounding the birth and death of their child at Defendant Southwestern Medical Center (SMC). Jurors were seated and questioned. All were asked if they knew any of the parties, their attorneys, or any of the potential witnesses. Following the opening statement of the parties, the trial court was notified that one of the jurors believed he was related to a nurse who would be a witness in this case. The nurse was not a named party in the lawsuit, but was characterized as a major actor in the events leading to the death of Plaintiffs' infant. We need only review the transcript of the discussion between the juror, the trial court, and counsel for both parties to determine that reversible error occurred. The transcript clearly reveals that the juror, under questioning by the trial court, was equivocal regarding his ability to listen to the evidence with an open mind and discharge his duty as an unbiased juror. He further acknowledged it would be difficult for him to judge the case fairly. But most significantly, and decisive to this Court's determination that error occurred, was juror's own admission of bias when it came to accepting the testimony of the nurse to whom he was related, without even hearing her testimony. Even when he was later asked to consider how he would regard testimony that might put into question the nurse's actions, juror was unable to assure the trial court that he would be unbiased. His admission of bias rendered him unfit to serve on the jury. The trial court's Journal Entry of Judgment is reversed and the matter is remanded for a new trial. REVERSED AND REMANDED FOR NEW TRIAL. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

115,363 — In the Matter of the Estate of Frank J. Stockard, Deceased, Lynn Wilson Stockard, Appellant, v. Cassandra Stockard-Ware, Courtney Stockard, and Gerald E. Kelley, Special Administrator of the Estate of Frank James Stockard, Deceased, Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Richard W. Kirby, Trial Judge, granting Appellees' motion for a directed verdict. A bench trial was held on the Appellant's petition for declaratory relief. Appellant testified she signed Deceased's name on three titles at his request in the presence of a notary public. The conveyance transferred ownership of two vehicles and motorcycle from Deceased to Appellant. At the conclusion of the presentation of Appellant's evidence, the trial court granted Appellees' motion for directed verdict since Appellant was clearly an interested person in the transaction at the time she signed Deceased's name. Accordingly, the trial court properly granted Appellees' motion for directed verdict as Appellant cannot demonstrate a prima facie case for recovery. The trial court's order granting Appellees' motion for directed verdict is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

Wednesday, December 20, 2017

116,092 — City of Bartlesville and Own Risk #14551, Petitioners, v. Tommy E. Bowers, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of a three-judge panel of The Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge, affirming a trial court order awarding benefits to Claimant, Tommy E. Bowers. Employer's first legal challenge is that 85 O.S.2001 and Supp. 2005, § 43(C)'s three-year statute of limitation had expired. We agree with the panel that this statute

is inapplicable. Section 43(C) addresses awards sought as a result of a change of condition for the worse. The trial court's order awarded benefits arising from the aggravation of a preexisting condition. This is a new injury, not one based on a change of condition. The panel's order correctly reasoned that the statute is inapplicable. We find no legal error. Employer's second attack on the trial court's order concerned the sufficiency of the evidence supporting the order. We find Claimant's undisputed testimony established that his worsening problems had a definite, temporal origin, rather than being the result of an inexorable, continuous change of condition for the worse beginning from the initial injury. The panel correctly found the trial court's order was neither contrary to law nor against the greater weight of the evidence, and we sustain the panel's order. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

116,034 — Iven Daffern, Plaintiff/Appellant, v. Sheriff Larry Rhodes, individually and in his official capacity; Jim Mullett, in his individual capacity, et al., Defendants/ Appellees. Appeal from an order of the District Court of Garvin County, Hon. Lori Walkley, Trial Judge, granting the motion to dismiss Plaintiff's petition filed by Defendants Sheriff Larry Rhodes, individually, and in his official capacity, and Jim Mullett, in his individual capacity. The trial court found the one-year statute of limitations period in 12 O.S. 2011, § 95(A)(11) had run, and Plaintiff's petition, filed more than one year after his claim arose, was untimely. Plaintiff appeals, contending the trial court's order should be reversed because § 95(A)(11) is an unconstitutional statute as applied to him. Plaintiff's status at the time his claim arose was that of a person who was being held in custody for trial or, in other words, an inmate. Because it is undisputed that Plaintiff was not at liberty to leave the Garvin County jail at will, but was confined to jail until released, we hold he was an inmate. Further, because Plaintiff has admitted that a reduced statute of limitations is constitutional for inmates, we find Plaintiff has waived his constitutional argument. The trial court properly granted Defendants' motion to dismiss. Because the basis for the dismissal was that the applicable statute of limitations has expired, Plaintiff would be unable to correct his pleading, and therefore the procedures set out in 12 O.S.2011, § 2010(G) need not be followed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Rapp, J., concurs, and Fischer, P.J., concurs in part, dissents in part and concurs in result.

Thursday, December 21, 2017

115,020 — In Re The Marriage of: Echo L. Starr, Petitioner/Appellee, vs. William J. Starr, Respondent/Appellant. Appeal from the District Court of Canadian County, Hon. Gary D. McCurdy, Trial Judge. Appellant William Starr appeals the district court's decision to defer jurisdiction of his motion to modify custody, visitation and child support to Washington County, Minnesota. However, the record is devoid of any evidence upon which the district court's determination was based. Appellant has failed to meet his evidentiary burden. Consequently, we find no abuse of discretion in the district court's decision to defer jurisdiction. The district court's order is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Rapp, J., and Goodman, J., concur.

Friday, December 22, 2017

114,652 — In re the Marriage of: Charles Wade Wiseley, Petitioner/Appellee, vs. Allisha Gai Wiseley, Respondent/Appellant. Appeal from the District Court of Tulsa County, Hon. James W. Keeley, Trial Judge. Appellant Allisha Wiseley appeals those portions of the district court's Decree of Divorce awarding child support, dividing marital property, and joint custody to herself and Appellee Charles Wade Wiseley. After review of the record and applicable law, we reverse the district court's decision regarding imputed income and remand the issue for redetermination. All other aspects of the order are affirmed. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Rapp, J., and Goodman, J., concur.

