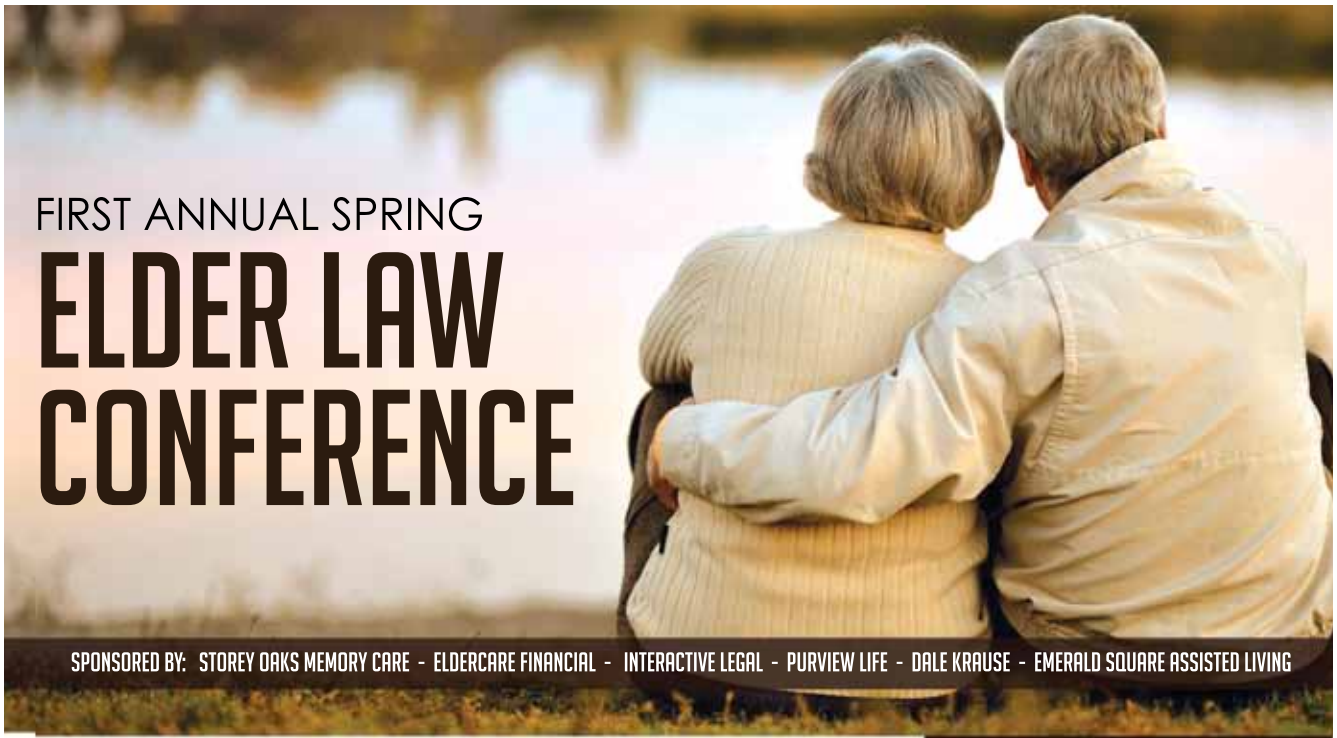
THE OKLAHOMA BAR
Journal
Volume 89 — No. 8 — 3/10/2018

Court Issue



FIRST ANNUAL SPRING

ELDER LAW CONFERENCE

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FRIDAY, APRIL 20, 9 A.M. - 2:50 P.M.

6/0

Gaylord-Pickens Museum, 1400 Classen Drive, Devon Classroom, OKC

A reception from 3 – 4:30 p.m. will follow the Friday's program at Gaylord-Pickens Museum and is open to all attendees.

THIS CLE WILL NOT BE WEBCAST OR RECORDED FOR FUTURE VIEWING

Early registration by Friday, April 13, 2018, is $150; Registrations received after April 13th will increase $25 and another $25 increase for walk-ins. Registration includes continental breakfast and a networking lunch. To receive a $10 discount on in-person programs register online at www.okbar.org/members/CLE.

Oklahoma Chapter

NAELA MEETING

SATURDAY, APRIL 21, 9 A.M. - 3 P.M.

Donna J. Jackson Law Office, 10404 Vineyard Blvd., Ste. E, OKC

On Saturday, April 21st, Oklahoma Chapter NAELA members may register to attend the first chapter unprogram meeting from 9:00 a.m. – 3:00 p.m. Lunch will be catered. There will be a $50 registration fee. For information on becoming an OK Chapter NAELA Member go to www.naela.org. To register for the meeting go to www.okbar.org/members/CLE.

PROGRAM MODERATOR:

Donna J. Jackson, President of the Oklahoma Chapter of NAELA

Topics & Presenters:

- **Background of the National Academy of Elder Law Attorneys (NAELA) & Elder Law**
  Hyman Darling, Bacon Wilson Attorneys at Law, MA
- **Elder Law and the Importance of NAELA**
  Donna J. Jackson, CPA, JD, LLM, Oklahoma City, OK
- **Jacobson Trusts and Work on (d)(4)(A) Trust for Children in Foster Care**
  Sara Murphy, Legacy Legal Center, OK
- **Special Needs Trusts**
  Barb Helm, Executive Director, Arcare, Inc., KS
- **Veterans Administration and Medicaid Planning**
  Dale Krause, JD, LLM, and Thomas Krause, JD, Krause Financial Services, WI
- **Oklahoma Medicaid**
  Travis Smith, Oklahoma Dept. of Human Services

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THE OKLAHOMA BAR
Journal

Volume 89 – No. 8 – 3/10/2018

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OKLAHOMA BAR ASSOCIATION

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No. 115,285; Consol. w/115,281; 115,293
September 25, 2017

ORDER DENYING THREE PETITIONS FOR CERTIORARI AND DIRECTING OFFICIAL PUBLICATION FOR THE OPINION BY THE COURT OF CIVIL APPEALS AND GIVING IT PRECEDENTIAL EFFECT

The three petitions for certiorari filed herein by: (1) Defendant/Appellant, BITCO General Insurance Corporation; (2) Defendant/Appellant, Alterra America Insurance Company; and (3) Defendant/Appellant, Navigators Insurance Company, **are each denied by the Court.**

The Opinion in this cause filed on March 20, 2017, by the Oklahoma Court of Civil Appeals, Division III,is ordered by the Supreme Court to be officially published, and the opinion by the Court of Civil Appeals shall be given precedential effect. The published opinion of the Court of Civil Appeals filed herein shall bear the notation "Approved for publication by the Supreme Court." Okla. Sup. Ct. R. 1.200(d)(2).

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 25th DAY OF SEPTEMBER, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

VOTE ON DENIAL OF EACH PETITION FOR CERTIORARI:

CONCUR: COMBS, C.J.; GURICH, V.C.J.; KAUGER, WATT, WINCHESTER, EDMONDSON, COLBERT, and REIF, JJ.

DISSENT: WYRICK, J.

VOTE ON ORDERING PUBLICATION OF OPINION BY COURT OF CIVIL APPEALS AND GIVING OPINION PRECEDENTIAL EFFECT:

CONCUR: COMBS, C.J.; GURICH, V.C.J.; WATT, WINCHESTER, EDMONDSON, COLBERT, and REIF, JJ.

DISSENT: KAUGER, and WYRICK, J.

Tammy Ober, Appellee, v. State of Oklahoma, ex rel., Department of Public Safety, Appellant

No. 111,990. February 26, 2018

ORDER

The mandate in the above-styled case is recalled. Appellee's Application for Expungement of Records in this case is granted. *See* 22 O.S. §§18 & 19 and Oklahoma Supreme Court Rule 1.260 *et seq*. The case records inthe present appeal are hereby expunged and sealed pursuant to Okla. Sup. Ct. R. 1.260 *et seq*. The published opinion in *Ober v. State* ex rel. *Department of Public Safety*, 2016 OK CIV APP 2, will no longer be available for public viewing on the Court's domain www. OSCN.net, and the Supreme Court Clerk's file shall be sealed.

West Publishing Company is requested to remove the opinion from its website (364 P 3.d 659) and not publish the opinion in any bound volume of the Pacific Reporter series of the National Reporter System.

LexisNexis is requested to remove the opinion from its website (2015 Okla. Civ. App. LEXIS 106) and not publish the opinion in any print or other online publication.

The Clerk of this Court is directed to mail a copy of this order to West Publishing Company and LexisNexis.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26th DAY OF FEBRUARY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

2018 OK 10

IN RE: AMENDMENTS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS FOR JUVENILE CASES

S.C.A.D. No. 2018-11. January 30, 2018

ORDER ADOPTING REVISED OKLAHOMA UNIFORM JURY INSTRUCTIONS AND VERDICT FORMS FOR JUVENILE CASES

¶1 The Court has reviewed the recommendations of the Oklahoma Supreme Court Committee for Uniform Jury Instructions for Juvenile Cases to adopt proposed amendments to existing jury instructions and to add a new jury instruction codified as Instruction No. 3.19A. The Court finds that the revisions to the OUJI-JUV Instructions, Statutory Authority, Committee Comments, and Notes on Use should be adopted.

¶2 It is therefore ordered, adjudged and decreed that the instructions shall be available for access via the Internet from the Court website at www.oscn.net and provided to West Publishing Company for publication. The Administrative Office of the Courts should notify the Judges of the District Courts of the State of Oklahoma regarding our adoption of the instructions set forth herein. Further, the District Courts of the State of Oklahoma are directed to implement these instructions effective January 30, 2018.

¶3 It is therefore ordered, adjudged, and decreed that the proposed amendments to OUJI-JUV Nos. 2.7, 2.7A, 3.4, 3.6, 3.11, 3.13, 3.14, 3.19 and 3.23, their Statutory Authority, Committee Comments, and Notes on Use, and the new proposed Instruction, OUJI-JUV No. 3.19A, its Statutory Authority, and Notes on Use, as set out and attached to this Order, are hereby adopted. The Court authorizes the attached OUJI-JUV instructions to be published.

¶4 The Court declines to relinquish its constitutional and statutory authority to review the legal correctness of these authorized instructions or verdict forms when it is called upon to afford corrective relief.

¶5 The amended OUJI-JUV instructions shall be effective January 30, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 29th DAY OF JANUARY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Winchester, J., not voting.

Juvenile Instruction No. 2.7

Instructions for Verdict Forms

[**Use for cases where only one ground for termination is alleged.**] If you find that the State has proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on the statutory ground that [**Set forth ground for termination** – *E.g.*, the rights of the parent to another child have been terminated, and the conditions that led to the prior termination of parental rights have not been corrected], you should sign and return the verdict form entitled Terminate Parental Rights for that parent and that child. Otherwise, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

OR

[**Use for cases where multiple grounds for termination are alleged**.] If you find that the State has proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on one or more statutory grounds, you should sign and return the verdict form entitled Terminate Parental Rights for every such statutory ground for that parent and that child. It is not necessary that the same five people sign each verdict form. If you find that the State has not proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on any statutory ground, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

Notes on Use

If the petition or motion for termination of parental rights was filed by the child's attorney, rather than the district attorney, under 10A O.S.Supp.2014 § 1-4-901(A), this Instruction should be modified accordingly. If any of the alleged grounds for termination is the failure of the parent to correct a condition that led to the deprived adjudication of the child, Juvenile Instruction No. 2.7A should be used instead of or in addition to this Instruction, along with the verdict form in Juvenile Instruction No. 2.8A.

Committee Comments

Okla. Const. art. VII, § 15 provides that "no law . . . shall require the court to direct the jury to make findings of particular questions of fact." The Oklahoma Supreme Court addressed the application of Okla. Const. art. VII, § 15 to Oklahoma's comparative negligence statutes in *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009. The Supreme Court held that the comparative negligence statutes did not violate art. VII, § 15, because they did not require a special verdict. The Supreme Court reasoned that under a general verdict, the jury must know the effect of its answers to special findings, and that if the jury did not know the effect of its answers, the verdict would be a special verdict that would violate Okla. Const. art. VII, § 15. 1977 OK 91, ¶¶ 11-12, 564 P.2d 1009, 1012-13. Under *Smith v. Gizzi*, a verdict that specified the grounds for termination of parental rights, would be constitutional as long as the jury knew the effect of its answers to special findings regarding the specific grounds for termination. A number of Oklahoma Court of Civil Appeals cases have decided that it is necessary for the trial judge to specify the grounds for termination of parental rights in the journal entry of judgment in order to facilitate appellate review. *See In re C.T.*, 2003 OK CIV APP 107, ¶ 6, 82 P.3d 123, 125; *Bales v. State ex rel. Dep't of Human Services*, 1999 OK CIV APP 96, ¶ 8, 990 P.2d 309, 311. *See also Matter of S.B.C.*, 2002 OK 83, ¶ 7, 64 P.3d 1080, 1083 (appellate court must find clear and convincing proof of grounds for termination of parental rights to affirm). Having the jury specify in its verdict the grounds it finds for termination of parental rights will facilitate the trial judge's preparation of the journal entry of judgment.

~~There is also a line of Oklahoma Court of Civil Appeals cases that have decided that when termination is ordered under 10 O.S. Supp. 2014, § 1-4-904(5) on the ground of failure to correct a condition that led to the deprived adjudication of the child the jury instruction and verdict forms must specify each condition that the parent failed to correct. *See In re B.W.*, 2012 OK CIV APP 104, ¶ 37, 293 P.3d 986, 996; *In re T.J.*, 2012 OK CIV APP 86, ¶ 48, 286 P.3d 659, 72; *In re R.A.*, 2012 OK CIV APP 65, ¶ 17, 280 P.3d 366, 372. *See also In re A.F.K.*, 2014 OK CIV APP 6, ¶ 7 & n.5, 317 P.3d 221, 225 (commending trial court for providing verdict forms that included lines for checkmarks for the jury to identify each condition that the parent failed to correct); *In re J.K.T.*, 2013 OK CIV APP 70, ¶ 4 & n.3, 308 P.3d 183, 185 (affirming termination order where verdict form included lines for checkmarks that the jury used to identify each condition that the parent failed to correct). *But see In re L.S.*, 2013 OK CIV APP 21, ¶ 10, 298 P.3d 544, 547 (affirming termination order neither the verdict nor order listed the conditions that the parent failed to correct but the jury instructions listed the conditions). The Committee recommends that in cases where termination is sought on the ground of failure of the parent to correct conditions, the trial court should provide verdict forms that include lines for checkmarks for the jury to use to identify each condition that the parent failed to correct.~~

Juvenile Instruction No. 2.7A

Instructions for Verdict Forms for Failure to Correct Conditions

If you find that the State has proved by clear and convincing evidence that the parental rights of the parent to the child should be terminated on the statutory ground that the parent has failed to correct one or more conditions that led to the finding that the child was deprived after the parent had been given at least three (3) months to correct the conditions, you must indicate this finding by putting a check mark on the line next to each uncorrected condition on the verdict form entitled Terminate Parental Rights for that parent and that

child given to you, and then sign and return the verdict form. Otherwise, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

Notes on Use

This Instruction should be used if any of the alleged grounds for termination is the failure of the parent to correct a condition that led to the deprived adjudication of the child. The trial judge should prepare a verdict form that identifies one or more conditions that the parent is alleged to have failed to correct and directs the jury to check the applicable condition or conditions that the parent failed to correct. An example of such a verdict form for failure to correct one or more conditions is found at Juvenile Instruction No. 2.8A, *infra*.

Committee Comments

~~See Committee Comments to Juvenile Instruction No. 2.7, *supra*.~~ The Oklahoma Supreme Court held in *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, that the jury instructions, verdict forms, and the final journal entry of judgment in termination actions for failure to correct conditions which led to the deprived adjudication of a child must "identify, ***with particularity,*** those conditions which a parent failed to correct." *Id*. ¶ 20, 373 P.3d at 1030 (emphasis in original). Prior to the *T.T.S.* case, there had been a split of authority among the different divisions of the Oklahoma Court of Civil of Appeals over whether it was necessary to specify the conditions that a parent failed to correct. Id. ¶ 13, 373 P.3d at 1027 ("This issue has been resolved inconsistently by several panels of COCA.").

Juvenile Instruction No. 3.4

Failure to Correct Conditions

The State seeks to terminate the parent's rights on the basis of failure to correct the **condition/conditions** that led to the finding that a child is deprived. The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent has failed to correct the **condition/conditions** that caused the child to be deprived;
3. The parent has had at least three months to correct the **condition/conditions**; and,
4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10A O.S.Supp. ~~2010~~2016 § 1-4-904(B)(5).

Notes on Use

The trial judge should give Juvenile Instruction No. 3.5, *infra,* along with this Instruction.

Committee Comments

The Oklahoma Supreme Court held in *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, that the jury instructions, verdict forms, and the final journal entry of judgment in termination actions for failure to correct conditions which led to the deprived adjudication of a child must "identify, ***with particularity,*** those conditions which a parent failed to correct." *Id*. ¶ 20, 373 P.3d at 1030 (emphasis in original). Prior to the *T.T.S.* case, there had been a split of authority among the different divisions of the Oklahoma Court of Civil of Appeals over whether it was necessary to specify the conditions that a parent failed to correct. *Id*. ¶ 13, 373 P.3d at 1027 ("This issue has been resolved inconsistently by several panels of COCA.").

Juvenile Instruction No. 3.6

Previous Termination of Rights to Another Child

The State seeks to terminate the parent's rights on the basis that a child has been born to a parent whose parental rights to another child

have already been terminated before. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent's parental rights to another child have been terminated before;
3. The conditions which led to the prior termination of parental rights have not been corrected; and,
4. Termination of parental rights is in the best interests of the child.

The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

Statutory Authority: 10A O.S.2011 § 1-4-904(B)(6).

Notes on Use

The trial judge should modify the jury instruction in Juvenile Instruction No. 2.7A, *supra*, and the verdict form in Juvenile Instruction No. 2.8A, *supra*, to refer to the basis that a child has been born to a parent whose parental rights to another child have already been terminated before, instead of a failure to correct conditions, and give the modified versions of Juvenile Instruction Nos. 2.7A and 2.8A along with this Instruction.

Juvenile Instruction No. 3.11

Definition of Heinous and Shocking Abuse

"Heinous and shocking abuse" includes, but is not limited to, aggravated physical abuse that results in serious bodily, mental, or emotional injury. "Serious bodily injury" means injury that involves:

a. a substantial risk of death,

b. extreme physical pain,

c. protracted disfigurement,

d. a loss or impairment of the function of a body member, organ, or mental faculty,

e. an injury to an internal or external organ or the body,

f. a bone fracture,

g. sexual abuse or sexual exploitation,

h. chronic abuse including, but not limited to, physical, emotional, or sexual abuse, or sexual exploitation which is repeated or continuing,

i. torture that includes, but is not limited to, inflicting, participating in or assisting in inflicting intense physical or emotional pain upon a child repeatedly over a period of time for the purpose of coercing or terrorizing a child or for the purpose of satisfying the craven, cruel, or prurient desires of the perpetrator or another person, or

j. any other similar aggravated circumstance.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(~~31~~33).