Thursday, December 28, 2017

115,585 — In the Matter of the Estate of Melva Joyce Whitewing, Deceased, Karen E. Younger, Appellant, v. The Estate of Melva Joyce Whitewing, Deceased, Appellee. Appeal from an order of the District Court of Osage County, Hon. Bruce David Gambill, Trial Judge, denying an Application to Set Aside or Invalidate an Antenuptial Agreement. Younger, Special Administrator of the Gordon Leroy Slate Estate, asserts the trial court erred in determining the Antenuptial Agreement entered into

between her father, Gordon Leroy Slate, and Melva Joyce Whitewing prior to their deaths, was valid. Younger contends the Agreement failed to disclose all of Whitewing's assets or their values and that there is no evidence Slate had any prior knowledge or awareness of Whitewing's worth prior to signing the Agreement. Younger further contends the Agreement is invalid because Slate was not represented by legal counsel or permitted to obtain independent legal counsel prior to signing the Agreement. The Agreement provides, *inter alia,* that both parties had the benefit of their own separate legal counsel who explained the consequences of the Agreement prior to signing. In addition, the Agreement specifically provides that a full disclosure of all assets of the parties has been made and that the parties are satisfied with the disclosure. There is nothing in the record to dispute these statements. Accordingly, we find no error by the trial court in upholding the Antenuptial Agreement. The trial court's order denying the Application to Set Aside or Invalidate an Antenuptial Agreement is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

115,504 — Security First National Bank, A banking corporation, Plaintiff/ Appellee, v. Sandro Ramos, Defendant/Appellant, and Amanda Siniga, Cheri Stacy, County Treasurer of Choctaw County, Oklahoma, and the Board of County Commissioners of Choctaw County, Oklahoma, Defendants. Appeal from an order of the District Court of Choctaw County, Hon. Michael D. DeBerry, Trial Judge, confirming a Sheriff's Sale. Ramos asserts he was denied due process of law when he was not given notice of the Journal Entry and other motions before the court. We find Ramos had actual notice of the judgment rendered against him and appeared to contest the proceedings. Ramos also asserts the trial court erred in confirming the Sheriff's Sale and by denying him the excess funds generated from the sale. A review of the record reveals there were no excess funds to return to Ramos. Ramos has provided no evidence to the contrary or that the statutory requirements of the Sheriff's Sale were not properly fulfilled. Accordingly, the trial court's order confirming a Sheriff's Sale is affirmed in its entirety. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

Friday, December 29, 2017

114,222 — Cody B. Bennett, Plaintiff/Appellee, v. Kyli D. Overturff, now Woods, Defendant/Appellant. Appeal from an order of the District Court of Grady County, Hon. Brad Benson, Trial Judge, awarding custody of the minor child, MB, to Father with supervised visitation to Mother. Mother contends, *inter alia,* that the trial court erred in finding Father had overcome the statutory presumption against placing custody in a parent whom there was a finding of domestic violence pursuant to 43 O.S.2011, § 109(I). We have reviewed the extensive evidentiary material and transcripts in the record and cannot say the trial court's determination is contrary to the minor child's best interests. Based on our review of the record, we see no abuse of discretion in this custody decision. Accordingly, the trial court's order is affirmed in its entirety. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

116,038 — Annette Shannon, individually and as parent and next friend of Mallory Shannon, a minor, Plaintiff/Appellee, v. Eric Peters, Defendant/Appellant. Appeal from an Order of the District Court of Pushmataha County, Hon. Michael D. DeBerry, Trial Judge. The trial court's order is reversed and the matter is remanded with directions to dismiss the case. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

114,955 — Cheryl Denise Barber, Plaintiff/ Appellee, vs. M&N Dealerships, LLC d/b/a Edmond Hyundai, Defendant/Appellant, and Tinker Federal Credit Union, Defendant. Appeal from order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Appellant M&N Dealerships, LLC d/b/a Edmond Hyundai appeals the district court's award on remand of attorney fees in favor of Appellee Cheryl Denise Barber. We find the settled law of the case established the lodestar amount for trial-level attorney fees and instructed the district court to hold a hearing pursuant to *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659. The district court conducted the necessary hearing and awarded fees consistent with the Opinion from this panel. Edmond Hyundai has failed to demonstrate that the district court's decision regarding the amount of attorney fees awarded was an abuse of discretion. We summarily af-

firm pursuant to Okla. Sup. Ct. R. 1.202(d) and (e), 12 O.S.2011, ch. 15, app. 1. SUMMARILY AFFIRMED UNDER RULE 1.202(D) AND (E). Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Rapp, J., and Goodman, J., concur.

115,650 — In the Matter of B.C., alleged deprived child. State of Oklahoma, Appellee, vs. Cortney Cox and David Cox, II, Appellants. Appeal from Order of the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. Father and Mother appeal the district court's order denying their motions to vacate the orders terminating their parental rights. The district court set the matter for a hearing on September 26, 2016. Mother and Father both failed to appear for the hearing, although their attorneys were present. Neither Mother nor Father claims that they lacked adequate notice of the hearing and, indeed, their attorneys were present. Instead, they argue that they were confused about the scheduled court date. This is an insufficient basis on which to overturn the district court's decision. Mother and Father also claim that the termination orders were default judgments. They are wrong. The orders clearly state that the decision to terminate parental rights was made on the grounds of failure to protect from shocking or heinous abuse, or having committed shocking or heinous abuse, pursuant to 10A O.S.2011 § 1-4-904(B)(9). AFFIRMED. Opinion from Court of Civil appeals, Division II by Fischer, P.J.; Goodman, J., concurs, and Rapp, J., not participating.

(Division No. 3)
Thursday, December 7, 2017

113,861 — State of Oklahoma ex rel., Department of Transportation, Plaintiff/Appellee, vs. JIGNA, Inc., LLC, an Oklahoma Limited Liability Company; Ranjit Patel; Kay Patel; and Haus Patel, Defendants/Appellants, and NK Group, Inc., an Oklahoma Corporation; Alva State Bank & Trust Co.; Howard Johnson Motel, a/k/a Howard Johnson International, Inc.; and, The Tulsa County Treasurer, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Dana Kuehn, Trial Judge. Defendants/Appellants JIGNA Inc., LLC, Ranjit Patel, Kay Patel, and Haus Patel appeal the trial court's denial of their motion for new trial relating to a jury verdict in a condemnation action brought by Plaintiff/Appellee Oklahoma Department of Transportation (ODOT) for a hotel property in Tulsa County. Appellants also appeal from the trial court's award of attorney fees and costs in favor of ODOT. We affirm the jury verdict, but reverse the trial court's order awarding attorney fees to ODOT, and remand this matter to the trial court to enter an order consistent with this opinion concerning the litigation costs and fees for discovery from ODOT's experts to which ODOT is entitled. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion by Swinton, J.; Mitchell, P.J., and Buettner, C.J., concur.

114,830 — In Re the Marriage of Rinehart: Deborah G. Rinehart, Petitioner/Appellant/Counter-Appellee, vs. Stormy Dean Rinehart, Respondent/Appellee/Counter-Appellant. Appeal from the District Court of Pontotoc County, Oklahoma. Honorable C. Steven Kessinger, Judge. Petitioner/Appellant/Counter-Appellee Deborah G. Rinehart and Respondent/Appellee/Counter-Appellant Stormy Dean Rinehart appeal the trial court's order denying their motions to reconsider the Decree of Divorce and Dissolution of Marriage entered following a bench trial. The parties agree their custody dispute is moot because their child has reached majority. Our review of the record shows the property division is equitable. The provisions of the decree are not against the clear weight of the evidence and we find no abuse of discretion in the denial of the motions to reconsider. We AFFIRM. Opinion by Buettner, C.J.; Mitchell, P.J., and Swinton, J., concur.

114,921 — Nationstar Mortgage, L.L.C., Plaintiff/Appellee, vs. John Medlock and Kimberlee D. Medlock, Defendants/Appellants, and Occupants of the Premises and Mortgage Electronic Registration Systems, Inc., Defendants. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila S. Condren, Trial Judge. In this mortgage foreclosure action, Defendants John Medlock and Kimberlee D. Medlock (the Medlocks) appeal a trial court order denying their combined 1) petition to vacate the Sheriff's Sale and the Journal Entry of Judgment, 2) motion to dismiss for lack of jurisdiction, and 3) objection to confirmation of Sheriff's Sale. The order of appeal, attached and incorporated herein, makes detailed, well-reasoned findings. Based on this Court's review of the parties' briefs, applicable law, and the record in this appeal, we determine no reversible error of law appears, and the trial court did not abuse its discretion. AFFIRMED UNDER RULE 1.202(e).

Opinion by Swinton, J.; Mitchell, P.J., and Buettner, C.J., concur.

116,010 — Steven Muse, Petitioner, vs. Hoffmeier, Inc., Great West Casualty Co., and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims. Petitioner Steven Muse seeks review of an order of a three judge panel of the Workers' Compensation Court of Existing Claims which affirmed the trial court's finding that Muse did not sustain a compensable injury while working for Respondent Hoffmeier, Inc. The panel's order is not against the clear weight of the evidence and we SUSTAIN. Opinion by Buettner, C.J.; Mitchell, P.J., and Swinton, J., concur.

Tuesday, December 12, 2017

113,976 — In Re the Henry S. Frazer Trust Established July 18, 2007: Margaret L. Frazer, Plaintiff/Appellee, vs. Bonnie M. Bratcher, Linda C. Brown, and Heritage Trust Company, Co-Trustees of the Henry S. Frazer Trust, Defendants/Co-Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Trial Judge. Defendants Bonnie M. Bratcher, Linda C. Brown, and Heritage Trust Company, as Co-trustees of the Henry S. Frazer Trust Agreement (Trust), appeal an order granting the counter-motion for summary judgment filed by Plaintiff Margaret Frazer. Defendants' appeal from the trial court's interlocutory order finding in favor of Plaintiff on her claims seeking to remove Co-Trustees Bratcher and Brown for cause and to invalidate the Trust's amendment is dismissed as premature. The part of the trial court's order interpreting the Frazers' 1983 Antenuptial Agreement is final and is affirmed, although on other grounds. DISMISSED IN PART AND AFFIRMED IN PART. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J. (sitting by designation), concur.

Friday, December 22, 2017

115,526 — In Re the Marriage of Fenton: Jamie Lee Fenton, Petitioner/Appellee, vs. Russell Evans Fenton, Respondent/Appellant. Appeal from the District Court of Payne County, Oklahoma. Honorable R.L. Hert, Jr., Judge. Respondent/Appellant Russell Evans Fenton (Father) appeals the trial court's denial of Father's emergency motion to modify child custody. The trial court originally awarded custody to Petitioner/Appellee Jamie Lee Fenton (Mother). Father sought to modify custody after an incident of domestic violence between Mother and her boyfriend. The trial court's finding that Father failed to prove a permanent, material and substantial change in conditions is not against the clear weight of the evidence or an abuse of discretion and we AFFIRM. Opinion by Buettner, C.J.; Mitchell, P.J., and Swinton, J., concur.

115,532 — Southern Lake Estates Homeowners Association, Plaintiff/Appellee, vs. Kathy Tezeno, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson D. Sellers, Judge. Defendant/Appellant Kathy Tezano (Homeowner) appeals from a summary judgment entered in favor of Plaintiff/Appellee Southern Lake Estates Homeowners Association (HOA) in HOA's action for declaratory judgment. The court also entered summary judgment for HOA on Homeowner's counterclaims for breach of contract and breach of fiduciary duty. Homeowner additionally appeals from an agreed order granting HOA injunctive relief, as well as a final judgment awarding HOA $36,006.27 in attorney fees and costs. We find the trial court properly entered summary judgment as a matter of law because the HOA governing documents provide no right to an unobstructed lake view nor any authority requiring the HOA to restrict or regulate trees on the private property of other HOA homeowners. Further, because Homeowner drafted the agreed order granting HOA injunctive relief and did not object to any of the provisions modified by the court, we hold Homeowner may not now complain of the effect of that order on appeal. Finally, we find the court properly awarded attorney fees and costs pursuant to 60 O.S. 2011 §856. We AFFIRM. Opinion by Mitchell, P.J.; Buettner, C.J., and Swinton, J., concur.