Juvenile Instruction No. 3.13

Definition of Neglect

"Neglect" means:

a. the failure or omission to provide any of the following:

(1) adequate nurturance and affection, food, clothing, shelter, sanitation, hygiene, or appropriate education,

(2) medical, dental, or behavioral health care,

(3) supervision or appropriate caretakers, or

(4) special care made necessary by the physical or mental condition of the child,

b. the failure or omission to protect a child from exposure to any of the following:

(1) the use, possession, sale, or manufacture of illegal drugs,

(2) illegal activities, or

(3) sexual acts or materials that are not age-appropriate, or

c. abandonment.

Neglect does not include the parent's selecting and depending upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of a child.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(~~46~~47).

Juvenile Instruction No. 3.14

Definition of Heinous and Shocking Neglect

"Heinous and shocking neglect" includes, but is not limited to:

a. chronic neglect that includes, but is not limited to, a persistent pattern of family functioning in which the caregiver has not met or sustained the basic needs of a child which results in harm to the child,

b. neglect that has resulted in a diagnosis of the child as a failure to thrive,

c. an act or failure to act by a parent that results in the death or near death of a child or sibling, serious physical or emotional harm, sexual abuse, sexual exploitation, or presents an imminent risk of serious harm to a child, or

d. any other similar aggravating circumstance.

"Sexual abuse" includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

"Sexual exploitation" includes but is not limited to, allowing, permitting, or encouraging a child to engage in prostitution, as defined by law, by a person responsible for the health, safety, or welfare of a child, or allowing, permitting, encouraging, or engaging in the lewd, obscene, or pornographic, as defined by law, photographing, filming, or depicting of a child in those acts.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(2)(b)-(c), (~~32~~34).

Juvenile Instruction No. 3.19

Abuse Subsequent to Previous Abuse or Neglect

The State seeks to terminate the parent's rights on the basis of abuse subsequent to previous **abuse/neglect** of the child or a sibling of the child. In order to terminate parental rights on the basis of abuse subsequent to previous **abuse/neglect**, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;

2. The parent has previously **abused/neglected** the child or a sibling of the child or failed to protect the child or a sibling of the child from **abuse/neglect** that the parent knew or reasonably should have known of;

3. After the previous **abuse/neglect**, the parent has abused the child or a sibling of the child or failed to protect the child or a sibling of the child from abuse that the parent knew or reasonably should have known of; and,

4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 §§ 1-4-904(B)(10)~~, 1-1-105(2), 1-1-105(46)~~.

Notes on Use

The trial court should select the appropriate definitions or parts of the definitions that are supported by the evidence.

Juvenile Instruction No. 3.19A

Definition of Failure to Protect

Failure to protect a child from abuse or neglect means the failure to take reasonable action to remedy or prevent child abuse or neglect.

Failure to protect a child from abuse or neglect includes the conduct of a non-abusing **parent/guardian** who:

1. Knew the identity of the **abuser/(person who neglected the child)** but **(lied about)/concealed/(failed to report)** the child **abuse/neglect**; or

2. Otherwise failed to take reasonable action to end the **abuse/neglect**.

Statutory Authority: 10A O.S.Supp.2016 § 1-1-105(25).

Notes on Use

The trial judge should give this Instruction along with Juvenile Instruction Nos. 3.11 and 3.14 through 3.19, when the State seeks to terminate the parent's rights on the basis of the parent's failure to protect the child from heinous and shocking abuse or neglect.

Juvenile Instruction No. 3.23

Conditions from Previous Deprived Adjudication Have Occurred Again

The State seeks to terminate the parent's rights on the basis that the **condition/conditions** that led to a previous deprived adjudication of **(the child)/(a sibling of the child) has/have** occurred again. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived in this case;

2. There has been a previous deprived adjudication of **(the child)/(a sibling of the child)**;

3. The **condition/conditions** that led to the deprived adjudication in this case **was/were** the subject of the previous deprived adjudication, and the parent was given an opportunity to correct the **condition/conditions** in the previous case; and,

4. Termination of parental rights is in the best interests of the child.

The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

Statutory Authority: 10A O.S.Supp.2016 § 1-4-904(B)(14).

Notes on Use

The trial judge should modify the jury instruction in Juvenile Instruction No. 2.7A, *supra*, and the verdict form in Juvenile Instruction No. 2.8A, *supra*, to refer to the basis that the conditions which led to a previous deprived adjudication of the child have occurred again, instead of a failure to correct conditions, and give the modified versions of Juvenile Instruction Nos. 2.7A and 2.8A along with this Instruction.

2018 OK 15

In Re: Rules Creating and Controling the Oklahoma Bar Association

SCBD 4483. February 26, 2018

ORDER

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

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

EXHIBIT "A"

Oklahoma Statutes Citationized
Title 5. Attorneys and the State Bar
Chapter 1 - Attorneys and Counselors
Appendix 1 - Rules Creating and Controlling the Oklahoma Bar Association
Article Article VI
Section Art VI Sec 5 - Report of Executive Director

Cite as: O.S. §, __ __

~~On or before the tenth day of each month the Executive Director shall mail to each member of the Board of Governors and the Chief Justice of the Supreme Court a detailed account showing the receipts and disbursements of the preceding month; such statement shall contain any additional information requested by the Board of Governors. On or before the 21st day of January of each year an annual financial report shall be prepared by the Executive Director. It shall be submitted to the Board of Governors no later than the regular February meeting of the Board. After approval thereof by the Board of Governors the same shall be published promptly in the Bar Journal.~~

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

2018 OK 16

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

SCBD 2109. February 26, 2018

ORDER

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

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

EXHIBIT A

RULE 1 PURPOSE OF THE LICENSED LEGAL INTERNSHIP RULES

Rule 1.1 Purpose

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

RULE 2 ELIGIBILITY FOR A LIMITED LICENSE

Rule 2.1 Law Student Applicant

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

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

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

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

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

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

Rule 4 Law School Internship Programs

Rule 4.1 Approved Law School Internship Programs

A law school may create an internship training program as part of its regular curriculum which uses Licensed Legal Interns licensed by the Supreme Court of the State of Oklahoma. These programs may be of two types:

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

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

Rule 4.2 Minimum Criteria for Law School Programs

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

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

RULE 5 PROCEDURE TO OBTAIN LIMITED LICENSE

Rule 5.1 Documentation

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

(a) Application Form

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

(b) Law School Certificate

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

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

(c) Supervising Attorney Form

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

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

(b) Recommends the applicant for a limited license;

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

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

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

(d) ~~Enrollment~~ Certification Form

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

in as a Licensed Legal Intern. (See Interpretation 2017-2)

RULE 7 PRACTICE UNDER THE LIMITED LICENSE

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

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

Rule 7.2 In-Court Practice Requirement

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

Rule 7.6 Civil Representation Limitations

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

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

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

(1) Waiver, default, or uncontested divorces.

(2) Friendly suits including settlements of tort claims.

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

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

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

(6) Depositions.

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

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

2018 OK 17

ANKE MONTGOMERY, Individually and as Personal Representative of the Estate of Mark Montgomery, Deceased; EAGLEMED, L.L.C.; a Delaware Corporation, and STARR INDEMNITY AND LIABILITY COMPANY, a Texas Corporation and Domiciliary, Plaintiffs/Appellants, v. AIRBUS HELICOPTERS, INC., a Delaware Corporation; And SOLOY, LLC., Defendants/Appellees, and HONEYWELL INTERNATIONAL, INC., Defendant.

No. 114,045. March 6, 2018

CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION IV

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

Honorable Bryan C. Dixon, Trial Judge

¶0 The plaintiff/appellant, EagleMed, L.L.C. (EagleMed) purchased an unassembled helicopter from Airbus Helicopters, Inc. (Airbus) in Texas. EagleMed trans-

ported the helicopter to Wichita, Kansas, where it was assembled at EagleMed's headquarters to be used in Oklahoma as an ambulance helicopter. The engine used in the helicopter was manufactured by defendant, Honeywell International, Inc. (Honeywell) with design installation instructions by the defendant/appellee, Soloy, L.L.C, (Soloy). The helicopter crashed in Oklahoma and killed two Oklahoma residents: the pilot and a flight nurse. The pilot's widow/personal representative, EagleMed, and the helicopter's insurer, Starr Indemnity and Liability Company (Star), filed a products liability/negligence lawsuit in Oklahoma County, Oklahoma, against Airbus, Soloy, and Honeywell. The trial court dismissed Airbus and Soloy for lack of personal jurisdiction, and the Court of Civil Appeals affirmed. We granted certiorari to address the issue of minimum contacts with the State of Oklahoma. We hold that the trial court did not err in granting the motion to dismiss for a lack of personal jurisdiction.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

Robert D. Tomlinson, Ross N. Chaffin, Oklahoma City, Oklahoma, and

Timothy A. Loranger (*pro hac vice*), Los Angeles, California, for Plaintiff/Appellant Anke Montgomery.

Craig Allen Fitzgerald, Steven J. Adams, Tulsa, Oklahoma, and

Gary Don Swaim (*pro hac vice*), Dallas, Texas, for Plaintiffs/Appellants EagleMed, L.L.C. and Star Indemnity and Liability Company.

Mark R. McPhail, Alex M. Sharp, Oklahoma City, Oklahoma, and

Eric C. Strain (*pro hac vice*), San Francisco, California, for Defendant/Appellee Airbus Helicopters, Inc.

Brock C. Bowers, Katie R. McCune, Oklahoma City, Oklahoma, and

Geffrey W. Anderson (*pro hac vice*), Jonathan W. Harrison (*pro hac vice*), Fort Worth, Texas, for Defendant/Appellee Soloy, L.L.C.

KAUGER, J.:

¶1 We granted certiorari to address whether the defendants/appellees whose products were used to make an ambulance helicopter had sufficient minimum contacts with the State of Oklahoma in order to establish personal jurisdiction over them after the helicopter crashed in Oklahoma, killing two Oklahoma residents. We hold that they do not.

FACTS

¶2 This cause arises from an ambulance helicopter crash (accident helicopter), on February 22, 2013, shortly after takeoff in Oklahoma City, Oklahoma. The pilot, Mark Montgomery (pilot), and his crew, responded to an emergency medical transport call at Integris Baptist Hospital in Oklahoma City, Oklahoma for Watonga, Oklahoma. The crash killed two Oklahoma residents who were onboard the helicopter: the pilot, and the flight nurse, Chris Denning. The onboard flight paramedic, Billy Wynne, survived with severe injuries which resulted in amputation. The crash destroyed the helicopter. Allegedly, the crash was witnessed by dozens of Oklahoma residents.

¶3 EagleMed, L.L.C. (EagleMed), a Delaware incorporated L.L.C. with its principal place of business in Wichita, Kansas, employed the Oklahoma pilot and the crew. EagleMed operates a helicopter ambulance service for the region. The crash was allegedly caused by an air intake defect which allowed ice to accumulate in the air inlet and enter the compressor, causing the engine to flame out and crash.

¶4 Airbus Helicopters SAS, a French Company, designed and manufactured the accident helicopter in France, and sold it to the appellee, Airbus Helicopters, Inc. (Airbus), a Grand Prairie, Texas, company. The original engine was replaced by Honeywell International, Inc. (Honeywell) of Morristown, New Jersey, who designed and manufactured the replacement engine. An Olympia, Washington company, Soloy, L.L.C. (Soloy), provided the engineering and design for installation of the engine. Starr Indemnity and Liability Company (Starr) insured the helicopter.

¶5 In 2004, Airbus sold the helicopter, an AS350B, to Ballard Aviation, Inc. d/b/a Eagle Med. Airbus delivered the helicopter in an unassembled condition to Texas for shipment, but it did not make the arrangements for it to be delivered to Wichita, Kansas. Rather, the Airbus standard practice was to deliver their helicopters to their place of business in Texas, and have the buyers handle any further transportation services. The purchase agreement

between EagleMed and Airbus contained a forum selection and choice of law clause regarding any litigation to take place in Texas.[1]

¶6 According to Airbus, it: 1) does not conduct any business activities in Oklahoma; 2) is not registered to do business in Oklahoma, nor does it own any real or personal property in Oklahoma; 3) does not keep any officers, directors, employees, or agents in Oklahoma; and 4) does not hold any bank accounts or have any telephone listings in Oklahoma. However, Airbus did know that this helicopter would be going to EagleMed's headquarters in Wichita and purportedly knew it would be used in Oklahoma.

¶7 On July 21, 2008, four years after EagleMed purchased the helicopter from Airbus, Soloy sold and shipped an "engine conversion kit" to EagleMed at their headquarters in Wichita, Kansas, which was installed shortly thereafter. According to Soloy, it did not specifically design its conversion kit for the Oklahoma market, nor did it direct advertising or marketing materials specifically to Oklahoma. Soloy has no offices, agents, employees, or property in Oklahoma nor does it distribute to Oklahoma.[2]

¶8 In 2009, EagleMed sold the helicopter to Wells Fargo Equipment Finance, Inc. who leased it back to EagleMed. EagleMed is an established Oklahoma air ambulance service. It is licensed by the Oklahoma Secretary of State and the Department of Health. It has five Oklahoma "bases," serving the entire state. At the time it purchased the helicopter, EagleMed had two Oklahoma "bases" and eight helicopters. The purchase was specifically for the establishment of its third base with Airbus' alleged knowledge.

¶9 EagleMed operates out of three states, but services five states: Kansas, Oklahoma, Missouri, Arkansas, and Nebraska. The main base in Wichita advertised that it could service the northern part of Oklahoma in less than 24 minutes. Airbus has offered continuous technical support to EagleMed regarding their helicopters, but none of the communication was directed to a base in Oklahoma. All communication was made with the main base in Wichita, even though it is likely that some of the communication regarded helicopters which were located in Oklahoma.

¶10 On August 16, 2013, the flight nurse's family (Denning family) sued Airbus, Airbus SAS, Soloy, and Honeywell for wrongful death, negligence, and products liability in the 141st District Court in Tarrant County, Texas. On April 7, 2014, the pilot's widow intervened alleging similar claims. On June 23, 2014, EagleMed also intervened in the Texas lawsuit, alleging claims for loss of the helicopter and other damages. The flight paramedic filed a separate claim without joining the other plaintiffs. In December of 2014, the defendants in the Texas lawsuit filed counterclaims against the pilot, arguing that the pilot's operational errors caused or contributed to the crash.

¶11 On February 13, 2015, the pilot's widow, EagleMed, and Starr, filed a products liability/negligence lawsuit against Airbus, Honeywell, and Soloy, in the District Court of Oklahoma County, Oklahoma. The same day, the widow and EagleMed filed a notice of non-suit in the Texas action which the Texas Court granted on February 25, 2015.[3] They alleged that venue was proper in Oklahoma, because the accident occurred in Oklahoma County and because the defendants/appellees could properly be sued in Oklahoma County.

¶12 On March 23, 2015, Airbus and Soloy filed motions to dismiss for lack of personal jurisdiction pursuant to 12 O.S. §2012(B)(2)[4] and under the doctrine of *forum non conveniens*.[5] Honeywell filed a motion to dismiss under the doctrine of *forum non conveniens*, but it did not raise the defense of personal jurisdiction under 12 O.S. §2012(B)(2), thus waiving the issue.[6] After additional briefings, a hearing was held on May 1, 2015, in which Montgomery's request for additional time to conduct jurisdictional discovery was denied.

¶13 In an order filed May 20, 2015, the trial court granted motions to dismiss for lack of personal jurisdiction to Airbus and Soloy, but it did not make any finding regarding *forum non conveniens*. The court determined that there was not enough evidence to establish personal jurisdiction and that additional discovery would be unnecessary. The claims against defendant Honeywell were stayed, pending resolution of an appeal.[7] The Court of Civil Appeals affirmed the trial court. We granted certiorari on April 24, 2017.

THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

¶14 Airbus and Soloy argue that they have no contacts with Oklahoma which would allow

an Oklahoma court to assert jurisdiction over them. The pilot's widow, EagleMed, and Star Indemnity argue that because Airbus and Soloy sold their product to a company that has, and continues to use, millions of dollars worth of their products in Oklahoma. They also argue that because of these sales, Airbus and Soloy should be subject to Oklahoma jurisdiction. The record gives no indication that Airbus continued to earn revenue from this particular helicopter after its initial sale to EagleMed. In fact, at the time of the crash, the helicopter was not even owned by EagleMed.

¶15 *In personam* jurisdiction is the power to render a binding judgment against a defendant.[8] When a plaintiff's cause of action does not arise directly from a defendant's forum related activities, a court could nonetheless maintain general personal jurisdiction over the defendant based on the defendant's business contacts with the forum state.[9] However, general jurisdiction has been modified by the United States Supreme Court in Daimler AG v. Bauman, 134 S.Ct. 746, 571 U.S. 20, 187 L.Ed.2d 624 (2014) which reaffirmed that general jurisdictions exists only over a defendant who is at "home" within a state.[10]

¶16 It is undisputed that general jurisdiction does not exist against either defendant in this cause. Even if it were not agreed to be a non-issue, the facts of this cause could not pass the Daimler, supra, test for general jurisdiction. Nevertheless, if a defendant has purposefully directed activities at the residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, specific jurisdiction over a nonresident defendant may exist unless jurisdiction would be unreasonable or would offend the traditional notions of substantial justice and fair play.[11]

¶17 We review dismissal for lack of personal jurisdiction over a non-resident defendant *de novo*.[12] When *in personam* jurisdiction is challenged, the jurisdiction over a non-resident defendant cannot be inferred, but instead must affirmatively appear from the trial court record, and the burden of proof in the trial court is upon the party asserting that jurisdiction exists.[13] We canvas the record for proof that the nonresident party has sufficient contacts with the state to assure that traditional notions of fair play and substantial justice will not be offended if this state exercises *in personam* jurisdiction.[14]

¶18 Personal jurisdiction is a protection granted by the Due Process Clause of the Fourteenth Amendment of the United States Constitution[15] and by the Oklahoma Constitution.[16] Oklahoma's long arm statute for establishing specific jurisdiction is 12 O.S. 2011 §2004(F).[17] It sets the limits of the state's jurisdiction over a nonresident to the outer limits permitted of the Oklahoma and United States Constitutions.[18] Consequently, the outer limits as defined by the United States Supreme Court are relevant to our inquiry.

¶19 Recently, the United States Supreme Court decided Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco, *et al.*, 137 S.Ct. 1772, 582 U.S. __, 198 L.Ed.2d 395 (2017). In Bristol-Myers, the majority of the plaintiffs were not from the state where they filed their lawsuit, nor were they injured in that state. Nevertheless, it does provide the latest specific jurisdiction analysis from the Court. In Bristol-Myers, a group of more than 600 plaintiffs sued the pharmaceutical company over the drug Plavix in California, even though most of the plaintiffs were not California residents [only 86 were California residents].

¶20 The drug company was incorporated in Delaware and headquartered in New York and maintained substantial operations in both New York and New Jersey. The company sells Plavix in California; has five research and laboratory facilities in California; employs about 250 sales representatives in California; and maintains a small state-government advocacy office in Sacramento. However, it did not develop, create a marketing strategy, manufacture, label, package, or work on regulatory approval for Plavix in California. California sales of the drug accounted for only 1% of the company's total revenue for the years 2006 and 2012. The nonresident plaintiffs did not allege they were injured or treated for injuries in California.

¶21 The drug company moved to quash service of summons on the nonresident's claim, but the California Superior Court denied this motion finding that the California courts had general jurisdiction over the drug company. On appeal, the California Court of Appeals determined that California did not have general jurisdiction based on Daimler, supra, but that it did have specific jurisdiction over the nonresidents' claims. The California Supreme Court affirmed and the United States Supreme Court reversed, holding that California lacked

specific jurisdiction to entertain the nonresidents' claims.

¶22 In Bristol-Myers, supra, the Court expressly rejected California's "sliding scale approach" which permitted the exercise of specific jurisdiction based on the notion that the more wide ranging the forum contacts, the more readily a connection between the forum contacts and the claim is shown. The Court noted that:

> 1) there must be an affiliation between the forum and the underlying controversy such as an activity or an occurrence that takes place in the forum State, which subjects the cause to the State's regulation; and
>
> 2) an adjudication of issues must derive from, or be connected with, the very controversy that establishes jurisdiction.

¶23 The Court also delineated that the interests to consider begin with the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice. The primary concern which it recognized was the burden on the defendant. The burden on the defendant requires a court to consider the practical problems resulting in litigation in the forum, and also the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.

¶24 Relying on another case concerning specific jurisdiction, Walden v. Flore, 134 S.Ct. 1115, 571U.S. 12, 188 L.Ed.2d 12 (2013), the Court noted that a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction. Because it was not alleged that the drug company engaged in relevant acts together with its California distributor, or that it was derivatively liable for the distributor's conduct the Court held the requirements of International Shoe Co., v. Washington, 66 S.Ct. 154, 326 U.S. 310, 90 L.Ed 95 (1945) were not satisfied. Because the non-California residents were not attempting to show that the drug they took was distributed to the pharmacies that dispensed to them in California, the fact that the drug company contracted with a California distributor was not enough to establish personal jurisdiction.

¶25 In Walden v. Flore, supra, a Georgia police officer working as a Drug Enforcement Agent (DEA) at a Georgia airport confiscated $97,000.00 in cash that the plaintiffs, California and Nevada residents, were carrying on August 8, 2006. According to the plaintiffs, they were professional gamblers and had been gambling at a casino in Puerto Rico. The Georgia police officer advised the plaintiffs that their funds would be returned if they later proved a legitimate source for the cash. The funds were eventually returned by the DEA in March of 2007.

¶26 The professional gamblers filed a lawsuit against the Georgia police officer in Nevada (one of the gambler's home states). The trial court dismissed the lawsuit on lack of personal jurisdiction. The 9th Circuit Court of Civil Appeals reversed. The Supreme Court determined that personal jurisdiction over the Georgia police officer did not belong to Nevada. The Court noted two important aspects which were necessary for jurisdiction: 1) the relationship between the defendant and the forum State must arise out of contacts that the defendant "himself" creates with the forum State; and 2) "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contact with persons who reside there. While physical presence in the forum is not a prerequisite to jurisdiction, the plaintiff cannot be the only link between the defendant and the forum. The Georgia officer's actions never formed any jurisdictionally relevant contacts with Nevada, therefore, personal jurisdiction in Nevada could not exist.

¶27 In Bristol-Myers, supra, and Walden, supra, the Court, relying on its previous minimum contacts cases, clarified specific jurisdiction analysis and omitted from that analysis any previous "stream of commerce" analysis. [By omitted, we mean the Court neglected to mention it at all, presumptively, at least implicitly, rejecting such analysis.] Our prior precedents worked much like the California "sliding scale" approach which the Court expressly rejected Bristol-Myers, supra. It focused either on the "totality of contacts" between the nonresident defendant[s] and the State of Oklahoma and the resident plaintiff[s], or the nature of the contacts and whether the contact occurred in the "stream of commerce."[19] For example, in Guffey v. Ostonakulov, 2014 OK 6, 321 P.3d 971, after the Oklahoma buyer filed a fraud and consumer protections lawsuit, we addressed whether an Oklahoma district court had *in personam* jurisdiction over a Tennessee individual and corporation which sold a motor vehicle to an Oklahoma resident through eBay.

¶28 In Guffey, supra, the purchase was not a single, isolated transaction on eBay made by a random seller to an Oklahoma resident. Rather, the seller used eBay as a central and regular aspect of their business which allowed them to reach out and to sell to potential buyers in numerous states. Nor was the particular sale at issue an isolated contact between the Oklahoma buyer and the Tennessee seller. For instance, the seller had reached out to the buyer before the eBay auction ended in an attempt to negotiate a sale outside of the eBay process. Written communications were also exchanged between the buyer and seller's father's office in Oklahoma and the vehicle was subject to a thirty-day warranty. This created a continuing obligation between the Tennessee seller and the Oklahoma buyer, after the vehicle was shipped to Oklahoma to be registered and driven in Oklahoma.

¶29 We said, in a unanimous opinion, that:

> ¶26 Defendants are involved in the commercial sale of vehicles to numerous states, and eBay is a primary means through which they conduct these sales. Defendants negotiated with Guffey directly over the vehicle eventually sold to her in Oklahoma, warrantied that vehicle while it was to be titled and driven in Oklahoma, and have allegedly engaged in more than one such transaction in this state. The totality of Defendants' contacts with Oklahoma constitute more than sufficient minimum contacts for the exercise of *in personam* jurisdiction to be reasonable and comport with traditional notions of fair play and substantial justice.

¶30 Our other cases have reached similar results when the contact was directly between the non-resident and the Oklahoma resident.[20] While there may have been some continuing obligations between EagleMed, Airbus, and Soloy regarding warranties, or keeping the aircraft in a safe, working order,[21] there was no direct contact between Airbus and Soloy and the deceased Oklahoma pilot whose widow is the plaintiff in this cause. The only direct contacts appear to be between the non-resident EagleMed and the non-residents Airbus and Soloy which took place in Texas and in Kansas where the aircraft and engine were sold, contracted, and delivered and it appears this contact is insufficient under the teachings of Bristol-Myers, supra, for specific personal jurisdiction to exist. Furthermore, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State.[22]

¶31 Prior to Bristol-Myers, supra, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the New York resident plaintiffs were involved in a car crash in Oklahoma. The plaintiffs sued the car dealer who sold them their car in New York, arguing that minimal contacts were met because it was foreseeable for a car to be driven across the country, thus submitting the non-resident defendant's to jurisdiction. The Court denied the argument because it was merely fortuitous that a single car sold in New York to New York residents would crash in Oklahoma.[23]

¶32 However, World-Wide Volkswagen, supra, noted that "the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[24] The Court later diverged into two competing tests, in a plurality opinion, for a "stream of commerce" analysis in Asahi Metal Ind., LTD v. Superior Ct. of California, 480 U.S. 103 (1987). In Asahi, the Court agreed on the result that no personal jurisdiction was established, but diverged on which approach to use in reaching that result.[25]

¶33 The two diverging tests from Asahi are the "stream of commerce plus" test from Justice O'Connor's opinion which requires some "[a]dditional conduct of the defendant [that] may indicate an intent or purpose to serve the market or the forum State."[26] Justice Brennan's more lenient view allows jurisdiction when "the regular and anticipated flow of products" reaches the forum state with no additional conduct needed.[27]

¶34 This Court addressed and utilized a stream of commerce analysis in State ex rel. Edmondson v. Native Wholesale Supply, 2010 OK 58, 237 P.3d 199 (NWSI).[28] In NWSI, the State of Oklahoma filed a lawsuit in Oklahoma against a nonresident Canadian-chartered cigarette importer and distributor, Native Wholesale Supply (NWS). NWS moved for dismissal based on lack of personal jurisdiction which the trial court denied. NWS appealed.

¶35 We analyzed the personal jurisdiction issue without formally adopting either the O'Connor or Brennan test. However, we stated

that if the "stream of commerce plus" test was satisfied, by definition, Brennan's less stringent test was also satisfied. We held that personal jurisdiction existed because the sheer quantity of cigarettes "for reservation sales only" sold in the state on tribal land was also for sales to the general public of Oklahoma off tribal land. NWS was not an innocent bystander because it reaped hefty financial benefits. The State alleged that over a fifteen-month period more than one hundred million cigarettes worth more than eight million dollars were sold into the Oklahoma market. The volume of cigarettes sold in the state revealed that the Company was part of a distribution channel intentionally to bring their product into the State.

¶36 NWSI established that Justice O'Conner's stricter 'stream of commerce plus' test can be met when a defendant's conduct outside the forum results in their product being placed in the forum and they know and benefit from that placement.[29] However, subsequent, to Bristol-Myers, supra, we must conclude that any "stream of commerce" test applied to Airbus and Soloy products used by EagleMed cannot establish Oklahoma jurisdiction for several reasons:

> 1) Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco, *et al.*, 137 S.Ct. 1772, 582 U.S. __, 198 L.Ed.2d 395 (2017) requires an affiliation between the forum and the underlying controversy, an activity or an occurrence that takes place in the forum State, which subjects the cause to the State's regulation. The adjudication of issues must derive from, or be connected with, the very controversy that establishes jurisdiction. Accordingly, a "sliding scale" approach, or "totality of the contacts" or "stream of commerce" approach is insufficient to establish specific personal jurisdiction.
>
> 2) Pursuant to Walden v. Flore, 134 S.Ct. 1115, 571U.S. 12, 188 L.Ed.2d 12 (2013), a defendant's relationship with a third party, such as EagleMed, is an insufficient basis for jurisdiction.
>
> 3) EagleMed's unilateral choice to fly the helicopter into Oklahoma cannot serve as a basis for subjecting Airbus and Soloy to suit in Oklahoma. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result . . . of the unilateral activity of another party or a third person."[30]

Perhaps equally persuasive, is the United States Supreme Court's action two recent cases. In Galier v. Murco Wall Products, Inc., Docket No. 17-733, an Oklahoma Court of Civil Appeals Case,[31] and Simmons Sporting Goods v. Lawson, Docket No., 17-109, an Arkansas Court of Civil Appeals Case,[32] the Court, granted certiorari, vacated the judgment, and remanded the case back to the appellate courts for further consideration in light of Bristol-Myers, supra.

¶37 Oklahoma may have an interest in adjudicating this case. The crash happened in Oklahoma and the helicopter took off from a base in this State. The two people killed were citizens of this State. Most of the harm from this incident occurred in this State, but these facts alone, without Airbus, or Soloy having further direct and specific conduct with this State directly related to the incident giving rise to the injuries, is insufficient for asserting specific personal jurisdiction over them. Furthermore, we cannot see the need for additional jurisdictional discovery in this cause because the "totality of the contacts" or "stream of commerce" is no longer the analysis this Court will use to determine specific personal jurisdiction.

CONCLUSION

¶38 The emergency helicopter industry is not a traditional industry with a traditional manufacturer selling products to masses of consumers. Airbus and Soloy created very specific products but did not aim the products at Oklahoma markets. It sold those products to a company who operated regionally in Oklahoma, Texas, Kansas, Arkansas, Missouri and Nebraska. Nor did they solicit business from Oklahoma markets and Oklahoma residents. Consequently, minimum contacts with the State of Oklahoma were insufficient.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

COMBS, C.J., KAUGER, WINCHESTER, REIF, WYRICK, JJ., concur.

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

EDMONDSON, COLBERT, JJ., dissent.

KAUGER, J.:

1. The Purchase Agreement ¶8 provides in pertinent part:

General (a): "This Purchase Agreement and the rights of the parties hereto shall in every respect be governed by and construed in accordance with the substantive laws of the State of Texas without reference to the laws of any other state or jurisdiction. Buyer hereby irrevocably consents and agrees that any legal proceeding arising out of or in connection with this Agreement or the rights of the parties hereto may be commenced and prosecuted to conclusion in Dallas, Dallas County, Texas. . . .

2. Soloy's Chief Operating Officer does admit in the past, it has had two customers from Oklahoma. One in 2004 and another from the years 2002 through 2010. It also advertised with trade magazines on a national level, but nothing purposefully directed to Oklahoma.

3. The remaining counterclaims against the pilot in Texas are stayed pending resolution of this case in speculation that this cause might be dismissed.

4. Title 12 O.S. 2011 §2012(B) provides in pertinent part:

B. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . .

2. Lack of jurisdiction over the person;

3. Improper venue; ...

8. Another action pending between the same parties for the same claim; . . .

5. Title 12 O.S. 2011 §140.3 provides:

A. If the court, upon motion by a party or on the court's own motion, finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum either in this state or outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay, transfer or dismiss the action.

B. In determining whether to grant a motion to stay, transfer or dismiss an action pursuant to this section, the court shall consider:

1. Whether an alternate forum exists in which the action may be tried;

2. Whether the alternate forum provides an adequate remedy;

3. Whether maintenance of the action in the court in which the case is filed would work a substantial injustice to the moving party;

4. Whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the action of the plaintiff;

5. Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the action being brought in an alternate forum; and

6. Whether the stay, transfer or dismissal would prevent unreasonable duplication or proliferation of litigation.

6. Title 12 O.S. 2011 §2012(F)(1) provides:

a. if omitted from a motion that raises any of the defenses or objections which this section permits to be raised by motion, or

b. if it is not made by motion and it is not includded in a responsive pleading or an amendment thereof permitted by subsection A of Section 2015 of this title to be made as a matter of course. A motion to strike an insufficient defense is waived if not raised as in subsection D of this section.

7. Pursuant to 12 O.S. 2011 §2012(F), see note 6, supra, Honeywell waived their right to defend on personal jurisdiction.

8. Guffey v. Ostonakulov, 2014 OK 6, ¶12, 321 P.3d 971; Conoco v. Agrico Chemical Co., 2004 OK 83, ¶16, 115 P.3d 829; Gilbert v. Security Finance Corp. of Oklahoma, Inc., 2006 OK 58, ¶16, 152 P.3d 165.

9. Helicopters Nacionales de Colombia v. Hall, 104 S.Ct. 1868, 466 U.S. 408, 414-16 & n. 9, 80 L.Ed.2d 404 (1984); World-Wide Volkswagon Corp. v. Woodson,100 S.Ct. 559, 444 U.S. 286, 291, 62 L.Ed.2d 490 (1980).

10. Daimler AG v. Bauman,134 S.Ct., 571 U.S. 20, 187 L.Ed.2d 624 (2014) involved plaintiffs from Argentina who filed a lawsuit against defendants that had no contacts with the forum state of California, other than having a subsidiary incorporated in Delaware with its principal place of business in New Jersey, who distributed its vehicles throughout the United States including California. The Court said at slip op., at 20, discussing the 2011 case of Goodyear Dunlop Tires Operations S.A. v. Brown, 151 S.Ct. 2846, 564 U.S. 915, 180 L.Ed.2d 796 (2011):

> . . . Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 564 U. S., at ___ (slip op., at 2). Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U. S., at 472 (internal quotation marks omitted). (Footnotes omitted).

See also, the Court's application of Daimler to a railroad injury brought by North and South Dakota residents in Montana State Court in BNSF Railway Co., v. Tyrrell, 137 S.Ct. 1549, 581 U.S. ___, 198 L.Ed.2d 36 (2017). In BNSF, the Court determined that BNSF was not incorporated or headquartered in Montana and its activity there was not "so substantial and of such a nature as to render the corporation at home in that State."

11. Mastercraft Floor Covering v. Charlotte Flooring, Inc., 2013 OK 87, ¶12, Hough v. Leonard, 1993 OK 112, ¶7, 867 P.2d 438.

12. Guffey v. Ostonakulov, 2014 OK 6, ¶10, 321 P.3d 971; Gilbert v. Security Financial Corp., 2006 OK 58, ¶2, 152 P.3d 165; Conoco, Inc. v. Agrico Chemical Co., 2004 OK 83, ¶20, 115 P.3d 829.

13. Guffey v. Ostonakulov, see note 12, supra; Gilbert v. Security Financial Corp., see note 12, supra; Conoco, Inc. v. Agrico Chemical Co., see note 12, supra.

14. Guffey v. Ostonakulov, see note 12, supra; Conoco, Inc., v. Agrico Chemical Co., 2004 OK 83, ¶16, 115 P.3d 829.

15. The U.S. Const. amend 14, §1 provides in pertinent part:

> …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 drprive any person of life, liberty, or deny to any person within its jurisdiction the equal protection of the laws.

16. The Okla. Const. art. 2, §2 provides:

> All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

17. Title 12 O.S. 2011 §2004(F) provides:

> A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.

18. Title 12 O.S. 2011 §2004(F), note 17, supra. In Mastercraft Floor Covering, Inc., v. Charlotte Flooring, Inc., see note 11, supra at ¶10 and in Hough v. Leonard, see note 11, supra at note ¶7, we noted that this statute was a codification of our holding in Fields v. Volkswagen of America, Inc., 1976 OK 106, ¶6, 555 P.2d 48.

19. Guffey v. Ostonakulov, see note 12, supra; Mastercraft Floor Coverings, Inc. v. CFI, see note 11, supra; State ex rel. Edmondson v. Native Wholesale Supply, 2010 OK 58, 237 P.3ds 199; Gilbert v. Security Finance Corp of Oklahoma, 2006 OK 58, 152 P.3d 165; Conoco, Inc., v. Agrico Chemical Company, see note 14, supra; Hough v. Leonard, see note 11, supra.

20. In Mastercraft Floor Coverings, Inc., v. Charlotte Floorings, Inc., see note 11, supra, we held that Oklahoma had jurisdiction over a North Carolina company who had fired an Oklahoma company to lay carpet on a construction project in North Carolina. The contacts involved 30-40 telephone calls, 140 emails, with documents and negotiated contracts emailed to Oklahoma for signature. In Gilbert v. Security Finance Corp of Oklahoma, see note 12, supra, we held that a company engaged in systematic day-to-day Oklahoma contacts so as to meet requirements of both general and specific jurisdiction. However, regarding subsidiary company we noted that "in order to establish jurisdiction under an alter-ego theory, there must be proof of pervasive control by the parent over subsidiary more than what is ordinarily exercised by a parent corporation. We said:

> ¶20 Addressing only the holding companies, the evidence is that they held Oklahoma defendants' stock, they had some board of directors in common with the Oklahoma defendants, they filed consolidated income tax returns, and CHC signed the management agreement with SFC-S. There is no evidence that the holding companies have any direct contacts with Oklahoma or that they exercise more control over the Oklahoma defendants than that generally exercised by a parent company. The record fails to show the "minimum contacts" necessary for the exercise of *in personam* jurisdiction over the holding companies, and the holding companies never surrendered to the trial court's *in personam* jurisdiction. Our finding of a lack of "minimum contacts" is based on the specific facts in this case. On remand, the trial court is instructed to dismiss the holding companies as parties in this action.