115,541 — (Comp. w/115,785) Charles B. and Kathleen J. Wheeler Trust; Geraldine T. Brownlee Trust; Judy Coburn; Laurence Coburn; Mary Jane Tontz Carey and Michael Carey, Plaintiffs/Appellees, vs. Slawson Exploration Company, Inc., and Stephens Production Company, Defendants/Appellants. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Trial Judge. Defendants/Appellants Slawson Exploration, Inc. and Stephens Production Company (Defendants) appeal from the trial court's order granting summary judgment in favor of Plaintiffs/Appellees Charles B. and Kathleen J. Wheeler

Trust, Geraldine T. Brownlee Trust, Judy Coburn, Laurence Coburn, Mary Jane Tontz Carey and Michael Carey (Plaintiffs) in a breach of contract action related to minerals located in Logan County, Oklahoma. Defendants assert the trial court incorrectly determined the conveyance at issue granted a non-participating mineral interest in the subject property, and should have determined the conveyance was a non-participating royalty interest instead. Upon *de novo* review of the instant record, the parties' pleadings and applicable law, we hold the trial court's findings are supported by sufficient competent evidence, and its order adequately explains the decision. We therefore summarily AFFIRM the judgment of the trial court pursuant to Supreme Court Rule 1.202 (b) and (d). Opinion by Swinton, Acting P.J.; Buettner, C.J., and Bell, J. (sitting by designation), concur.

115,871 — In Re the Marriage of Sharon Elaine Sanders and Charley Martin Sanders: Sharon Elaine Sanders, Petitioner/Appellant, vs. Charley Martin Sanders, Respondent/Appellee. Appeal from the District Court of Cherokee County, Oklahoma. Honorable Mark L. Dobbins, Judge. Petitioner/Appellant Sharon Elaine Sanders (Wife) appeals from the trial court's order denying her petition to vacate the agreed decree of dissolution of marriage (the Agreed Decree). Wife claimed the Agreed Decree did not divide the retirement account of Respondent/Appellee Charley Martin Sanders (Husband). She claimed that, although she (and/or her attorney) drafted the Agreed Decree, she mistakenly believed that Husband had taken an early withdrawal and had spent the retirement funds. Wife, however, failed to conduct discovery to ascertain the existence of Husband's retirement account and did not sufficiently plead any elements of actionable fraud. Accordingly, we find the court did not abuse its discretion by denying Wife's petition and AFFIRM. Opinion by Mitchell, P.J.; Buettner, C.J., and Swinton, J., concur.

116,155 — Christopher Carlson, Petitioner, vs. Corrpro Companies, Inc., Liberty Mutual Insurance Company, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of The Workers' Compensation Court of Existing Claims. Petitioner Christopher Carlson seeks review of an order of the Workers' Compensation Court of Existing Claims which denied Carlson's claim for compensation. Carlson fell on ice at a hotel in Missouri where he was staying while he was working in Missouri for Respondent Corrpro Companies, Inc., a Tulsa-based company. Carlson first sought medical treatment four months later and filed his claim eleven months after the fall. The trial court found the fall was not the major cause of Carlson's problems. The trial court's order is not against the clear weight of the evidence or contrary to law and we SUSTAIN. Opinion by Buettner, C.J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Wednesday, November 15, 2017

115,643 — Multiple Injury Trust Fund, Petitioner, vs. Alejandro Cervantes and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, Hon. Carla Snipes, Trial Judge. The Multiple Injury Trust Fund seeks review of a panel's order modifying and affirming a workers' compensation trial court's award of permanent total disability (PTD) benefits to Claimant in a cumulative trauma injury case. MITF contends the panel erred by modifying the order to reflect Claimant's date of last exposure and finding that MITF had liability for Claimant's PTD based on the latter date. Pursuant to *Multiple Injury Trust Fund v. McCauley,* 2015 OK 84, 374 P.3d 773, we find the panel's decision was correct. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Wiseman, J., and Barnes, J., concur.

Monday, Nov. 20, 2017

115,730 — Lewis Colvin Hawes, Plaintiff/Appellee, vs. George Brown, Defendant/Appellant. Proceeding to review a judgment of the District Court of Adair County, Hon. L. Elizabeth Brown, Trial Judge. George Brown appeals a decision of the district court setting aside a deed to him from Lewis Hawes. In 2011, Hawes made a will leaving the subject property to Brown on his death. In 2013, Hawes had a deed made out to Brown for the same property. He testified that this was intended to simplify the probate procedure, and that he gave the deed to Brown with instructions that it not be filed until his death. The deed was, however, filed shortly afterwards, and the relationship between Hawes and Brown appears to have begun to deteriorate around this time. The testimony of the

parties agreed that the deed was given to Brown purely to simplify probate of the promised, but as yet ineffective will, and confirms that Hawes did not intend to forever part with all lawful right and power to retake or repossess the deed. *See Maynard v. Hustead,* 1939 OK 224, ¶ 13, 90 P.2d 30. The district court found there was a failure of consideration of the contract to make a will to pass the property to Brown on Hawes death, and found clear positive evidence that there was no intent to give the property or otherwise transfer it outside Hawes' will. We find that this decision is not against the clear weight of the evidence. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

Monday, Nov. 27, 2017

116,002 — In the Matter of J.T.F., L.T.F., L.K.M.F., Deprived Juveniles as Defined by the Laws of the State of Oklahoma, Joshua Fairless, Appellant, v. State of Oklahoma, Ap-pellee. Appeal from the District Court of Kay County, Hon. Jennifer Brock, Trial Judge. Joshua Fairless (Father) appeals from an Order of the district court denying his motion to vacate an order of the court terminating his parental rights by default (termination Order) to his three minor children because he failed to appear at a pre-trial conference of which he had notice and at which he was ordered to appear. We conclude the trial court abused its discretion in refusing to vacate the termination Order because the notice Father was given did not state his failure to appear at the pre-trial conference would serve as his consent to termination of his parental rights and, in any event, a pre-trial conference is not a hearing within the context of 10A O.S. 2011 § 1-4-905(A). Further, the trial court abused its discretion in refusing to vacate the termination Order because nothing in the record demonstrates Father waived his right to counsel or to a jury trial; thus, Father's due process rights were violated in the proceedings leading to the termination Order. Accordingly, we reverse and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, J., concurs, and Thornbrugh, V.C.J., dissents in part and concurs in part.