21. This is not to say that Airbus or Soloy owed no duty of care toward the pilot or others. In Hudgens v. Cook Industries, Inc. 1973 OK 145, ¶18, 521 P.2d 813, the Court said:

Where there is foreseeable risk of harm to others unless precautions are taken, it is the duty of one who is regularly engaged in a commercial enterprise which involves selection of motor carriers as an integral part of the business, to exercise reasonable care to select a competent carrier. Failure to exercise such care may create liability on the part of the employer for the negligence of that carrier.

22. World-Wide Volkswagen Corp. v. Woodson, see note 9 supra at 299.

23. World-Wide Volkswagen Corp. v. Woodson, see note 9 supra.

24. World-Wide Volkswagen Corp. v. Woodson, see note 9 supra at 297-98.

25. Asahi Metal Ind., LTD v. Superior Ct. of California, 480 U.S 102 (1987).

26. Asahi Metal Ind., LTD v. Superior Ct. of California, see note 25, supra at 112.

Justice O'Connor, and three other justices, supported the 'stream of commerce plus' test.

27. Asahi Metal Ind., LTD v. Superior Ct. of California, see note 25, supra at 116-117.

Justice Brennan, and three other justices, supported the 'stream of commerce' test.

We also noted another writing in Asahi stating:

¶16 Still another writing in *Asahi*, authored by Justice Stevens, declared that, although it was unnecessary to reach the question of minimum contacts, it was their considered opinion that a regular course of dealing that results in deliveries of a large quantity of a product annually over a period of several years would satisfy the "purposeful availment" requirement. Because Justice Stevens could discern "no unwavering line . . . between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market," he advocated that the volume, the value, and the inherent dangerousness of the product be taken into account in determining whether a defendant's conduct amounted to purposeful availment of the forum. (Citations omitted)

28. We also decided State *ex rel.* Pruitt v. Native Wholesale Supply, 2014 OK 49, 338 P.3d 613 (Native Wholesale Supply II), which did not involve the question of personal jurisdiction, but we did reiterate what we had previously said in Native Wholesale Supply I regarding personal jurisdiction.

29. The Court said:

¶24 This is not a case where the defendant is merely aware that its product might be swept into this State and sold to Oklahoma consumers. The sheer volume of cigarettes sold by Native Wholesale Supply to wholesalers in this State shows the Company to be part of a distribution channel for Seneca cigarettes that intentionally brings that product into the Oklahoma marketplace. Native Wholesale Supply is not a passive bystander in this process. It reaps a hefty financial reward for delivering its products into the stream of commerce that brings it into Oklahoma. To claim, as Native Wholesale Supply does, that it does not know, expect, or intend that the cigarettes it sells to Muscogee Creek Nation Wholesale are intended for distribution and resale in Oklahoma is simply disingenuous. (Citations omitted)

¶25 In short, Native Wholesale Supply does not "merely set its products adrift on a stormy sea of commerce which randomly [sweeps] the products into" Oklahoma. They arrive here by the purposeful collective acts of the Company and the tribal wholesalers with whom it does business. We hence hold that the minimum contacts segment of due process analysis is satisfied.

30. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984); Kulko v. Cal. Superior Court, 436 U.S. 84, 93-94 (1978); Hanson v. Denckla, 357 U.S. 235, 253 (1958)("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State"); Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd., 385 F.3d 1291, 1297 (10th Cir. 2004) ("[M]ere foreseeability that a customer will unilaterally move a chattel into a given state does not create jurisdiction over the vendor of the chattel." (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980))).

31. On February 20, 2018, the United States Supreme Court granted certiorari, vacated and remanded Galier v. Murco Wall Products to the Oklahoma Court of Civil Appeals with instructions to reconsider in light of Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco, *et al.*, 137 S.Ct. 1772, 582 U.S. __, 198 L.Ed.2d 395 (2017). In Galier, the Court applied Guffey v. Ostonakulov, 2014 OK 6, 321 P.3d 971 "totality of the contacts" analysis. The defendant was a Texas corporation with its place of business in Fort Worth and it sold tens of thousands of sales in a two-year period beginning in 1972 to Oklahoma markets. In the 1970's, it had eight purchases in Lawton, Oklahoma City, Stonewall, and Duncan and it entered into an agreement with an Oklahoma company who applied its label to one of the defendant's products for resale.

32. On October 2, 2017, the United States Supreme Court granted certiorari, vacated and remanded Simmons Sporting Goods v. Lawson to the Arkansas Court of Civil Appeals with instructions to reconsider in light of Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco, et al., 137 S.Ct. 1772, 582 U.S. __, 198 L.Ed.2d 395 (2017). In Simmons, the defendant was a Louisiana retailer who advertised in Arkansas and sought to draw Arkansas residents to its store. It also hosted a "Big Buck Contest" in Arkansas. The Arkansas appellate court looked to whether the defendant's conduct connected itself with the State of Arkansas through direct solicitation of Arkansas residents.

2018 OK 18

JASON RIDINGS and KATHRYN RIDINGS, personally and as parents and next friends of H.R., a minor, T.R., a minor, and P.R., a minor, Plaintiffs/Respondents, v. ALEXANDRIA MAZE, LANCE MAZE, CHERYL MAZE, and NORMAN PUBLIC SCHOOLS, Defendants/Petitioners.

No. 115,782; Comp. w/115,869. March 6, 2018

ON APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA, THE HONORABLE TRACY SCHUMACHER, DISTRICT JUDGE

¶0 Plaintiffs/Respondents filed this negligence suit alleging that minor Plaintiff, H.R., was struck by a car driven by Defendant, Alexandria Maze, after H.R. exited from a school bus operated by Defendant, Norman Public Schools. Defendants Lance and Cheryl Maze, the driver's parents, moved to dismiss the claims of infliction of emotional distress against them. The trial court denied their motion but certified its order as immediately appealable. The school also sought dismissal of the claims against it. The trial court granted dismissal of the intentional infliction of emotional distress claim against the school but denied dismissal of the remaining claims. This Court granted certiorari to review the interlocutory orders and retained the matters which were appealed separately.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Jake S. Aldridge, Marcus D.A. Pacheco, Foshee & Yaffe, Oklahoma City, OK, for Plaintiffs/Respondents.

Ronald L. Walker, Jerry D. Noblin, Jr., Tomlinson McKinstry, P.C., Oklahoma City, OK, for Alexandra Maze, Lance Maze, and Cheryl Maze, Defendants/Petitioners.

Frederick J. Hegenbart, Jerry A. Richardson, Rosenstein, Fist & Ringold, Tulsa, OK, for Norman Public Schools, Defendants/Petitioners.

Winchester, J.

¶1 Two appeals arising out of the same litigation are disposed of in this opinion. The dispositive issue in both appeals centers on whether the bystander plaintiffs, who were not involved in the auto-pedestrian traffic accident but say they witnessed it from the window of their house, can recover against the defendants for infliction of emotional distress. We find Oklahoma law requires dismissal of the emotional distress claims herein.

BACKGROUND

¶2 Upon crossing the street after exiting a Norman Public Schools[1] ("NPS") bus, H.R. Ridings, a minor child, was struck by a car driven by Alexandria Maze ("Driver"). Plaintiffs, Jason and Katheryn Ridings, parents of H.R., brought suit on behalf of H.R., as well as on their own behalf and on behalf of two of their other minor children who are all alleged to have witnessed the accident from the window of their house. Plaintiffs sued the driver, the driver's parents, Lance and Cheryl Maze ("Driver's Parents"), and NPS for, among others, intentional and negligent infliction of emotional distress as a result of witnessing the accident.[2]

¶3 Driver's Parents and NPS filed separate motions to dismiss, each arguing that Oklahoma law does not recognize a claim for infliction of emotional distress under the facts alleged by Plaintiffs. The trial court denied both motions but certified the rulings for interlocutory appeal. We previously granted certiorari, treated these related appeals as companion cases, and have retained both matters (Case No. 115,782 against Driver's Parents and Case No. 115,869 against NPS) to adjudicate in a single opinion. *See* Okla. Sup. Ct. R. 1.27(d); *Redding v. State*, 1994 OK 102, 882 P.2d 61; *McMinn v. City of OKC*, 1997 OK 154, 952 P.2d 517.

DISCUSSION

¶4 A petition may be dismissed as a matter of law for two reasons: (1) lack of any cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *Indiana National Bank v. State Dept. of Human Services*, 1994 OK 98, ¶ 4, 880 P.2d 371, 375. A motion to dismiss is granted when "there are no facts consistent with the allegations under any cognizable legal theory." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. When evaluating a motion to dismiss, a court must examine only the controlling law, not the facts." *Wilson* at ¶ 4.

¶5 The courts must take as true all of the challenged pleading's allegations, together with all reasonable inferences which may be drawn from them. *Indiana National Bank v. State Department of Human Services*, 1994 OK 98, ¶ 3, 880 P.2d 371, 375. A pleading will not be dismissed for failure to state a claim unless the allegations show beyond any doubt that the litigant can prove no set of facts which would entitle him to relief. *Indiana National Bank v. State Department of Human Services*, 1994 OK 98, ¶ 4, 880 P.2d 371, 375-376.

I. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

¶6 The negligent causing of emotional distress is not an independent tort, but is in effect the tort of negligence. *Lockhart v. Loosen*, 1997 OK 103, ¶ 16, 943 P.2d 1074, 1081. Before emotional distress damages can be awarded, a plaintiff must establish: a duty on the part of the defendant to protect the plaintiff from injury, a failure of the defendant to perform the duty, and an injury to the plaintiff resulting from the failure. *Kraszewski v. Baptist Med. Ctr.*, 1996 OK 141, ¶ 1, 916 P.2d 241, 243, fn. 1.

¶7 To recover for emotional distress under Oklahoma law, "a plaintiff must . . . be a 'direct victim' rather than a 'bystander.'" *Kraszewski* at ¶ 10. Direct victims are those individuals who are "directly physically involved in the accident," but whose emotional distress results from the suffering of another. *Kraszewski* at ¶ 8. Bystanders, on the other hand, are those individuals who are not directly involved in the accident, but are seeking damages for emotional distress resulting from witnessing the injury of another. *Kraszewski* at ¶ 7. *See also Shull v. Reid*, 2011 OK 72, n. 5, 258 P.3d 521 ("The plaintiff must be a victim, not a bystander, directly involved in the incident, damaged from directly viewing the incident and a close family relationship must exist between the plaintiff and the party whose injury gave rise to plaintiff's mental anguish.").

¶8 We have identified a direct victim as one who was involved in the same accident that gave rise to their emotional suffering. *Kraszewski* at ¶ 11. In *Kraszewski*, a drunk driver hit an elderly couple walking hand-in-hand in a store parking lot. The husband was struck in the

shoulder, chest, and knee while his wife was trapped under the vehicle as it continued to drive. The husband subsequently brought an emotional distress claim for witnessing his wife's fatal injury. The Court allowed the husband to recover since he was a direct victim who "was part of the accident which caused the mental suffering." *Kraszewski* at ¶ 11.

¶9 This Court first addressed the bystander theory of recovery for emotional distress in *Slaton v. Vansickle*, 1994 OK 39, ¶ 15, 872 P.2d 929, 931. In *Slaton*, a negligently manufactured rifle discharged as the gun owner was loading it into his vehicle. Unknown to him at the time, a child was killed from the stray shot. When the gun owner later learned a child died from the shot, he sued the manufacturer to recover for emotional distress. This Court rejected the bystander theory of recovery and reiterated that "recovery for mental anguish is restricted to such mental pain or suffering as arises from an injury or wrong to the person rather than from another's suffering or wrongs committed against another person." *Slaton* at ¶ 12. The death of the child caused the gun owner's emotional distress when he later learned of it, it was not the shot from the gun itself. The court did not allow the gun owner to recover because "his injury resulted from the wrong to another." *Slaton* at ¶ 15.

¶10 Recognizing this Court's precedent would not allow recovery for the alleged emotional distress herein, Plaintiffs advocate for this Court to adopt a more lenient approach. However, in *Slaton*, and again later in *Kraszewski*, this Court specifically rejected an expanded theory of bystander recovery for emotional distress such as was adopted by the California case of *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72 (1968). In *Dillon*, a mother was a bystander to an auto accident in which her child was killed. The child had been crossing a street when she was struck by a vehicle. The mother was not crossing the street and was not otherwise involved in the accident, but did allegedly witness it. Although she was not directly involved, the California court allowed the mother to recover for emotional distress because of her "physical closeness" to the accident, her "contemporaneous observation of the accident" and her "close relationship" with the accident victim.

¶11 Just as we declined to adopt *Dillon's* bystander approach in *Slaton* and *Kraszewski*, we decline to do so here today.[3] The uncontested facts of the instant matter establish Plaintiffs' emotional distress arose from allegedly witnessing the accident from the window of their house. In *Kraszewski*, the husband was allowed to recover emotional distress for witnessing a drunk driver fatally hit his wife. However, he was physically injured by the drunk driver's car. Unlike the husband in *Kraszewski*, the driver herein did not physically harm Plaintiffs, nor were Plaintiffs even outside or in harm's way. Rather, this case is similar to *Slaton* because Plaintiffs' emotional distress "resulted from the wrong to another" – the driver injuring their child. Consequently, Plaintiff's' claims fall under *Kraszewski's* definition of a "bystander" because the basis for liability rests solely on the fact that they witnessed the accident, not that any defendant physically injured them.

¶12 The controlling law in Oklahoma requires Plaintiffs to establish they were a direct victim in order to recover for emotional distress. Because Plaintiffs are bystanders, rather than direct victims, they have no basis for recovery and their claims for emotional distress should be dismissed.

II. Intentional Infliction of Emotional Distress

¶13 To establish a cause of action for intentional infliction of emotional distress, a plaintiff must prove extreme and outrageous conduct done intentionally or recklessly by the defendant which resulted in severe emotional distress in the plaintiff. *Kraszewski*, at ¶ 14, citing *Breeden v. League Services Corp.*, 1978 OK 27, ¶ 12, 575 P.2d 1374, 1377-78. Liability for the tort has only been found where the offending conduct "has so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress." *Miller v. Miller,* 1998 OK 24, ¶ 33, 956 P.2d 887, 901. The trial court must act as a gatekeeper to ensure that only valid claims reach the jury. *Computer Publications, Inc. v. Welton*, 2002 OK 50, ¶ 16, 49 P.3d 732, 737. Nothing in Plaintiffs' Petition alleges conduct on the part of Driver's Parents which would be sufficient to show intent or outrageousness. Accordingly, this claim against Driver's Parents is dismissed.[4]

III. Remaining Claims Against NPS, Case No. 115,869

¶14 Plaintiffs' Petition alleges additional claims against NPS for respondeat superior for the alleged negligence of the school bus driver and also for negligent training and supervi-

sion. NPS argues that Plaintiffs' Petition set forth no facts to support these claims, instead relying on conclusory assertions of negligence. NPS further urges that it owed no duty to H.R. because the accident occurred after H.R. had exited the school bus. The trial court disagreed and declined to dismiss the negligence claims against NPS.

¶15 Taking Plaintiffs' Petition as true, as we must when reviewing a motion to dismiss, it cannot be said that the allegations show that Plaintiffs can prove no set of facts in support of their theories of recovery. Dismissal of the case at this stage would be premature. The Oklahoma Pleading Code does not require plaintiffs to set out in detail the facts upon which their claims are based. *Fanning v. Brown*, 2004 OK 7, ¶ 19, 85 P.3d 841, 847.

¶16 Plaintiffs' petition alleged that the bus driver was "wrongful, careless and negligent in operating" the school bus and that as a result of this negligence, Plaintiff, H.R., was injured by Maze's vehicle. Plaintiffs further allege that NPS failed to properly train and supervise the bus driver and that this failure breached the duty to transport its students in a manner calculated to prevent harm and that H.R. was injured as a result. Whether the bus driver was negligent in fulfilling the duty of providing reasonable care to H.R., and whether any breach of that duty was foreseeable, remain unknown at this stage of the litigation. Plaintiffs may or may not be able to prove a set of facts exists which would ultimately find NPS liable. Such facts will be borne out by discovery and, as such, dismissal of the case against NPS is premature at this time.[5]

CONCLUSION

¶17 Under Oklahoma law, infliction of emotional distress is established when (1) the plaintiff was directly physically involved in the incident, (2) the plaintiff was injured from actually viewing the injury, and (3) a close personal relationship exists between the victim and the plaintiff. *Kraszewski v. Baptist Med. Ctr.*, 1996 OK 141, ¶ 18, 916 P.2d 241, 250. The bystander Plaintiffs were not directly involved in the accident which injured H.R. and their claims for negligent and intentional emotional distress against Driver's Parents must be dismissed. Further, because Plaintiffs' allegations could accommodate a set of facts which would be actionable in negligence, we cannot find that the petition does not state a cause of action in negligence against NPS. Accordingly, we reverse the trial court as to its rulings on the infliction of emotional distress claims at issue on appeal, and affirm the denial of the dismissal as to the remaining negligence claims against NPS.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Concur: Combs, C.J., Gurich, V.C.J., Kauger, Winchester, Edmondson, Reif, and Wyrick, JJ.

Dissent: Colbert, J.

Winchester, J.

1. The correct name for NPS is Independent School District No. 29 of Cleveland County, Oklahoma.

2. The remaining claim against the Driver's Parents, not at issue in this appeal, is for negligent entrustment as the owners of the vehicle that struck H.R. The remaining claims against NPS, for negligence, will be addressed herein.

3. Later California cases have recognized that *Dillon's* case-by-case approach to evaluating claims for negligent infliction of emotion distress "has not only produced inconsistent rulings in the lower courts, but has provoked considerable critical comment by scholars who attempt to reconcile the cases." *See, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 661, 771 P.2d 814, 825 (1989)("the only thing that was foreseeable from the *Dillon* decision was the uncertainty that continues to this time as to the parameters of the third-party NIED action.")

4. The trial court previously dismissed the claim of intentional infliction of emotional distress against NPS as NPS is a political subdivision of the State of Oklahoma and therefore not liable for the intentional torts of its employees under Oklahoma's Governmental Tort Claims Act, 51 O.S.2011, § 151 *et. seq.* This dismissal is not at issue on appeal.

5. The Court renders no opinion regarding the ultimate determination of the liability, if any, of NPS; rather, we merely hold that it is premature, absent the opportunity for preliminary discovery, to grant dismissal of these negligence claims.

2018 OK 19

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA BAR ASSOCIATION, Complainant, v. JOHN KNOX BOUNDS, Respondent.

Rule 7.2, RGDP. SCBD No. 6597
March 6, 2018

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE PURSUANT TO RULES 7.1 AND 7.2 RULES GOVERNING DISCIPLINARY PROCEEDINGS

¶0 The Oklahoma Bar Association initiated this disciplinary proceeding against Respondent for misconduct arising out of his convictions for one felony and one misdemeanor. Respondent did not request a hearing before the Professional Responsibility Tribunal. The Bar recommended suspension for two years and one day. After de novo review, this Court finds that

Respondent is guilty of misconduct and the appropriate discipline is suspension for two years and one day.

RESPONDENT SUSPENDED FROM THE PRACTICE OF, LAW FOR TWO YEARS AND ONE DAY.

Gina L. Hendryx, General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant,

Hack Welch, Hugo, Oklahoma, for Respondent.

OPINION

EDMONDSON, J.

¶1 This case is a summary disciplinary proceeding against Respondent, John Knox Bounds, pursuant to Rule 7.1, 5 O.S. 2011, Ch. 1, App. 1-A. Respondent was convicted in Choctaw County of felony unlawful possession of a controlled substance, methamphetamine, and a misdemeanor of unlawful possession of drug paraphernalia. On November 21, 2017, Respondent received a two-year deferred sentence with probation on the felony conviction; and he was sentenced to imprisonment for 30 days on the misdemeanor conviction.

¶2 On December 11, 2017, we issued an Order of Interim Suspension directing Respondent to file a response no later than December 22, 2017 to show cause, if any, why this interim suspension should be set aside. Respondent did not file a timely response and he did not request a hearing. He thus waived his right to contest the interim suspension. There was no hearing before the Professional Responsibility Tribunal.

¶3 The Bar Association requested this Court to impose an order suspending Respondent for a period of two years and one day. Respondent sought leave to file a response out of time. He apologized to this Court for his untimely failure to respond and advised this Court that after his release from jail in early December, 2017, he was acutely ill for six weeks. Respondent agreed to a suspension that would continue until after the expiration of his deferred criminal sentence in November, 2019.

¶4 The regulation of licensure, ethics, and discipline of attorneys is a nondelegable constitutional responsibility solely vested in this Court. *State ex rel. Oklahoma Bar Ass'n v. Passmore*, 2011 OK 90, 264 P.3d 1238, *State ex rel. Oklahoma Bar Ass'n. v. Whitebook*, 2010 OK 72, 242 P.3d 517. Protection of the public and purification of the Bar are the primary purposes of disciplinary proceedings rather than to punish the accused lawyer. *State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, 343 P.3d 214. This Court will conduct a de novo review of the record to determine if misconduct has occurred and what discipline is appropriate. *State ex rel. Oklahoma Bar Ass'n v. Garrett*, 2005 OK 91, 127 P.3d 600.

¶5 To impose appropriate discipline, the record must be sufficient for this Court to conduct a thorough inquiry into essential facts. *Oklahoma Bar Ass'n. v. Donnelly*, 1992 OK 164, 848 P.2d 543. The record in this case includes the conviction of Respondent for the possession of methamphetamine with deferred sentencing and the misdemeanor conviction with a 30 day jail term. Respondent asserts in his response that he is in compliance with all terms of his probation and has fulfilled the terms of his 30 day jail sentence. Respondent states that he has followed all guidelines for assessment, treatment and follow-up for drug and alcohol abuse. He provided this Court with letters from three different attorneys attesting to his character and long years of service to the bar as a prosecutor and defense attorney, as well as his involvement in his community. Respondent became a licensed Oklahoma attorney in 1975 and has practiced without any prior incidents.

¶6 Respondent does not dispute the Bar Association's recommendation for a suspension period of two years and one day. Although Respondent has not had any prior incidents before this Court, we find his criminal convictions for possession of methamphetamine and possession of drug paraphernalia of considerable concern. We adopt the recommendation of the Bar Association for a suspension of a period of two years and one day from the date this opinion becomes final. *State ex rel. Oklahoma Bar Ass'n. v. Soderstrom*, 2013 OK 101, ¶ 8, 321 P.3d 159, 160.

¶7 In the event Respondent seeks reinstatement, it will be conditioned upon his continued sobriety, as it is essential to his rehabilitation1 and to the successful completion of his probation.

RESPONDENT SUSPENDED FROM THE PRACTICE OF LAW FOR TWO YEARS AND ONE DAY.

COMBS, C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, and WYRICK, JJ., concur;

GURICH, V.C.J., dissents;

Gurich, V.C.J., dissenting

"I would suspend the Respondent for two years from the date of his interim suspension."

REIF, J., not participating.

EDMONDSON, J.

1. *State ex rel. Oklahoma Bar Ass'n v. Briery*, 1996 OK 45, ¶ 14, 914 P.2d 1046, 1050; *see also State ex rel. Oklahoma Bar Ass'n v. Rogers*, 2006 OK 54, ¶ 21, 142 P.3d 428, 436.

Court of Criminal Appeals Opinions

2018 OK CR 6

EDWARD ANTHONY TAYLOR, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2016-1078. February 23, 2018

SUMMARY OPINION

ROWLAND, J.:

¶1 Appellant Edward Anthony Taylor was convicted by jury in the District Court of Caddo County, Case No. CF-2016-56, of Possession of a Controlled Dangerous Substance with Intent to Distribute, in violation of 63 O.S.Supp.2012, § 2-401(A)(1). The jury assessed punishment at fifteen years imprisonment and a $20,000.00 fine. The Honorable Wyatt Hill, Associate District Judge, presided at trial and sentenced Taylor accordingly. Taylor appeals, raising the following issues:

(1) whether the district court erred in denying his motion to dismiss because he was denied his Fifth and Sixth Amendment right to counsel during custodial interrogation; and

(2) whether he was denied the effective assistance of counsel.

¶2 We find reversal is not required and affirm the Judgment and Sentence of the district court.

1. Motion to Dismiss

¶3 Taylor argues the district court erred in denying dismissal of his drug charge to remedy the violation of his Fifth and Sixth Amendment right to counsel during a pretrial custodial interrogation that occurred while he was represented by counsel. We review the district court's ruling on a motion to dismiss for an abuse of discretion. *See Sanders v. State*, 2015 OK CR 11, ¶ 4, 358 P.3d 280, 283. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id*.

¶4 Taylor filed a motion to dismiss the case because of the prosecutor's "flagrant" violation of his right to counsel. That motion alleged the prosecutor ordered a deputy sheriff to interview Taylor, knowing that Taylor had counsel, in violation of the rule in *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). Taylor simultaneously filed a motion to suppress any statements made during the interrogation. At the hearing on those motions, the prosecutor conceded that the proper remedy to correct the constitutional violation of Taylor's right to counsel was to suppress Taylor's statement. The district court sustained Taylor's motion to suppress, but denied his motion to dismiss. No evidence of the interrogation was admitted at trial.

¶5 It is undisputed that the deputy sheriff interviewed Taylor after criminal proceedings had begun on his drug charge and defense counsel had entered an appearance. Taylor maintains he is entitled to relief because the acquisition of information during the custodial interrogation in violation of his right to counsel resulted in the assigned prosecutor refusing to offer a more attractive plea bargain. This claim is without merit because there was no constitutional violation of Taylor's right to counsel.[1]

¶6 This case gives occasion to compare the rights to counsel embodied in the Fifth and Sixth Amendments, respectively. The Fifth Amendment right arises when one who is in custody is interrogated. *See Miranda v. Arizona*, 384 U.S. 436, 469-70, 86 S.Ct. 1602, 1625-26, 16 L.Ed.2d 694 (1966) (holding the Fifth Amendment right to interrogation counsel is triggered by the advice of constitutional rights that police must give before any custodial questioning.) Under *Miranda*, no statement obtained through custodial interrogation may be used against a defendant without a knowing and voluntary waiver of those rights. *Id*., 384 U.S. at 444, 86 S.Ct. at 1612. The Sixth Amendment right to trial counsel is triggered by the initiation of adversarial judicial proceedings, which may be initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 2085, 173 L.Ed.2d 955 (2009); *United States v. Gouveia*, 467 U.S. 180, 187–88, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984). Both the Fifth and Sixth Amendment rights to counsel apply to custodial interrogations post initiation of adversarial judicial pro-

ceedings, and each is invoked and waived in exactly the same manner — under the Fifth Amendment prophylactic *Miranda* rules. *See Montejo,* 556 U.S. at 786-87, 129 S.Ct. at 2085. Here, it is neither disputed that Taylor was in custody and interrogated, nor is there any claim that his waiver was not voluntary. His complaint is that he was approached by law enforcement, after he had been appointed counsel, and asked to submit to an interview. Thus, this case is within the ambit of the Sixth Amendment right to assistance of counsel, which attaches once the adversary judicial process has been initiated. *See Montejo*, 556 U.S. at 786, 129 S.Ct. at 2085.

¶7 A defendant has the right to have counsel present at all "critical" stages of a criminal prosecution, including custodial interrogation. *Randall v. State,* 1993 OK CR 47, ¶ 3, 861 P.2d 314, 315. Formerly, once a criminal defendant requested the assistance of counsel based on his Sixth Amendment right, the police could not initiate questioning or attempt to induce a waiver of his right to counsel because that police interrogation and any waiver obtained was invalid under *Michigan v. Jackson*, 475 U.S. at 635–636, 106 S.Ct. at 1410–11. Jackson held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Jackson*, 475 U.S. at 636, 106 S.Ct. at 1411. Unfortunately for Taylor, *Jackson's* prophylactic protection of the Sixth Amendment right to counsel is no longer available.

¶8 In *Montejo v. Louisiana*, the United States Supreme Court overruled *Jackson* and rejected its bright-line rule. *Montejo*, 556 U.S. at 797, 129 S.Ct. at 2091. The trial court in Montejo's case appointed him counsel at preliminary hearing to assist in the defense of his murder charge. *Id.*, 556 U.S. at 781, 129 S.Ct. at 2082. Later that same day, the police, seemingly unaware that counsel had been appointed, approached the jailed Montejo, and requested that he accompany them to locate the murder weapon. *Id.*, 556 U.S. at 781-82, 129 S.Ct. at 2082. The police read Montejo his Miranda rights, and he agreed to go with them. *Id*., 556 U.S. at 782, 129 S.Ct. at 2082. During the trip, Montejo wrote an inculpatory letter of apology to the victim's widow. *Id.* The letter was admitted at trial over objection, and Montejo was convicted. *Id.*

¶9 The Court in *Montejo* rejected the rationale for *Jackson* and its prophylactic rule, holding "it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because [the defendant] had previously been appointed a lawyer." *Id.*, 556 U.S. at 792, 129 S.Ct. at 2088. Once the right to counsel has attached, "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited." *Id.*, 556 U.S. at 794-95, 129 S.Ct. at 2090. On balance, the Court found "that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering 'society's compelling interest in finding, convicting, and punishing those who violate the law')." *Id.*, 556 U.S. at 793, 129 S.Ct. at 2089 (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986)).

¶10 The Court explained further that without *Jackson*, few badgering-induced waivers, if any, would be admitted at trial because the Court had already taken substantial other, overlapping measures to exclude them. *Id*., 556 U.S. at 794, 129 S.Ct. at 2089. First, under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present during questioning. *Id.* Second, under *Edwards v. Arizona,* once such a defendant has invoked his *Miranda* rights, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. 477, 484–85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981) (discussed in *Montejo*, 556 U.S. at 794, 129 S.Ct. at 2090). And third, under *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), no subsequent interrogation may take place until counsel is present. *Minnick*, 498 U.S. at 153, 111 S.Ct. at 491 (discussed in *Montejo,* 556 U.S. at 794, 129 S.Ct. at 2090). Quoting *Patterson v. Illinois*, 487 U.S. 285, 296, 108 S.Ct. 2389, 2397, 101 L.Ed.2d 261 (1988), the Court reaffirmed that "an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth

Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Montejo*, 556 U.S. at 786-87, 129 S.Ct. at 2085. The basis for *Jackson's* bright line rule, the Court found, was simply unsound. *Id.*, 556 U.S. at 794, 129 S.Ct. at 2089-90. A further safeguard against badgered confessions is the Fourteenth Amendment's requirement that all statements introduced against a criminal defendant, regardless of whether they are in custody or have secured counsel, be voluntarily made. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493-94, 12 L.Ed.2d 653 (1964); *Young v. State*, 1983 OK CR 126, ¶¶ 10-11, 670 P.2d 591, 594.

¶11 Post-*Montejo*, a court can no longer presume that a waiver of a right to counsel executed after the right to counsel has attached is invalid. The represented defendant may make a clear assertion of the right to counsel when officers initiate interrogation or may waive that right provided the relinquishment of the right is voluntary, knowing and intelligent. *See Id.*, 556 U.S. at 786, 129 S.Ct. at 2085. And, "the decision to waive [the right to counsel] need not itself be counseled." *Id.* Hence, once "a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and [knowingly] agrees to waive those rights," that advice of rights and waiver is sufficient to comply with the Fifth and Sixth Amendments. *Id.*, 556 U.S. at 786–87, 129 S. Ct. at 2085.[2] This Court's decisions in *Warner v. State*, 2006 OK CR 40, ¶ 55, 144 P.3d 838, 866; *Miller v. State*, 2001 OK CR 17, ¶ 10, 29 P.3d 1077, 1080; *Valdez v. State*, 1995 OK CR 18, ¶ 33, 900 P.2d 363, 374; *Walker v. State*, 1990 OK CR 44, ¶ 12, 795 P.2d 1064, 1067; *Ake v. State*, 1989 OK CR 30, ¶ 40, 778 P.2d 460, 469; and *McCaulley v. State*, 1988 OK CR 25, ¶ 9, 750 P.2d 1124, 1126 are overruled to the extent they are inconsistent with this opinion.

¶12 The record shows that the deputy sheriff began Taylor's custodial interrogation by asking Taylor if he had made an initial appearance and had spoken to an attorney and Taylor answered affirmatively. The deputy read Taylor his *Miranda* rights and asked if Taylor wished to speak with him. Taylor asked if he should speak to the deputy without counsel present and the deputy informed him that it was his right to have an attorney present if he so desired. Taylor stated unequivocally that he wanted to speak to the deputy. The deputy asked Taylor to review the rights previously read to him and to print and sign his name on the Advice of Rights form if he wanted to waive his rights and talk to the deputy. Taylor waived his rights.

¶13 Taylor undoubtedly had a right to counsel for the custodial interrogation under the Fifth and Sixth Amendments, but knowingly and voluntarily waived his rights. The statement he made was admissible. Nevertheless, the statement was suppressed because all parties erroneously believed that *Jackson* was still the law. Under *Montejo*, there was no violation of Taylor's constitutional rights to counsel because of his valid waiver. Because his statement was not acquired unlawfully, Taylor can show neither that constitutional violations of his right to counsel affected the plea bargaining process nor that the district court abused its discretion in denying his motion to dismiss. This claim is denied.

2. Ineffective Assistance of Counsel

¶14 Taylor claims the cumulative effect of defense counsel's ineffective assistance deprived him of a fair trial. He argues that defense counsel's inappropriate and unprofessional conduct during the motion hearing alienated the judge and caused the judge to rule against him on his motion to dismiss. Taylor also complains that defense counsel failed to competently and effectively present evidence and argument in support of his motion to dismiss further causing the judge to reject his motion.

¶15 This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Taylor must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. To accomplish this, Taylor must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." *Head*, 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether coun-

sel's performance was deficient if the claim can be disposed of based on lack of prejudice. *Malone,* 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

¶16 As discussed in Proposition 1, *supra*, the district court did not err in denying Taylor's motion to dismiss because there was no violation of his right to counsel during the custodial interrogation. Moreover, the court suppressed Taylor's statement to remedy the alleged constitutional violation. Taylor has not shown that reversible error occurred. Hence, he cannot establish the necessary prejudice to prevail on his ineffective assistance of counsel claim. This claim is denied.

DECISION

¶17 The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY THE HONORABLE WYATT HILL, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

David Kanehl, 1111 W. Willow Ave., Ste. 200, Duncan, OK 73533, Counsel for Defendant

Alan D. Rosenbaum, Assistant District Attorney, 110 S.W. 2nd, Ste. 108, Anadarko, OK 73005, Counsel for State

APPEARANCES ON APPEAL

Neilson Lea, P.O. Box 926, Norman, OK 73070-0926, Counsel for Appellant

Mike Hunter, Oklahoma Attorney General, Ashley L. Willis, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

March

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

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

20 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David Swank 405-325-5254 or David B. Lewis 405-556-9611

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

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

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

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

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

29 **OBA Awards Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Jennifer Castillo 405-553-3103

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

OBA Bar Center Facilities Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Bryon J. Will 405-308-4272

April

3 **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

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

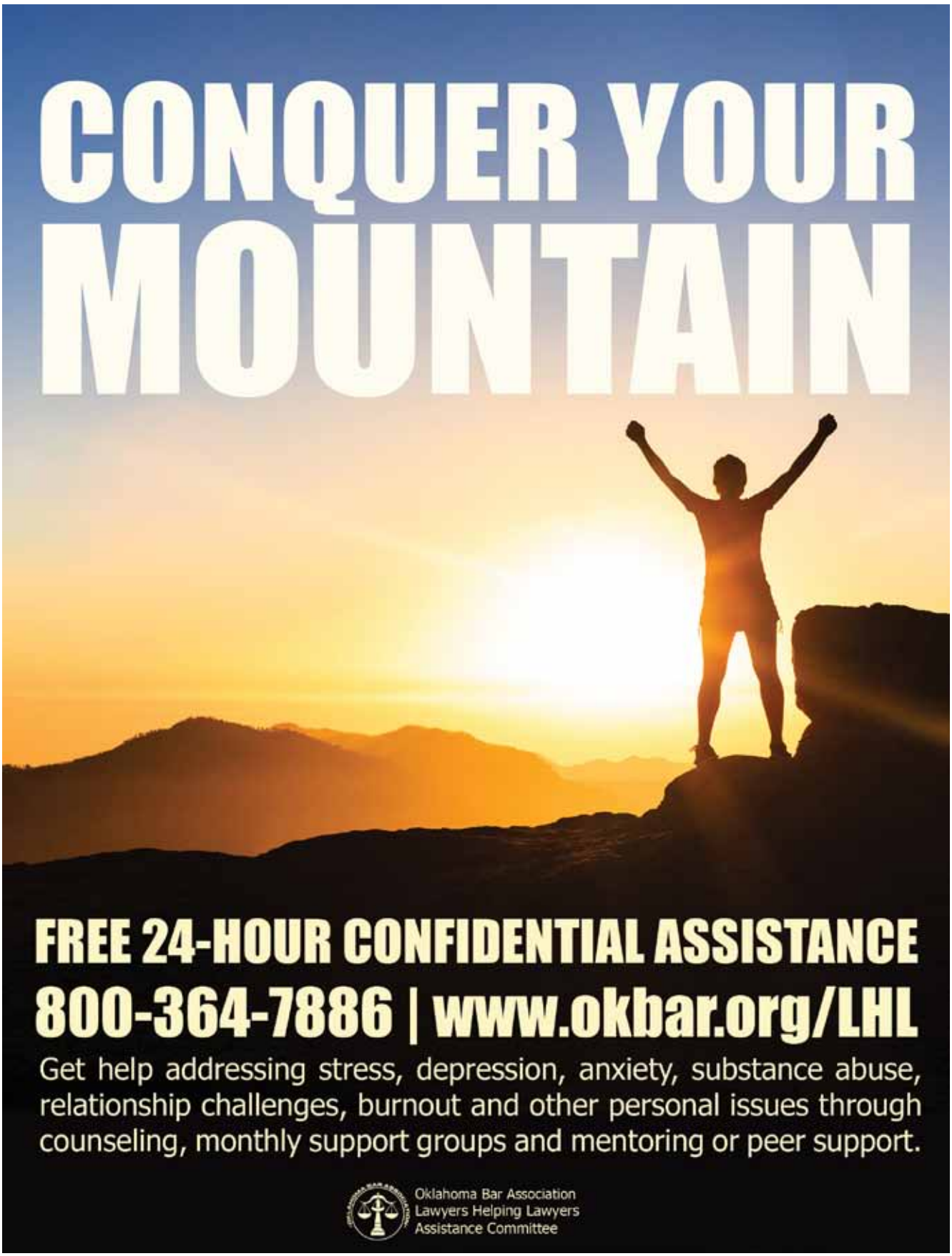
6 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

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

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

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

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

2018 OK CIV APP 10

HAISAM AL-KHOURI, M.D., Plaintiff/Appellee, vs. OKLAHOMA HEALTH CARE AUTHORITY, and JOEL N. GOMEZ, in his capacity as Administrator of the Oklahoma Health Care Authority, Defendants/Appellants.