Friday, December 1, 2017

114,876 — In re the Marriage of: Katrina S. Morris, Petitioner/Appellant/Counter-Appellee, v. Thomas G. Morris, Respondent/Appellee/Counter-Appellant. Appeal from the District Court of Oklahoma County, Hon. Howard R. Haralson, Trial Judge. Petitioner (Wife) appeals, and Respondent (Husband) counter-appeals, from the parties' divorce decree. Husband also challenges the trial court's partial award of attorney fees and costs to Wife. We find unpersuasive Wife's argument that the percentage increase of Husband's interest in his inherited and separate property, though it occurred during the marriage, can be deemed marital property. We affirm the trial court's determination in this regard. We also conclude the trial court did not clearly abuse its discretion in entering its partial award of fees and costs in favor of Wife. However, we reverse that portion of the decree determining that a certain "enhancement value" of Husband's separate property at the time Wife filed for divorce was reachable for equitable division. Having reached this conclusion, the decree is corrected to state that no enhancement value of Husband's separate property is attributable to Husband's skills and efforts and, in order to effectuate an equitable distribution of the marital estate, we decrease Wife's alimony in lieu of property award to the amount set forth in the Opinion. We also conclude the trial court erred in its award of support alimony in this case, and we increase that award to the amount set forth in the Opinion. AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., and Wiseman, J., concur.

115,753 — In the Matter of the Adoption of J.J.M., a Minor Child. C.S., Biological Father/Appellant, vs. J.M. and L.M., Adoptive Parents/Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge, finding that Father's child was eligible for adoption without Father's consent due to Father's alleged failure to maintain a substantial and positive relationship with Child. We agree with Father's argument that Adoptive Parents' evidence did not overcome the presumption that Father's consent was necessary. The only evidence in Adoptive Parents' case in chief was Adoptive Mother's testimony, who admitted that Father had regular visitation and communication with Child,

even though Father was in prison for much of the time that Child was in Adoptive Parents' custody. Father's evidence supports his claim that he maintained a positive relationship with Child, largely with the assistance of Father's grandparents while Father was incarcerated. We find the trial court's determination is not supported by clear and convincing evidence. The order allowing adoption without Father's consent is reversed and this matter is remanded with instructions to deny the adoption petition absent Father's consent. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

115,984 — American Beauty Manufacturing, Inc. and CompSource Mutual Insurance Company, Petitioners, v. Carl Haynes and the Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an Order of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge. Petitioners (collectively, Employer) seek review of the trial court's order finding Carl Haynes (Claimant) suffered compensable injuries to various body parts as a result of cumulative trauma sustained while working as a machine operator for approximately ten years for Employer. Employer argues the trial court's finding that the date of awareness lands in July 2011 is clearly against the weight of the evidence. Employer also argues the trial court failed to address its notice defense, thereby rendering the order unresponsive to the issues formed by the evidence. We conclude the trial court's determination as to the date of awareness is not clearly against the weight of the evidence, and we conclude the lack of an explicit finding regarding Employer's notice defense does not render the trial court's order unresponsive to the issues formed by the evidence. Therefore, we sustain. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., and Wiseman, J., concur.

Tuesday, December 5, 2017

116,074 — National Collegiate Student Loan Trust 2005-1, a Delaware Statutory Trust, Plaintiff/Appellee, v. Lori Scoggins, Defendant/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. Donald Easter, Trial Judge, denying Defendant's motion to reconsider the entry of summary judgment in favor of Plaintiff. Defendant argues on appeal that the affidavit with supporting documentation attached to Plaintiff's motion for summary judgment fails to meet the requirements of 12 O.S. § 2803(6) which is the business records exception to the hearsay rule. We find the affidavit meets all the foundational requirements for admissibility under Oklahoma law and after review, conclude that the material facts and applicable law are as the trial court described them, requiring the denial of Defendant's motion to reconsider the entry of summary judgment in favor of Plaintiff. The trial court's decision is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Thornbrugh, V.C.J., and Barnes, P.J., concur.

Wednesday, December 6, 2017

115,115 — Jose Michel-Jimenez, Plaintiff/Appellee, v. Bernard J. Albaugh, Defendant/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. James B. Croy, Trial Judge, granting judgment in favor of Appellee Jose Michel-Jimenez. Appellee filed a small claims action alleging Appellant was indebted to him for "construction project/labor." Appellant asked the trial court to dismiss Appellee's claims on the ground the contract between the parties was void. Appellant argued Appellee is not a licensed plumbing contractor and did not hold a license at the time the parties entered into the contract for plumbing services. The trial court found the evidence insufficient to establish fraud, enforced the contracts between the parties, and reduced the damages Appellant requested. We find no dominant public interest that would allow Appellant to avoid paying Appellee for the services performed. In setting damages, the trial court, in its offset, took into account that Appellant had to pay a subsequent plumber to complete work or to correct work to conform to industry standards. The trial court's findings and conclusions explained the basis for its decision. After review of the record and applicable law, we see no error in the judgment rendered and affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Thornbrugh, V.C.J., and Barnes, P.J., concur.

Monday, December 11, 2017

115,984 — American Beauty Manufacturing, Inc. and CompSource Mutual Insurance Company, Petitioners, v. Carl Haynes and the Workers' Compensation Court of Existing Claims,

Respondents. Proceeding to review an Order of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge. Petitioners (collectively, Employer) seek review of the trial court's order finding Carl Haynes (Claimant) suffered compensable injuries to various body parts as a result of cumulative trauma sustained while working as a machine operator for approximately ten years for Employer. Employer argues the trial court's finding that the date of awareness lands in July 2011 is clearly against the weight of the evidence. Employer also argues the trial court failed to address its notice defense, thereby rendering the order unresponsive to the issues formed by the evidence. We conclude the trial court's determination as to the date of awareness is not clearly against the weight of the evidence, and we conclude the lack of an ex-plicit finding regarding Employer's notice de-fense does not render the trial court's order unresponsive to the issues formed by the evidence. Therefore, we sustain. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., and Wiseman, J., concur.