No. 115,769. September 29, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, JUDGE

TEMPORARY INJUNCTION VACATED CASE IS REVERSED AND REMANDED

Danny K. Shadid, RIGGS, ABNEY, NEAL, TURPEN ORBISON & LEWIS, Oklahoma City, Oklahoma, for Plaintiff/Appellee,

Nicole M. Nantois, Joseph H. Young, Rebecca I. Burton, OKLAHOMA HEALTH CARE AUTHORITY, Oklahoma City, Oklahoma, for Defendants/Appellants.

Kenneth L. Buettner, Chief Judge:

¶1 Defendants/Appellants Oklahoma Health Care Authority and Joel N. Gomez,[1] in his capacity as Administrator of the Oklahoma Health Care Authority, (collectively, the OHCA) appeal from an order granting a temporary injunction prohibiting the OHCA from terminating Plaintiff/Appellee Haisam Al-Khouri, M.D.'s contract to provide health care services to SoonerCare (Medicaid) members. Dr. Al-Khouri sought declaratory relief that the administrative process for appealing the immediate termination of his SoonerCare provider agreement violated due process and injunctive relief prohibiting the OHCA from terminating his provider agreement. We hold the trial court abused its discretion by granting a temporary injunction. Dr. Al-Khouri does not have a property interest in continued participation in Medicaid programs and, therefore, has failed to demonstrate clear and convincing evidence of his likelihood of success on the merits of his due process claim. The temporary injunction is vacated and this case is reversed and remanded.

¶2 Dr. Al-Khouri is a licensed psychiatrist and has been a Medicaid provider in Oklahoma since 1993. In a letter dated September 23, 2016, the OHCA confirmed Dr. Al-Khouri's SoonerCare General Provider Agreement (Provider Agreement) had been received and updated. On November 29, 2016, the OHCA issued a letter immediately terminating Dr. Al-Khouri's Provider Agreement for multiple contract violations related to the quality of care provided to SoonerCare members, including failure to adhere to applicable professional standards and failure to adhere to the OHCA's patient medical record documentation requirements. The termination letter outlined the reasons for termination and that, based on those reasons, the OHCA was terminating Dr. Al-Khouri's contract immediately to protect the health and safety of its members. Dr. Al-Khouri did not appeal the termination of his contract pursuant to OAC 317: 2-1-12.[2] Rather, on December 16, 2016, Dr. Al-Khouri filed this lawsuit seeking injunctive and declaratory relief. Dr. Al-Khouri claims the recent changes to the OHCA's administrative procedures for reviewing the immediate termination of provider agreements, specifically OAC 317: 2-1-12, violate procedural due process protections afforded under the Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution and do not comply with Article II of Oklahoma's Administrative Procedures Act (APA), 75 O.S. §§ 308a-323. Dr. Al-Khouri argues the new rule provides only a "desk review" of the decision but that due process requires a full post-termination evidentiary hearing. The district court issued a temporary restraining order December 19, 2016, prohibiting the OHCA from terminating Dr. Al-Khouri's contract and temporarily reinstating him as a SoonerCare provider. The trial court held an evidentiary hearing December 28, 2016, took the matter under advisement, and extended the restraining order. On January 27, 2017, the trial court found the procedures provided in OAC 317: 2-1-12(2) violated due process and granted Dr. Al-Khouri's application for a temporary injunction. The trial court also found the OHCA was subject to Article II of the APA and that Dr. Al-Khouri was entitled to minimum due process, including a full post-termination evidentiary hearing. The OHCA appeals.[3]

¶3 Matters involving the grant or denial of injunctive relief are of equitable concern. *Dowell v. Pletcher,* 2013 OK 50, ¶ 5, 304 P.3d 457. A judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence. *Id.* This Court will consider all the evidence on appeal to determine whether the trial court's grant of a temporary injunction was an abuse of discretion. *See id.*

¶4 The grounds for issuing a temporary injunction are: (1) the likelihood of success on the merits, (2) irreparable harm to the party seeking injunctive relief if relief is denied, (3) relative effect on the other interested parties, and (4) public policy concerns arising out of the issuance of injunctive relief. *See Daffin v. State of Okla. ex rel., Okla. Dep't of Mines*, 2011 OK 22, ¶ 7, 251 P.3d 741. The need for an injunction must be shown by clear and convincing evidence, and the nature of the injury must not be speculative in nature. *Id.*

¶5 The OHCA contends Dr. Al-Khouri failed to prove by clear and convincing evidence his likelihood of success on the merits of his due process claim and, therefore, a temporary injunction was unwarranted. "[A] procedural due process challenge first requires the existence of either a fundamental right or a constitutionally protected 'property or liberty' interest." *Ross v. Peters*, 1993 OK 8, ¶ 24, 846 P.2d 1107; *see Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-71 (1972); The OHCA argues Dr. Al-Khouri does not have a protected property interest in continued participation in Medicaid programs and, therefore, he is not entitled to due process.

¶6 In his appellate brief, Dr. Al-Khouri does not respond to or cite any authority rebutting the OHCA's primary argument that he did not have a protected property interest and, therefore, did not demonstrate a likelihood of success on the merits. However, in his Petition, Dr. Al-Khouri claims that, based on the terms of the Provider Agreement and his long-time participation as a Medicaid provider, he had a reasonable expectation of continued participation in Oklahoma's Medicaid programs. Dr. Al-Khouri asserts that this reasonable expectation of continued participation in the Medicaid programs constitutes a protected property interest, thereby implicating due process. While the trial court in this case found OAC 317: 2-1-12 violates due process, it did not make specific findings of fact as to whether Dr. Al-Khouri had a protected property or liberty interest or as to his likelihood of success on the merits of his due process claim.[4] Whether a provider has a property interest in continued participation in Medicaid programs is an issue of first impression in Oklahoma.

¶7 Procedural due process applies only to property and liberty interests protected by state or federal constitutions.[5] *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-71 (1972). To determine whether due process requirements apply, we must look to the nature of the interest at stake. *See id.* at 570-71.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . .
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. A protected property interest must be based on an independent source such as a law, rule, or mutually explicit understanding. *See Koerpel v. Heckler*, 797 F.2d 858, 864 (10th Cir. 1986). Dr. Al-Khouri has not identified any state statute or regulation creating such a property interest. Rather, he points to the terms of the Provider Agreement and his long-time participation in the Medicaid program as the sources of his property interest. Dr. Al-Khouri claims these amount to a mutually explicit understanding of his continued participation in Medicaid programs.

¶8 The terms for terminating the Provider Agreement are:

> ARTICLE VIII. TERMINATION
>
> 8.1 This Agreement may be terminated by three methods: (I) Either party may terminate the Agreement for cause with a thirty-day written notice to the other party; (ii) either party may terminate the agreement without cause with a sixty-day written notice to the other party; or (iii) OHCA may terminate the

> Agreement immediately (a) to protect the health and safety of Members, (b) upon evidence of fraud, (c) pursuant to Paragraph 4.1(e) above.

Section 9.2 of the Provider Agreement provides that "OHCA does not guarantee PROVIDER will receive any patients, and PROVIDER does not obtain any property right or interest in any SoonerCare Member business by this Agreement." The Provider Agreement states that it expires on the date indicated in the Special Provisions for the provider type. The Special Provisions for Physician states the agreement expires September 30, 2020. However, the letter from the OHCA accepting Dr. Al-Khouri's Provider Agreement indicates it expires December 30, 2016. The Provider Agreement also provides the parties will be bound by the state Medicaid statutes and rules and any changes to them during the term of the Provider Agreement.

¶9 The mutually explicit understanding created by the terms of the Provider Agreement was that Dr. Al-Khouri's Provider Agreement could be terminated by the OHCA at any time in order to protect the health and safety of SoonerCare members. While Dr. Al-Khouri may have held an expectation that he would be a Medicaid provider until December 30, 2016 or even September 30, 2020, the terms of the contract do not guarantee that. Furthermore, the provider agreement explicitly disavows any property interest in SoonerCare business. The terms of the Provider Agreement retain for the state significant discretionary authority over the bestowal or continuation of a government benefit, *i.e.* participation as a provider in Medicaid programs. This suggests Dr. Al-Khouri is not entitled to the benefit. We hold that the terms of the Provider Agreement do not give Dr. Al-Khouri a protected property interest in continued participation in Medicaid programs.

¶10 Our holding is consistent with the decisions of the majority of courts in other jurisdictions. While no other court has analyzed the precise terms of the Provider Agreement in this case, several federal circuit courts have found that providers do not have a property interest in continued participation in federal health care programs. *See Erickson v. U.S., ex rel., Dep't of Health & Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995) (holding medical providers do not have a property interest in continued participation in Medicare); *Senape v. Constantino,* 936 F.2d 687, 689-91 (2d Cir. 1991) (holding providers have no property right to continued enrollment as a qualified Medicaid provider); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 581-82 (2d Cir. 1989) (suggesting the rights reserved by the state with regard to Medicaid providers, including laws permitting the state agency to terminate the provider's participation upon 30 days' notice without cause and permitting the state agency to take immediate action to suspend or terminate a provider's participation under certain circumstances "casts doubt on whether the provider's interest in continuing as a provider, either indefinitely or for any period without interruption, is a property right that is protected by due process"); *Koerpel v. Heckler*, 797 F.2d 858, 863-65 (10th Cir. 1986) (holding the provider did not demonstrate any laws, rules, or mutually explicit understandings that secured a property interest in his continuing eligibility for Medicare reimbursement); *Geriatrics, Inc. v. Harris,* 640 F.2d 262, 264-65 (10th Cir. 1981) (holding a nursing home did not have a property interest in the renewal of its Medicaid and Medicare provider agreements); *Cervoni v. Sec'y of Health, Educ. & Welfare*, 581 F.2d 1010, 1018-19 (1st Cir. 1978) (holding that the mere fact a provider was paid under Medicare Part B did not create a valid expectation that he could continue to be reimbursed under Part B); *but see Ram v. Heckler,* 792 F.2d 444, 447 (4th Cir. 1986) (holding, without discussion, that the provider's expectation of continued participation in the medicare program is a property interest protected by the due process clause); *Bowens v. N.C. Dep't of Human Res.*, 710 F.2d 1015, 1017-18 (4th Cir. 1983) (holding state regulations that did not authorize termination of a provider without cause created a property interest in continued participation in program entitling him to be terminated only for cause); *Hathaway v. Mathews*, 546 F.2d 227, 230 (7th Cir. 1976) (holding nursing home's expectation of continuing to receive Medicaid payments on behalf of residents is a protected property right under the due process clause). Courts have reasoned that health care providers are not the intended beneficiaries of the federal health care programs and, as such, they do not have a property interest in continued participation or reimbursement. *See Koerpel*, 797 F.2d at 864; *Cervoni,* 581 F.2d at 1018.

¶11 Dr. Al-Khouri asserts that termination of the Provider Agreement would be devastating to his practice. Seventy percent of his patients are SoonerCare members. Dr. Al-Khouri's license to practice medicine is not being revoked and,

although he is likely to suffer financial losses, the financial losses are not controlling. *See Koerpel*, 797 F.2d at 864; *Geriatrics, Inc. v. Harris*, 640 F.2d 262, 265. Dr. Al-Khouri's financial losses do not advance to the level of a protected property right because no clear promises have been made by the government. *See Koerpel,* 797 F.2d at 864. The financial impact on Dr. Al-Khouri's practice by not being able to treat Medicaid patients is not of constitutional significance for the establishment of a protected property interest. *Id.*; *Geriatrics*, 640 F.2d at 265. He may still operate and render care to private-pay patients. *See Geriatrics*, 640 F.2d at 265.

¶12 Dr. Al-Khouri also argues his patients will suffer if his Provider Agreement is terminated. He claims it takes 2-3 months to reroute a SoonerCare patient from one provider to another. However, the indirect adverse effect on Dr. Al-Khouri's patients does not create a constitutional right. *Id.* at 264. Terminating his contract is not an agency action depriving SoonerCare members of their direct benefits. *Id.*

¶13 Whether Dr. Al-Khouri was deprived of a protected liberty interest was not emphasized in the parties' arguments before the trial court or even mentioned on appeal. A person or entity may have a liberty interest if its good name, reputation, honor, or integrity is at stake because of what the government is doing to him. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Kelly Kare, Ltd. v. O'Rourke,* 930 F.2d 170, 177 (2d Cir. 1991). After Dr. Al-Khouri's Provider Agreement was terminated, the OHCA sent letters to his patients notifying them that Dr. Al-Khouri was no longer a SoonerCare provider. We hold the letter is not sufficiently stigmatizing to amount to a deprivation of a liberty interest.

¶14 Without a protected property or liberty interest, due process is not implicated. Our review of the trial court's decision to grant a temporary injunction, at a minimum, raises serious doubt as to the existence of a protected property interest. Dr. Al-Khouri has failed to present clear and convincing evidence of his likelihood of success on the merits of his due process claim. Our inquiry into the grounds for issuing a temporary injunction need not go any further. We hold the trial court abused its discretion by granting a temporary injunction.

¶15 OAC 317: 2-1-12 is part of the regulatory scheme with which Dr. Al-Khouri agreed to comply when he entered into the Provider Agreement. As a result, Dr. Al-Khouri must operate within the rules or work to change them. *See Choices Inst., Inc. v. Okla. Health Care Auth.*, 2013 OK CIV APP 71, ¶ 13, 308 P.3d 177.[6] If a provider wishes to object to the fairness of a Medicaid rule, whether that rule relates to reimbursement rates or the recourse a provider has available to it after facing an audit, the provider must persuade those with authority to write and approve the regulations to change them. *See id.* ¶ 20. The same holds true if a provider objects to rules governing the process for appealing the termination of a provider agreement.

¶16 The OHCA also argues the trial court erred as a matter of law by finding Article II of the APA applies to the OHCA. Issues of statutory construction are questions of law to be reviewed *de novo,* and appellate courts exercise plenary, independent, and non-deferential authority. *Welch v. Crow,* 2009 OK 20, ¶ 10, 206 P.3d 599. In cases requiring statutory construction, the cardinal rule is to ascertain and give effect to the intent of the Legislature. *Id.* The words of a statute will be given a plain and ordinary meaning, unless it is contrary to the purpose and intent of the statute considered as a whole. *Naylor v. Petuskey*, 1992 OK 88, ¶ 4, 834 P.2d 439.

¶17 The Oklahoma Health Care Authority Act includes the following definitions:

> 1. "Administrator" means the chief executive officer of the Authority;
>
> 2. "Authority" means the Oklahoma Health Care Authority;
>
> 3. "Board" means the Oklahoma Health Care Authority Board;

63 O.S.2011 § 5005(1)-(3). Section 5006 establishes the Oklahoma Health Care Authority, *i.e.* the state agency. 63 O.S.2011 § 5006(A). Section 5007 establishes the Oklahoma Health Care Authority Board and describes its powers and duties. *See* 63 O.S.2011 § 5007(F). Subsection (H) provides that "[t]he Board and the Authority shall act in accordance with the provisions of the Oklahoma Open Meeting Act, the Oklahoma Open Records Act and the Administrative Procedures Act." *Id.* § 5007(H). Section 5008 describes the Administrator's powers and duties and provides that "[t]he Administrator of the Oklahoma Health Care Authority shall be the chief executive officer of the Authority and shall act for the Authority in all matters

except as may be otherwise provided by law." 63 O.S.2011 § 5008(B).

¶18 The APA specifies which agencies or classes of agency activities are not required to comply with Article II of the APA. According to § 250.4 of the APA, "[t]he Oklahoma Health Care Authority *Board* and the *Administrator* of the Oklahoma Health Care *Authority*" are exempt from Article II of the APA. 75 O.S.Supp. 2014 § 250.4(B)(19) (emphasis added). The trial court found this provision does not exempt the Oklahoma Health Care *Authority*, the agency itself, from the APA. On appeal, the OHCA argues the plain meaning of the language in § 250.4(B)(19) is that the exemption applies to the agency as a whole. Dr. Al-Khouri argues that 63 O.S. § 5005 identifies and defines three separate persons and/or entities: the Authority, the Administrator, and the Board. *See* 63 O.S. § 5005(1)-(3). Dr. Al-Khouri contends the plain language of § 5007(H) requires that the *Board* and the *Authority* comply with Article II of the APA, and the *Authority* is not among the agencies listed as exempt in § 250.4(B). Only the *Board* and the *Administrator* are listed as exempt. *See id.* § 250.4(B)(19). Therefore, Dr. Al-Khouri contends, the Authority must comply with Article II of the APA.