Tuesday, December 12, 2017

116,069 — Russell Aron Smith, Plaintiff/Appellant, vs. Military Order of the Purple Heart, a District of Columbia Corporation, Defendant/Appellee. Proceeding to review a judgment of the District Court of Oklahoma County, Honorable Don Andrews, trial judge. Plaintiff Russell Smith sued the Military Order of the Purple Heart (MOPH) and several officials of that organization, alleging defamation. MOPH filed a motion to dismiss pursuant to the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §§ 1430 through 1440 (OCPA or the Act). Smith then dismissed his claims voluntarily, without prejudice. MOPH then filed a motion arguing that the trial court had continuing jurisdiction over Smith's claim, and urging dismissal with prejudice. The court granted this motion. The rule of *Gen. Motors Acceptance Corp. v. Carpenter,* 1978 OK 39, ¶ 8, 576 P.2d 1166, is that "once an action has been dismissed, no jurisdiction remains in district court to go forward with the action." This rule has been tempered in cases involving claims for sanctions that were pending at the time of dismissal, but remains good law in general. In this case, we find no indication of any pending sanctions motion at the time of Smith's dismissal, nor do we find any indication in the court's decision that it dismissed Smith's case with prejudice as a sanction. The court appears to have found some form of continuing jurisdiction to decide an OCPA motion after the underlying suit is dismissed. We find no legal basis for such jurisdiction. We therefore reverse and vacate the court's orders. REVERSED AND VACATED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

Thursday, December 14, 2017

116,031 — Environmental Cleanup, Inc., Plaintiff/Appellant, vs. Sher & Sons Trucking, Inc., Defendant, and United Specialty Insurance Company, Garnishee/Appellee. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. James B. Croy Trial Judge. Environmental Cleanup, Inc. (ECI), appeals a decision of the district court holding that the insurance policy issued by United Specialty Insurance Company (USIC) did not cover the cost of removing or cleaning up a load of blasting sand that was being transported when a tractor-trailer left the highway while negotiating an off-ramp. ECI argues that 47 O.S.2011 § 11-1110(C) creates a duty to remove injurious substances dropped upon the highway or the highway right-of-way or other location from a vehicle, and that "the insurer is responsible for the cost of such removal if the [vehicle] owner's insurance policy provides coverage for such expense." Even assuming that some sand was spilled, we find no record of the sand actually ending up on the roadway and posing the "danger of physical injury to vehicles, persons or animals in the specific context of roadway safety" required to trigger the statute. Further, we find no coverage for the removal of the sand under those circumstances in the insurance policy. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

Thursday, December 21, 2017

115,814 — In the Matter of E.L., Jr., and Z.L., Deprived Children, Edward Lister, Sr., Appellant, and State of Oklahoma, Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Lisa Hammond, Trial Judge, entered on a jury verdict terminating Father's parental rights to his minor children, EL and ZL. We are asked to review whether the State of Oklahoma proved by clear and convincing evidence that Father failed to correct the conditions leading to the adjudications of EL and ZL

being deprived and whether termination of Father's parental rights was in the children's best interests. Despite substantial evidence of the positive interactions and love between Father and the children, there was clear and convincing evidence that Father failed to correct the conditions that led to the deprived adjudication. Although Father has demonstrated his dedication and successful adherence to the ISP, his violent outbursts and continued use of drugs and alcohol show that he has failed to correct the conditions that led to the adjudication of EL and ZL as deprived, including failure to provide proper parental care and guardianship and providing a safe and stable home free from violence and drug and alcohol use. State also showed that it was in the best interests of EL and ZL to terminate Father's parental rights based on his episodes of uncontrolled anger and violence and his continued use of drugs and alcohol. State has shown by clear and convincing evidence that Father's parental rights should be terminated pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(5). We affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Barnes, P.J., concurs, and Thornbrugh, V.C.J., concurs in result.

Friday, December 22, 2017

115,355 — OneProp, Plaintiff/Appellee, vs. Arifur Rahman, Defendant/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. Donald Easter, Trial Judge, in this forcible entry and detainer action that granted OneProp possession of the premises located in Edmond, Oklahoma. Although Rahman asserts OneProp did not own the property and that he did not have a rental agreement with OneProp, there is nothing in the trial court record showing that these documents and arguments were presented to the trial court. We must presume that the trial court made the findings necessary to conclude that OneProp was entitled to possession to the Property. Rahman failed to show that the trial court erred in granting possession of the Property to OneProp. Accordingly, we affirm the trial court's order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Thornbrugh, V.C.J., and Barnes, P.J., concur.

Friday, December 29, 2017

114,907 — State of Oklahoma *ex rel.* Oklahoma State Board of Medical Licensure and Supervision, Petitioner/Appellee, vs. Hazem Sokkar, M.D., Respondent/ Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Mary F. Fitzgerald, Trial Judge, ordering compliance with the Oklahoma Board of Medical Licensure and Supervision's administrative investigative subpoena. After receiving complaints regarding Dr. Sokkar's practice of medicine, the Board started an investigation and issued an administrative investigative subpoena duces tecum to Dr. Sokkar requesting the medical records of six patients. Dr. Sokkar filed a motion to quash the subpoena arguing it violated Oklahoma law, the Health Insurance Portability and Accountability Act (HIPAA) and federal regulations. Because the Board is a health oversight agency, Dr. Sokkar may not rely on HIPAA to prohibit his compliance with the Board's subpoena duces tecum or with the trial court's order directing such compliance including psychotherapy notes. According to Dr. Sokkar, the investigation involved the possibility of a prescribing violation. If this is accurate, we agree with Dr. Sokkar that this "information can be obtained separately and without the need for every single page of a patient's mental health records." The Board's subpoena for mental health records may only request records in compliance with 43A O.S. Supp. 2013 § 1-109(E)(12)'s limitation "to the minimum amount of information necessary" and its proviso that "such disclosure may not identify the person directly or indirectly as a person with a substance abuse disorder." This compliance maintains needed consistency with 75 O.S. Supp. 2014 § 315(A)(1)'s requirement to produce records "necessary and proper for the purposes of the proceeding or investigation." Accordingly, we reverse the trial court's order and remand to the trial court to review the records subpoenaed for compliance with 43A O.S. Supp. 2013 § 1-109(E)(12). REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Barnes, P.J., concurs, and Thornbrugh, V.C.J., concurs in part and dissents in part.