¶19 We agree with the OHCA that, pursuant to 75 O.S. § 250.4(B)(19), the Authority is exempt from Article II of the APA. The Authority and its powers and duties cannot be separated from those of the Administrator and the Board. Oklahoma law provides that the Administrator "shall act for the Authority." 63 O.S. § 5008(B). The Board also acts on behalf of the Authority, as outlined in § 5007(F). The Authority is an entity and cannot act without the Administrator or Board. Section 5007(H) does not override the specific exemption in 75 O.S. § 250.4(B)(19). It is a rule of statutory construction that the most recent statute will be given effect over a conflicting prior statute when there is a conflict between the two statutes. *See Shepard v. Okla. Dep't of Corrs.*, 2015 OK 8, ¶ 17, 345 P.3d 377. Section 250.4(B)(19) was enacted two years after § 5007(H). Our conclusion that the § 250.4(B)(19) exemption includes the agency itself is supported by the fact the Legislature has specifically folded the APA back into some OHCA proceedings. *See* 63 O.S.2011 § 5030.3(B) ("Any party aggrieved by a decision of the Oklahoma Health Care Authority Board or the Administrator of the Oklahoma Health Care Authority, pursuant to a recommendation of the Medicaid Drug Utilization Review Board, shall be entitled to an administrative hearing before the Oklahoma Health Care Authority Board pursuant to the provisions of the Administrative Procedures Act."); 63 O.S.2011 § 5052(D) ("Any applicant or recipient under this title who is aggrieved by a decision of the Administrator rendered pursuant to this section may petition the district court in which the applicant or recipient resides for a judicial review of the decision pursuant to the provisions of Sections 318 through 323 of Title 75 of the Oklahoma Statutes."). Furthermore, a 2001 Attorney General opinion noted 75 O.S. § 250.4(B)(19) exempts the OHCA from the hearing requirements set forth in Article II of the APA. *See* 2001 OK AG 15, ¶ 3, n.2.

¶20 We hold Dr. Al-Khouri has failed to present clear and convincing evidence of likelihood of success on the merits of his due process claim and that Article II of the APA does not apply to these proceedings. The order granting a temporary injunction is vacated. This case is reversed and remanded.

¶21 TEMPORARY ORDER VACATED; REVERSED AND REMANDED.

MITCHELL, P.J. and BELL, J. (sitting by designation), concur.

Kenneth L. Buettner, Chief Judge:

1. Rebecca Pasternik-Ikard was actually the Administrator and CEO of the Oklahoma Health Care Authority.

2. The applicable section of the Oklahoma Administrative Code that explains the appeals process for providers whose SoonerCare contracts are immediately terminated for cause provides, in pertinent part:

> (2) **Immediate termination.** The OHCA will provide notice to the provider of the termination of the provider's contract. The written notice of termination will state:
>
> (A) the reasons for the proposed termination;
>
> (B) the date upon which the termination will be effective; and
>
> (C) a statement that the provider has a right to appeal the termination of the provider's contract in a post-termination panel committee desk review within 20 days of the date of the termination letter.
>
> (3) **Post-termination panel committee desk review.**
>
> After the effective date of the termination of the provider's contract, the provider is entitled to receive a post-termination panel committee desk review. The panel review committee for the OHCA will be comprised of three (3) employees of the OHCA as designated by the Chief Executive Officer or his/her designee. Any OHCA employee who was involved with the underlying investigation of the provider's case for purpose of the termination will not be a panel review committee member. The purpose and scope of the panel committee desk review will be limited to issues raised in the OHCA's letter of termination as the basis of terminating the provider's contract. The panel committee does not have jurisdiction to hear issues not addressed in the termination notice.
>
> (A) The provider must request a panel committee desk review within 20 days of the date of the termination letter. The provider must submit a brief written statement detailing the facts which are refuted by the provider. Any documentation the provider requests consideration of by the panel review committee must also be submitted with the written statement.

(B) The OHCA may submit any additional documents to the panel committee for the desk review that may contradict the documents submitted by the provider for the purposes of the desk review. Any additional information that OHCA submits to the panel review committee will also be provided to the provider.

(C) The panel review committee will issue a written decision regarding the provider's contract termination approximately 60 days from receipt of the provider's written statement and documentation.

OAC 317: 2-1-12(2)-(3) (Amended at 33 Ok Reg 788, eff. Sept. 1, 2016).

3. An order granting a temporary injunction is an interlocutory order appealable by right. *See* 12 O.S.Supp.2013 § 993(A)(2); Okla.Sup. Ct.R. 1.60(c). The trial court modified its order February 23, 2017, but the OHCA's propositions of error remain the same.

4. The trial court bypassed the first critical consideration for granting a temporary injunction but did make findings of fact as to the other elements: irreparable harm, the effect on other interested parties, and public policy concerns.

5. The United States Constitution provides that no State shall deprive any person of life, liberty, or property without due process of law. *See* U.S. Const. amend. XIV, § 1. The Oklahoma Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. II, § 7.

6. Both parties discuss *Choices Inst., Inc. v. Okla. Health Care Auth.*, 2013 OK CIV APP 71, 308 P.3d 177, in their briefs. In *Choices*, the OHCA sought reimbursement of overpayments made to a provider. *See id.* ¶ 4. The Court of Civil Appeals did not make a specific determination as to whether the provider had a property interest in Medicaid funds already paid to it, thereby implicating due process. Ultimately, the appellate court determined the process for reviewing audit findings did not infringe upon the provider's due process rights. *Id.* ¶ 20. The *Choices* decision does not look at the threshold issue in this case: whether the Provider Agreement gives a provider a protected property interest in his continued participation in Medicaid programs.

2018 OK CIV APP 11

DANIEL RAY STOUT, Plaintiff/Appellant, vs. CLEVELAND COUNTY SHERIFF'S DEPARTMENT, Defendant/Appellee.

Case No. 115,931. December 29, 2017

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE TRACY SCHUMACHER, TRIAL JUDGE

AFFIRMED

Edward F. Saheb, E.F.S. LAW CENTER, Oklahoma City, Oklahoma, for Plaintiff/Appellant

David W. Lee, RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, Oklahoma City, Oklahoma, for Defendant/Appellee

JANE P. WISEMAN, JUDGE:

¶1 Plaintiff Daniel Ray Stout appeals a summary judgment entered in favor of Defendant Sheriff Lester in his Official Capacity as Sheriff of Cleveland County, Oklahoma. Plaintiff also appeals the trial court's order striking his motion to reconsider. This appeal, assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2016, ch. 15, app. 1, is considered without appellate briefing. After review, we find no error in the trial court's summary judgment or in its denial of Plaintiff's motion to reconsider, and we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Plaintiff explains in his amended petition that on March 16, 2011, he "sustained serious and permanent injuries as a result of being attacked by a dog owned by Defendant." Plaintiff states that while police officers were "in hot pursuit of two women," they found Plaintiff in his yard and ordered him to the ground even though he was not a suspect. Plaintiff alleges he complied with their request and then the officers ordered the police dog to attack him and "laughed as the Plaintiff was screaming in fear of being eaten alive." Plaintiff sought emergency care for his injuries which required subsequent treatment.

¶3 Plaintiff states that on April 13, 2011, he sent a Notice of Tort Claim 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. Plaintiff claims, "A notice of Denial of Claim was mailed on Friday, July 15, 2011 and received by this office on July 18, 2011."

¶4 Plaintiff then brought this action. According to the OSCN docket sheet, Plaintiff originally filed the petition on January 13, 2012, in response to which Defendant filed a motion to dismiss. Plaintiff then filed an amended petition on May 31, 2012, against the Cleveland County Sheriff's Department[1] for negligence arguing that the "wound and subsequent injuries were the direct and proximate result of the injuries suffered as a result of being [attacked] by the dog owned and controlled by the Defendant" and that the "Defendant is strictly liable under Okla. Stat. Tit. 4, §42.1, as it is the owner and custodian of the dog under Oklahoma law; [Plaintiff] did not provoke the attack by the animal and was in a location where he had a legal right to be." Plaintiff further alleged that Defendant negligently failed "to properly control and train the Dog and/or willfully ordered the dog to attack the Plaintiff and/or willfully refused to exert control over the dog in violation of Oklahoma Statutes and common [l]aw negligence." Plaintiff also sought recovery for Defendant's violation of his civil rights. Plaintiff contends that, as a result of these actions, he sustained permanent injuries, pain and suffer-

ing, medical expenses, and mental distress. If Defendant's actions are willful, Plaintiff argues he is entitled to punitive damages. Contemporaneously with filing the amended petition, Plaintiff filed a response to Defendant's motion to dismiss.

¶5 On October 23, 2012, Defendant filed both an answer to the amended petition and a second motion to dismiss arguing that "Plaintiff's state tort law cause of action should be dismissed as this court does not have subject matter jurisdiction as Plaintiff failed to comply with the [GTCA]." Defendant argues that "the Office of Risk Management has nothing to do with Cleveland County or Sheriff Lester" so the dates triggering the GTCA deadlines are inapplicable. Defendant maintains that the County Clerk of Cleveland County is the proper entity to receive the tort claim notice. Because the County Clerk's office received Plaintiff's notice on April 14, 2011, his "claim was deemed denied by operation of law on July 13, 2011, which is 90 days from April 14, 2011." So "in order to timely file his lawsuit, Plaintiff needed to file it by Monday, January 9, 2012, which was 180 days from July 13, 2011. However, the Petition was not filed until January 13, 2012," rendering Plaintiff's claims barred by the GTCA as untimely. And, Defendant adds, "Plaintiff's reliance on the letter from the Office of Risk Management cannot exten[d] the statutory filing deadline."

¶6 In response, Plaintiff argued: 1) The "Supreme Court has determined that the date can be extended by tolling, waiver, or estoppel," and 2) "the date relied on by the Plaintiff was provided by the State of Oklahoma." Plaintiff argues he never "received from either Sheriff's Department or Cleveland County Court [sic] Clerk" any communication "acknowledging receipt of Notice and/or Denial of Claim" and that he is entitled to rely on the Office of Risk Management's letter confirming receipt of the tort claim notice on April 18, 2011. Plaintiff's third proposition states the "Oklahoma Supreme Court recognized the right to rely on a date provided by an apparent authority." Plaintiff's last proposition contends that "the request for additional information of July 8, 2012 should restart the date."

¶7 In reply, Defendant argues that the GTCA does not require a political subdivision to "affirmatively acknowledge receipt of a notice or affirmatively advise that a claim is denied…. Plaintiff could have easily determined the precise date that the County, through the Cleveland County Clerk's Office, received Plaintiff's notice of tort claim" by hand delivering the notice or mailing it certified mail, return receipt requested, or calling the County Clerk's office to determine if it had received the notice. Defendant further argues that the 90-day time period could not be extended, tolled or waived by the Office of Risk Management. Defendant contends, "There is no relationship between the State and the County which would enable the state to waive the defenses of the County (specifically lack of jurisdiction) in this GTCA action. Moreover, a simple reading of the GTCA shows that the State has no 'apparent authority' over the County, or any other political subdivision, as claimed by Plaintiff."

¶8 In a minute order filed November 19, 2012, the trial court granted Defendant's motion to dismiss.[2]

¶9 On November 27, 2012, Plaintiff filed a motion to reconsider the trial court's order dismissing his tort claim arguing the trial court granted Defendant's motion to dismiss before having an opportunity to consider Plaintiff's response brief. Plaintiff's motion to reconsider restates the arguments set forth in his response to Defendant's motion to dismiss. Defendant responded incorporating by reference all of its previous arguments asserting the trial court's lack of subject matter jurisdiction over Plaintiff's tort claims because he failed to follow the requirements of the GTCA.

¶10 After a hearing, the trial court granted the motion to reconsider but requested supplemental briefing with additional authority which both parties submitted. After considering the additional briefing, the trial court denied Defendant's motion to dismiss pursuant to two handwritten "summary orders."

¶11 After discovery, Defendant filed a motion for summary judgment on December 29, 2014, arguing 1) "Plaintiff failed to comply with the [GTCA]; therefore, all torts against Cleveland County should be dismissed for lack of jurisdiction," and 2) "Sheriff Lester is entitled to summary judgment with regard to Plaintiff's 42 U.S.C. § 1983 claim for a civil rights violation against Sheriff Lester in his official capacity."

¶12 In response, Plaintiff argued summary judgment should not be granted because several facts regarding jurisdiction and Plaintiff's claim for a civil rights violation were disputed. Plaintiff further asserts that pursuant to the

"law of the case doctrine," Defendant's issues should not be heard because they have already "been heard, decided and appealed."

¶13 Defendant urges the issues raised in his summary judgment motion "have never been settled by a prior appellate opinion" because the Oklahoma Supreme Court denied Defendant's request for a writ "and the underlying issues in the case were never briefed or argued before the Court." Defendant further maintains that he has produced additional evidence to show that Plaintiff filed his lawsuit outside the 180-day requirement and he has raised additional arguments showing the petition's untimeliness. Finally, Defendant asserts Plaintiff has failed to produce any evidence contesting Defendant's undisputed material facts.

¶14 After considering the parties' responses, replies, and supplemental briefs and hearing argument on Defendant's motion for summary judgment, the trial court granted Defendant Sheriff Lester's motion for summary judgment "for the reasons stated in the arguments and authorities cited in the Defendant's Brief and for the reasons set forth in the Court's Summary Orders filed on April 2, 2015." The court further found that "the arguments under the [GTCA] cited in Propositions I and II of the Defendant's Motion apply as stated in Defendant's Brief. Therefore, the Court grants Defendant's Motion [] for Summary Judgment as to the Plaintiff and dismisses the Defendant from this case as to all causes of action."[3]

¶15 Plaintiff then filed a motion asking the trial court to "reconsider and modify" its order pursuant to 12 O.S. § 1031.1 as follows:

> In the absence of new facts this Court has reversed its own prior finding and ruling which was appealed and upheld previously. Defendant cannot re-urge the same proposition based on the same facts again and again until a desired result is achieved. Once an issue based on the same facts and requesting the same prayers has been litigated and decided by the Court, it should not be subject of re-litigation so that a different result can be obtained. . . . Defendant has in the instant case re-urged and re-argued the same set of facts and arguments no less than five times in order to get the desired result which contradicts prior findings of this Court.

¶16 In response, Defendant submits the trial court should deny the motion to reconsider without a hearing for failure to "comply with Rule 4(b) of the Rules for District Courts of Oklahoma, in that this Motion does not state the grounds for the Motion" and because Defendant "received Plaintiff's Motion to Reconsider Journal Entry on November 2, 2016, some thirteen days after Plaintiff filed his Motion on

October 20, 2016."

¶17 Defendant filed a motion to strike Plaintiff's motion to reconsider asserting the same arguments in the response and arguing that because Plaintiff brought it pursuant to 12 O.S. § 1031.1 and not 12 O.S. § 651, it could not be considered a motion for new trial which would have extended the "appeal time for review of a final order or judgment." Defendant argues if the motion falls under § 1031 or § 1031.1, "it will not extend the time to seek review of the final order or judgment to which it is directed." Defendant contends that because "there was no trial, or any of the other grounds as set forth in 12 O.S. § 651, . . . Plaintiff's Motion for Reconsideration cannot be considered to be a motion for new trial." According to Defendant, because Plaintiff failed to file his petition in error within 30 days of the October 11, 2016, order, the time to do so has expired.

¶18 On March 7, 2017, the trial court noted that Plaintiff failed to respond to Defendant's motion to strike and it granted the motion to strike. The trial court then determined that Plaintiff's motion to reconsider must be stricken.

¶19 Plaintiff appeals.

PROCEDURAL ISSUE

¶20 We first address a procedural issue Defendant raises in his response to the petition in error stating Plaintiff "cannot pursue this appeal because" he failed to timely file it within 30 days of the order granting the motion for summary judgment. In an order filed October 11, 2016, the trial court granted Defendant's motion for summary judgment. On October 21, 2016, Plaintiff filed a motion to reconsider – *i.e.*, within 10 days of the filing of the summary judgment order. Even though Plaintiff states the motion to reconsider is brought pursuant to 12 O.S. § 1031.1, we must determine whether it should be considered a motion for new trial under 12 O.S. § 651 or a motion to modify or to vacate pursuant to 12 O.S. §§ 1031 or 1031.1. Plaintiff appeals the trial court's order striking his motion to reconsider. "A motion to recon-

sider may be treated as a 12 O.S. § 651 motion for new trial when the motion to reconsider is filed within a ten-day period after the filing of a judgment, decree or appealable order." *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 15, 396 P.3d 210. "A motion to reconsider may [be] treated as a 12 O.S. § 1031 or § 1031.1 motion 'to modify or to vacate a *final order or judgment* . . . if filed *after* ten (10) days but within thirty (30) days of the filing of the judgment, decree, or appealable order." *Id.* Title 12 O.S.2011 § 990.2 provides:

> When a post-trial motion for a new trial, for judgment notwithstanding the verdict, or to correct, open, modify, vacate or reconsider a judgment, decree or final order, other than a motion only involving costs or attorney fees, is filed within ten (10) days after the judgment, decree or final order is filed with the court clerk, an appeal shall not be commenced until an order disposing of the motion is filed with the court clerk. The unsuccessful party may then appeal from the order disposing of the motion within thirty (30) days after the date such order was filed.

See also Oklahoma Supreme Court Rule 1.22(c), 12 O.S. Supp. 2016, ch. 15, app. 1.

¶21 Because Plaintiff filed his motion to reconsider within 10 days after the summary judgment order was filed, his time to appeal did not begin to run until the trial court disposed of the motion to reconsider. So Plaintiff's appeal was timely, having been filed within 30 days after the filing of the order disposing of his motion to reconsider.

STANDARD OF REVIEW

¶22 "We review the denial of a new trial for abuse of discretion." *State ex rel. Pruitt v. Native Wholesale Supply,* 2014 OK 49, ¶ 11, 338 P.3d 613. "It is an abuse of discretion to deny a new trial where the summary judgment was incorrect." *Id.* "Where, as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100.

ANALYSIS

¶23 Plaintiff seeks reversal for trial court error in granting Defendant's motion for summary judgment and for failing to grant his motion to reconsider. According to Defendant, Plaintiff failed to properly dispute the "Rule 13 Statement of Facts for Which No Genuine Issue Exists." We agree. Neither in Plaintiff's response to Defendant's motion for summary judgment nor in the supplement to his response does he dispute Defendant's material facts with evidentiary material as District Court Rule 13(b), 12 O.S. Supp. 2016, ch. 2, app. requires. The relevant part of Rule 13(b) states:

> In the statement, the adverse party or parties shall set forth and number each specific material fact which is claimed to be in controversy and reference shall be made to the pages and paragraphs or lines of the evidentiary materials. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment or summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material. If the motion for summary judgment or summary disposition is granted, the party or parties opposing the motion cannot on appeal rely on any fact or material that is not referred to or included in the statement in order to show that a substantial controversy exists.

"'In order for material facts that are not controverted by the adverse party to be deemed admitted for the purpose of summary judgment, those material facts must be supported by admissible evidence.'" *Lopez v. Board of Cnty. Comm'rs of Cherokee Cnty.*, 2016 OK CIV APP 69, ¶ 11, 383 P.3d 790 (quoting *Patterson v. Beall*, 2000 OK 92, ¶ 23, 19 P.3d 839).