115,931 — Daniel Ray Stout, Plaintiff/Appellant, v. Cleveland County Sheriff's Department, Defendant/Appellee. Appeal from orders of the District Court of Cleveland County, Hon. Tracy Schumacher, Trial Judge, entering summary judgment entered in favor of Defendant Sheriff Lester in his Official Capacity as Sheriff of Cleveland County, Oklahoma, and striking Plaintiff's motion to reconsider. Plaintiff, who

claimed he was injured when he was attacked by a dog owned by Defendant, sent a Notice of Tort Claim on April 13, 2011, as required by the Oklahoma Governmental Tort Claims Act (GTCA), 51 O.S. § 156 to the "Offices of Risk Management, Cleveland County Clerk and Sheriff's Department." The Risk Management Division confirmed its receipt of Plaintiff's letter on April 18, 2011, and Plaintiff claims a "notice of Denial of Claim was mailed on Friday, July 15, 2011 and received by this office on July 18, 2011." Plaintiff stated he never received any communication from the Sheriff's Department or Cleveland County. Plaintiff originally filed the petition on January 13, 2012, and then filed an amended petition on May 31, 2012, against the Cleveland County Sheriff's Department for negligence. In response, Defendant claimed that Plaintiff failed to comply with the GTCA. The trial court granted summary judgment in favor of Defendant. Plaintiff filed a motion to reconsider, but the trial court determined that Plaintiff's motion to reconsider must be stricken. We conclude that the trial court properly granted judgment in favor of Defendant. Because Plaintiff failed to timely file his petition, the trial court lacked jurisdiction over Plaintiff's tort claims. And, because Plaintiff's remedy for excessive force falls under the GTCA and we have determined Plaintiff failed to meet the GTCA's jurisdictional prerequisites, this claim is barred. After review, we conclude that the record and applicable law are as the trial court described them, requiring entry of summary judgment. Summary judgment being appropriate, the trial court did not abuse its discretion in striking Plaintiff's motion to reconsider. The trial court's decisions are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Thornbrugh, V.C.J., and Barnes, P.J., concur.

116,159 — Kenda Miller, Plaintiff/Appellant, v. State of Oklahoma *ex rel.* State Board of Education, Defendant/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. This case arises out of the suspension of a principal's Oklahoma teaching certificate for failing to report child abuse. Kenda Miller alleges she "did report suspected abuse to the police and maintains her innocence of all charges." The application to suspend Miller's teaching certification was presented, considered, and determined by the State Board of Education. Following the meeting, the Board entered an emergency order granting the application to suspend Miller's teaching certificate "pending an individual proceeding for revocation." Miller filed her request for permanent injunction to vacate the emergency order suspending her teacher certificate in the Oklahoma County District Court. We must determine whether the trial court properly granted summary judgment to the Board by examining whether Miller exhausted her administrative remedies and whether she has appealed from a final order. After review, we conclude Miller failed to exhaust her administrative remedies and failed to make a "strong showing" of the alleged inadequacy of administrative remedies. Although we affirm the trial court's decision granting judgment to the Board, we do so on the basis that Miller, by failing to request an individual hearing, did not exhaust her administrative remedies and that she failed to appeal to the trial court from a final order. Miller has the option of requesting an individual proceeding at the administrative level to address both the procedural issues associated with the emergency order of suspension and the suspension/revocation itself. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, J.; Thornbrugh, V.C.J., and Barnes, P.J., concur.

ORDERS DENYING REHEARING

OKLAHOMA CITY DIVISIONS
Thursday, December 7, 2017

115,098 — In Re: the Marriage of Lisa Barton, Petitioner/Appellee, vs. Jordan Scott Barton, Respondent/Appellant. Appellant's Petition for Rehearing is *DENIED*.

(Division No. 1)
Friday, December 1, 2017

115,156 — In the Matter of the Estate of Billye Jo Rollow, Deceased: Cyntia Rollow Hendrix, Appellant, vs. W.H. Rollow, III, Personal Representative of the Estate of Billy Jo Rollow, Appellee. Appellant's Petition for Rehearing filed November 27, 2017 is *DENIED*.

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POSITIONS AVAILABLE

ALLSTATE INSURANCE COMPANY IS HIRING A PARALEGAL IN OUR OKLAHOMA CITY firm. The plaintiff services paralegal job family supports the efficient operation of the Law & Regulation (L&R) Litigation Services Department by applying knowledge of legal concepts and processes. Under the direction of the department's attorneys, supports the management of insurance defense and tort litigation/dispute work and related issues/matters. Job Summary: provides paralegal support for litigation services attorneys; prepares pleadings and motions; under general attorney supervision, facilitates the discovery process, including obtaining records, reviewing documents, interviewing clients, preparing trial materials and summarizing and analyzing research, identifies, summarizes, and monitors relevant issues. Job description: review new file assignments, draft initial pleadings (e.g. answer, motion, etc.), and draft discovery; prepare brief to assist client in presenting case in small claims court; draft responses to discovery demands; assist clients in answering questions regarding discovery; review and serve responses to discovery demands; assist attorney in preparing materials for trial, arbitration or mediation; assist with the identification and summarizing of relevant issues; continually monitor issues and update attorney, as appropriate; review new and proposed legislation and determine applicability. Job qualifications: bachelor's degree in related field or American Bar Association (ABA) approved Paralegal Certificate Insurance; industry experience preferred; subrogation experience preferred; knowledge of legal holds and discovery processes; analytical skills and strong attention to detail; ability to identify, prioritize and solve problems effectively regarding basic matters; ability to work in diverse, multi-office, and long distance environments; basic budget management skills and ability to reconcile expense reports; basic project management skills and experience interacting with law firm/vendors; ability to exercise discretion and maintain confidentiality of sensitive information; basic researching, proofreading, and formatting skills; ability to collaborate and interact with all levels of personnel and build strong relationships with business colleagues; high degree of ethics and integrity; strong interpersonal skills, advanced written and oral communication and effective customer service skills; ability to identify inconsistencies in routine work and initiate corrective action within own workflow; able to deliver results with a sense of urgency; adapts well to change; able to multitask and make effective decisions in a fast-paced, deadline-driven environment; is a proactive self-starter who is able to manage his/her time effectively and work independently. Regular, predictable attendance is an essential function of this job. Please apply by visiting https://jobsearch.allstate.com/ and searching for job # 96288 or https://career8.successfactors.com/sfcareer/jobreqcareer?jobId=96288&company=Allstate&username=.

POSITIONS AVAILABLE

LITIGATION PARALEGAL. Growing Tulsa law firm seeks experienced litigation paralegal. At least three years of civil litigation experience is preferred. The ideal candidate will have excellent organizational skills and experience working with medical malpractice cases. Please provide cover letter, resume and references to MClarke@amlawok.com. Salary commensurate with experience.

ASSISTANT DISTRICT ATTORNEY needed in Pittsburg and Haskell counties, Oklahoma. DA Chuck Sullivan seeks VAWA prosecutor to handle domestic violence and sexual assault crimes. Duties include all statutorily defined domestic/sexual assault, and violent crimes with a pre-existing domestic relationship; also will maintain log of cases prosecuted, report statistics and serve as member of Community Coordinated Response Team. Strong courtroom skills, research and writing skills required. Primary office in McAlester — Pittsburg County, but also responsible for same crimes in Haskell County. 1-3 years' experience preferred but not required. Salary commensurate with experience. Submit resume, writing sample, references and cover letter to adam.scharn@dac.state.ok.us and amber.suter@dac.state.ok.us.

LOAN PROGRAM

THE OKLAHOMA DISTRICT ATTORNEYS COUNCIL (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of $38,242 to be divided among eligible full-time public defenders and prosecutors who have outstanding qualifying federal student loans. For more information about the JRJ Student Loan Repayment Program and how to apply, go to http://www.ok.gov/dac. Under "About the DAC," click on the "John R. Justice Student Loan Repayment Program" link. Applications are available online. Application packets must be submitted to the DAC or postmarked no later than March 15, 2018.

FOR SALE

FOR SALE: retiring attorney offers a busy and profitable solo private practice in growing Tulsa metro market community with established 26 year history. Turnkey operation with transferrable client base, marketing plan and all office furniture included. Flexible terms of sale. Contact Perry Newman at 918-272-8860 to discuss offer.

One complete set of PACIFIC SECOND P.2d VOL 1-995; One complete set of Pacific THIRD VOL 1-1126; One set OKLA. STATUTES ANNOT. (need updated) Call 1-580-326-7557.

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FEBRUARY 2 & 3, 2018

TWO HALF-DAY PROGRAMS
Friday Afternoon and Saturday Morning

FEBRUARY 2, 2018 (FRIDAY 1 P.M. TO 5 P,M,) 4.5 HOURS MCLE

1 - 2 P.M.	PLENARY: Intro & Legal Tech Tips, Tricks, Apps (Paul Unger, Barron Henley)
2:05 - 3 p.m.	TRACK ONE: iPractice on the iPad! (Paul Unger)
2:05 - 3 p.m.	TRACK TWO: It's Time For a Change: Superior Methods for Complex Legal Documents (Barron Henley)
3:05 - 4 p.m.	TRACK ONE: PowerPoint for Litigators and Client Presentations (Paul Unger)
3:05 - 4 p,m,	TRACK TWO: Microsoft Word Power Tips (Barron Henley)
4:10 - 5 p.m.	PLENARY: 10 Steps to Reducing Dependence on Paper (Paul Unger & Barron Henley)
5 p.m.	RECEPTION IMMEDIATELY FOLLOWING

FEBRUARY 3, 2018 (SATURDAY 9 A.M. TO 1 P.M.) 4.5 HOURS MCLE INCL. 2 ETHICS

7:30-8:30 a.m.	Continental Breakfast
8:30 - 10 a.m.	The Rules Have Changed: Legal Tech Security Measures Every Lawyer Must Take - *Ethics* (Barron Henley)
10:15 - 11:15	Track One: Outlook Power Hour (Barron Henley)
10:15 - 11:15	Track Two: PDFing for Legal Professionals: Nuance PowerPDF v. Adobe Acrobat! (Paul Unger)
11:20 - 12:30	PLENARY: Tame the Digital Chaos! Essentials of Time, Task & Email Management (Paul Unger)

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UPCOMING WEBCASTS

ALL of your required 12 hours of MCLE credit can be received by viewing Live Webcasts, these programs are being "live-streamed" at certain dates and times and MUST be viewed on these scheduled dates and times:

Wednesday, January 17
Discover Hidden and Undocumented Google Search Secrets
Presented by CLESeminars.com with Carole Levitt, Esq. & Mark Rosch

Friday, January 19
Advanced Google Search for Lawyers
Presented by CLESeminars.com with Carole Levitt, Esq. & Mark Rosch

Saturday, January 20
The 2018 Ethy Awards
Presented by Mesa CLE with Humorist Sean Carter

Monday, January 22
Social Media as Investigative Research and Evidence
Presented by CLESeminars.com with Carole Levitt, Esq. & Mark Rosch

Tuesday, January 24
Nice Lawyers Finish First
Presented by Mesa CLE with Humorist Sean Carter

Tuesday, January 30
Don't Be an Outlaw: The Ethycal Imperative to Follow the Law
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, January 31
The Ethics of Social Media Research
Presented by CLESeminars.com with Carole Levitt, Esq. & Mark Rosch

Wednesday, February 7
If You Can't Say Something Nice, Shut Up!: The Ethycal Imperative for Civility
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, February 14
The Ties That Bind: Avoiding Inappropriate Entanglements in the Practice of Law
Presented by Mesa CLE with Humorist Sean Carter

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To register go to: www.okbar.org/members/CLE/Webcasts