¶24 Beyond his uncontroverted facts being deemed admitted pursuant to Rule 13(b), Defendant must still establish he is entitled to judgment as a matter of law. District Court Rule 13(e), 12 O.S. Supp. 2016, ch. 2, app. ("If it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment for said party."). So we must next examine whether the trial court properly found Defendant is entitled to judgment as a matter of law.

I. Tort Claim

¶25 Defendant first asserts in his motion for summary judgment that "Plaintiff failed to

comply with the [GTCA]; therefore, all tort[] [claims] against Cleveland County should be dismissed for lack of jurisdiction."

¶26 "The GTCA is the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort." *Tuffy's Inc. v.City of Oklahoma City,* 2009 OK 4, ¶ 7, 212 P.3d 1158. Title 51 O.S.2011 § 152.1(A) states: "The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and *all of their employees acting within the scope of their employment*, whether performing governmental or proprietary functions, *shall be immune from liability for torts.*" (Emphasis added.) When a plaintiff sues a defendant in his official capacity, "[s]uit against a government officer in his or her official capacity is actually a suit against the entity that the officer represents and is an attempt to impose liability upon the governmental entity." *Speight v. Presley*, 2008 OK 99, ¶ 20, 203 P.3d 173. Under such circumstances, the governmental entity shall be named as the defendant and "in no instance shall an employee acting within the scope of employment be named as a defendant." *Id.* "Designating an employee in his or her official capacity as a named defendant for this type of claim is improper under the GTCA." *Id.* In pursuit of the aims of the GTCA, "[a]n employee of a political subdivision is relieved from private liability for tortious conduct committed within the scope of employment." *Tuffy's*, 2009 OK 4, ¶ 8.

¶27 In a pleading filed October 2, 2012, Plaintiff agreed to amend the case style to reflect Defendant as "Sheriff Lester in his official capacity as Sheriff of Cleveland County, of State of Oklahoma." Because Plaintiff claims Defendant is liable for actions taken in fulfilling his official duties, GTCA immunity applies.

¶28 And, Plaintiff failed to timely file his case according to the strictures of the GTCA. Plaintiff says he sent notice of his tort claim to the Office of Risk Management, the County Clerk of Cleveland County and the Sheriff's Department. Plaintiff states the Office of Risk Management confirmed it received the notice on April 18, 2011, and that he did not receive confirmation of receipt of notice from the other two entities. When a person has a claim against the State, the claim "shall be in writing and filed with the Office of the Risk Management Administrator," but when a person has a claim against a political subdivision, the claim "shall be in writing and filed with the office of the clerk of the governing body." 51 O.S.2011 § 156(C), (D).[4] A "political subdivision" means in relevant part a municipality or county. 51 O.S. Supp. 2010 § 152(11).[5] "'State' means the State of Oklahoma or any office, department, agency, authority, commission, board, institution, hospital, college, university, public trust created pursuant to Title 60 of the Oklahoma Statutes of which the State of Oklahoma is the beneficiary, or other instrumentality thereof." 51 O.S. Supp. 2010 § 152(13). Because Plaintiff asserted a tort claim against the Cleveland County Sheriff, the County Clerk of Cleveland County – *i.e.*, "the clerk of the governing body" at issue – is the proper entity to receive notices of tort claims as a political subdivision.

¶29 Although Plaintiff claims "no communication was ever received from either Sheriff's Department or Cleveland County Court [*sic*] Clerk acknowledging receipt of Notice and/or Denial of Claim," he does not cite any law establishing this requirement. To the contrary, 51 O.S.2011 § 157(A) only requires notice of approval or denial of the claim if it is within 90 days or less. If, however, the political subdivision fails to approve the claim "in its entirety within ninety (90) days," it is deemed denied. 51 O.S.2011 § 157(A). Section 157 provides:

> A. A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the state or political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period. If the state or a political subdivision approves or denies the claim in ninety (90) days or less, the state or political subdivision shall give notice within five (5) days of such action to the claimant at the address listed in the claim. If the state or political subdivision fails to give the notice required by this subsection, the period for commencement of an action in subsection B of this section shall not begin until the expiration of the ninety-day period for approval. The claimant and the state or political subdivision may continue attempts to settle a claim, however, settlement negotiations do not extend the date of denial unless agreed to in writing by the claimant and the state or political subdivision.

> B. No action for any cause arising under this act, Section 151 *et seq.* of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section. The claimant and the state or political subdivision may agree in writing to extend the time to commence an action for the purpose of continuing to attempt settlement of the claim except no such extension shall be for longer than two (2) years from the date of the loss.

51 O.S.2011 § 157.

¶30 As Defendant points out, Plaintiff could have mailed the notice of tort claim certified mail with return receipt requested, or hand-delivered the notice, or called the County Clerk's office to determine the date it received the notice so he could properly calculate the 90-day and 180-day periods. An action against a political subdivision must be "commenced within one hundred eighty (180) days after denial of the claim." 51 O.S.2011 § 157(B). It is undisputed that on April 14, 2011, the County Clerk's office received Plaintiff's notice of tort claim. The claim was therefore deemed denied 90 days later on July 13, 2011. Plaintiff was then required to bring his lawsuit within 180 days or by January 9, 2012. Plaintiff's lawsuit filed on January 13, 2012, was out-of-time. "Compliance with the statutory notice provisions of the GTCA is a jurisdictional requirement to be completed prior to the filing of any pleadings." *Hall v. GEO Group, Inc.*, 2014 OK 22, ¶ 13, 324 P.3d 399. Because Plaintiff failed to timely file his petition, the trial court lacked jurisdiction over Plaintiff's tort claims.[6]

II. Civil Rights Violation

¶31 In his amended petition, Plaintiff claims "the actions of the Defendant are additionally [a] violation of the Plaintiff's Civil Rights." Defendant argues in his motion for summary judgment that he "is entitled to summary judgment with regard to Plaintiff's 42 U.S.C. § 1983 claim for a civil rights violation against Sheriff Lester in his official capacity." In response, Plaintiff asserts that his civil rights violation "is premised on outrageous acts of the officer done intentionally without disregard to the health and safety of the Plaintiff." In his supplemental response, Plaintiff further explains his allegation stating his claim involves the "use of excessive force" by a police officer and cites *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, in support of this argument.

¶32 In *Bosh*, the Oklahoma Supreme Court held, "The Okla. Const. art 2, § 30 provides a private cause of action for excessive force, notwithstanding the limitations of the Oklahoma Governmental Tort Claims Act, 51 O.S.2011 §§ 151 *et seq.*" *Bosh*, 2013 OK 9, ¶ 33. The Supreme Court, however, later clarified its holding in *Bosh* stating:

> In *Bosh,* the applicable provisions of the OGTCA expressly immunized the state and political subdivisions such as counties and municipalities from liability arising out of the operation of prison facilities. Consequently, without the excessive force action brought under the Oklahoma Constitution, the *Bosh* plaintiff would have had no avenue for recovery for his injuries whatsoever.
>
> Here, employer liability for police officer's alleged excessive force conduct under the OGTCA is well settled. Because the plaintiff could have brought a claim for excessive force against the City under the OGTCA and potentially recovered for that claim, he was not left without a remedy. There is no rationale requiring the extension of a *Bosh* excessive force action brought under the Okla. Const. art. 2, § 30 to this cause. Rather, the plaintiff's remedy belongs exclusively within the confines of the OGTCA and a jury's determination concerning whether the police officers were acting within the scope of their employment under the OGTCA, 51 O.S.2011 §§ 151 *et seq*.

Perry v. City of Norman, 2014 OK 119, ¶¶ 18-19, 341 P.3d 689 (footnotes omitted). 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.

CONCLUSION

¶33 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.

¶34 **AFFIRMED**.

THORNBRUGH, V.C.J., and BARNES, P.J., concur.

JANE P. WISEMAN, JUDGE:

1. According to the docket sheet, Plaintiff filed a "combined supplement to his amended petition and notice of change in style of the case to reflect Sheriff Lester in his official capacity as Sheriff of Cleveland County as Defendant." We "may review information found on Oklahoma district court appearance dockets posted on the World Wide Web, such as on www.oscn.net . . . in order to enhance the court's ability to inquire into and protect its jurisdiction." Oklahoma Supreme Court Rule 1.1(d), 12 O.S. Supp. 2016, ch. 15, app. 1.

2. On December 10, 2012, an "Order Dismissing Plaintiff's Tort Claims" was filed.

3. It should be noted that, despite its common occurrence in trial court records, granting a motion for summary judgment results in a *judgment*, not a dismissal.

4. Subsequent amendments to 51 O.S. § 156 did not change the substance of the provision cited.

5. Subsequent amendments to 51 O.S. § 152 did not change the substance of the provision cited.

6. Plaintiff further argues that the trial court should not have considered the GTCA arguments in Defendant's motion for summary judgment because it had previously denied Defendant's motion to dismiss on the same issue and the Supreme Court had previously denied Defendant's writ of prohibition on the question. Plaintiff fails to cite any authority to support his argument that because the trial court denied Defendant's motion to dismiss on the GTCA jurisdiction issue, Defendant was precluded from later filing a motion for summary judgment on the same issue. "Argument without supporting authority will not be considered." Oklahoma Supreme Court Rule 1.11(k)(1), 12 O.S. Supp. 2016, ch. 15, app. 1. On June 19, 2013, in Case No. 111,888, Defendant filed an "Application to Assume Original Jurisdiction and Petition for Writ of Prohibition" on this issue. On September 10, 2013, the Supreme Court denied Defendant's application in an order simply denying relief. No opinion in the matter was issued. *Miller Dollarhide, P.C. v. Tal*, 2006 OK 27, ¶ 8, 174 P.3d 559 ("It is well settled that our refusal to exercise original jurisdiction under art. 7, § 4, has no preclusive effect as to the underlying issues and does not constitute an adjudication on the merits"). And, "where the prior appellate action is merely a summary order denying a writ . . . the doctrines of res judicata and law of the case are not implicated." *Id.* ¶ 15. We thus disagree with Plaintiff that the trial court was precluded from considering Defendant's motion for summary judgment on this issue.

2018 OK CIV APP 12

WILLIAM D. LUNN, Individually and as Natural Parent, Next Friend and Personal Representative of the Estate of KATHERINE LILLIAN LUNN and the Estate of ADRIENNE BADEEN LUNN and the Estate of MICHAEL DIXON LUNN, Plaintiff/Appellant, vs. HAWKER BEECHCRAFT CORPORATION, Defendant/Appellee, and Beech Aircraft Corporation, Raytheon Company, Raytheon Corporation, Raytheon Aircraft Company, Teledyne Inc., Continental Motors, Teledyne Continental Motors, Pete Pittenger, Gary Sipes, a/k/a Gary Clayton Sipes and Sipes Aircraft Sales LLC a/k/a Sipes Aircraft and Tulsa Towbot, LLC, Defendants.

Case No. 115,419. September 29, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE CAROLINE WALL, JUDGE

AFFIRMED

Lee I. Levinson, Terence P. Brennan, John M. Thetford, LEVINSON, SMITH & HUFFMAN, P.C., Tulsa, Oklahoma, for Plaintiff/Appellant,

Sidney G. Dunagan, Amy M. Stipe, GABLE & GOTWALS, Oklahoma City, Oklahoma, for Defendant/Appellee, Beechcraft Corporation,

Phil R. Richards, Brett E. Gray, Randy Lewin, RICHARDS & CONNOR, Tulsa, Oklahoma, for Defendant/Appellee, Continental Motors, Inc.,

ROBERT D. BELL, JUDGE:

¶1 In this action for damages arising out of a 2007 airplane crash, Plaintiff/Appellant, William D. Lunn, individually and as natural parent, next friend and personal representative of the estates of Katherine Lillian Lunn, Adrienne Badeen Lunn, and Michael Dixon Lunn, all deceased, appeals from the trial court's order granting Lunn's request to reconsider a partial summary judgment in favor of Defendant/Appellee, Hawker Beechcraft Corporation (Hawker), but denying the substantive relief requested therein. Lunn asked Judge Wall to reconsider and overturn a summary judgment entered five (5) years earlier by Judge Thornbrugh. Judge Thornbrugh ruled the eighteen (18) year statute of repose in the General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat 1552 (reprinted in note to 49 U.S.C. §40101) barred Lunn's claims against Hawker for negligence, strict products liability and breach of contract. Lunn insisted the summary judgment should be overturned because new case law supports his position that GARA did not preempt his state law design defect claims. Lunn also asserted his claims are not barred by GARA's statute of repose because newly discovered evidence places his claims within GARA's "rolling provision" and the "fraud exception." After *de novo* review of the record, we affirm the trial court's decision to deny the substantive relief requested in Lunn's motion to reconsider.

¶2 On October 17, 2007, a Beech Model A-36 Bonanza aircraft crashed in Tulsa County just 3.5 miles after takeoff, killing five (5) passengers including the three (3) teenage Lunn children. The airplane was manufactured by Hawker in 1977. Lunn sued Hawker and other defendants for strict products liability, negligence and breach of warranty. Lunn claimed an incorrectly installed (inverted) main fuel strainer

caused the crash. Hawker sought summary judgment on the basis that Plaintiff's action was barred by the 18-year statute of repose set forth at GARA §2. A statute of repose bars a cause of action before it arises. *Reynolds v. Porter,* 1988 OK 88, ¶7, 760 P.2d 816, 820.

¶3 "In GARA, Congress established an 18-year statute of repose for civil actions against manufacturers of general aviation aircraft and component parts. The 18-year period begins anew if the death, injury, or damage is caused by any 'new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft.'" *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1156 (9th Cir. 2000)(*citing* GARA §2). Congress enacted GARA because aircraft "manufacturers were being driven to the wall because, among other things, of the long tail of liability attached to those aircraft which could be used for decades after they were first manufactured and sold." *Lyon v. Augusta S.P.A*, 252 F.3d 1078, 1084 (9th Cir.2001)(*citing* H.R.Rep. No. 103-525, pt I, at 1-4 (1994), reprinted in 1994 U.S.C.C.A.N. 1638, 1638-41).

¶4 Lunn opposed the summary judgment arguing a factual dispute existed as to whether the repose period was tolled by GARA's "rolling provision" that restarts the 18-year statute of repose against the manufacturer of any new or replacement part. GARA's "rolling provision" restarts the eighteen (18) year limitation period as follows:

> with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

GARA §2(a)(2). Lunn argued the "new parts – rolling provision" tolled the repose period because Hawker issued a placard (service bulletin) describing the correct installation of a fuel strainer in the aircraft in 1989, Hawker failed to include the placard in the aircraft's republished flight manual and Hawker recommended replacing the fuel strainer with a new fuel strainer.

¶5 Next, Lunn urged a factual dispute existed as to whether GARA's "fraud exception" at GARA §2(b)(1) applies. Under GARA's fraud exception, the repose period does not apply if "the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer . . . knowingly misrepresented to the [FAA], or concealed or withheld from the [FAA], required information that is material and relevant to the performance or the maintenance or operation of" the aircraft or aircraft part and is causally related to the harm suffered. Lunn asserted Hawker failed to disclose to the Federal Aviation Administration (FAA) the risk to flight safety caused by the inverted fuel strainer and that the placard was a major level change.

¶6 The trial court granted Hawker's motion for summary judgment on May 23, 2011, holding:

> Plaintiff has the burden of establishing that an exception to the GARA statute of repose applies to a given case. Once the Defendant makes an initial showing of proof that GARA bars the action, as is the case here, the burden then shifts to the Plaintiff to provide evidence that one of the exceptions applies. *Cassoutt v. Cessna Aircraft Co.,* 660 S.2d 277, 280 (Fla, 1st DCA 1995).
>
> The Court finds that neither service bulletins nor maintenance manual are "parts" under GARA and a flight manual in not implicated under the facts of this case. Here, summary judgment is appropriate because the facts relevant to GARA are undisputed and none of the exceptions to GARA apply.

¶7 In 2016, Lunn filed a motion to reconsider the 2011 summary judgment. Lunn argued new evidence and new case law established GARA does not bar his claims against Hawker. Specifically, Lunn argued, the *Sikkellee* line of cases significantly clarified GARA does not preempt Lunn's state law design defect claims against Hawker. Thus, his claims against Hawker for inadequate warnings, improper design, negligent manufacturing, and knowingly withholding information from the FAA are jury questions.

¶8 Lunn also alleged new evidence, developed through discovery with Defendant Teledyne Continental Motors (Teledyne), established facts to toll the statute of repose under the new parts "rolling provision" and the "fraud exception." Lunn submitted Hawker designed and manufactured a defective fuel strainer which

caused contaminants in the unfiltered fuel to clog and disrupt the Teledyne designed and manufactured engine. Lunn asserted by 1989, Hawker concluded the fuel strainer was defective and caused engine failure, and Hawker "manufactured" a placard to remedy the problem. In 1993, Hawker issued a service bulletin to use a replacement fuel strainer; however, Hawker did not include the placard in the airplane's republished flight manual, undisputedly a "part" under GARA. Due to Hawker's actions during the eighteen (18) years prior to the aircraft crash, Lunn asserted a new period of repose under GARA was triggered by the "new parts" "rolling provision." Lunn further asserts that in November 1993, Hawker's engineering personnel wrote a cost calculation memo which concluded no more than 50% of the aircrafts would be retrofitted with new fuel strainers. Lunn asserted Hawker did not disclose this memo to the FAA, but instead chose to leave 50% of the aircrafts in service with the fatally defective fuel strainer. Because Hawker did not disclose this memo to the FAA, Lunn asserts GARA's statute of repose did not apply to bar his action against Hawker under the "fraud exception."

¶9 Hawker countered the trial court should not entertain a motion to reconsider filed more than five (5) years after the entry of the summary judgment. Hawker claimed it would be disadvantaged if it had to re-enter and defend against a lawsuit which has been in discovery, without Hawker's participation, for five (5) years. Hawker also maintained Lunn's motion to reconsider failed on the merits because the "new case law" pertains to preemption and not the statute of repose. Hawker also insisted neither the "new parts" nor the "fraud" exceptions apply and Lunn merely rehashes arguments already rejected by the prior trial judge.

¶10 After considering the parties' briefs, authorities and arguments of counsel, the trial court granted Lunn's motion to reconsider, but denied the relief sought therein. The trial court certified the journal entry of judgment as a final adjudication of all of Lunn's claims against Hawker pursuant to 12 O.S. 2011 §994. This appeal stands submitted for accelerated appellate review on the trial court record under Rule 13, *Rules for District Courts of Oklahoma*, 12 O.S. Supp. 2013, Ch. 2, App., and Rule 1.36, *Oklahoma Supreme Court Rules*, 12 O.S. Supp. 2013, Ch. 15, App. 1.

¶11 We first address whether Lunn's motion to reconsider was untimely and/or barred by Oklahoma procedural law. Recently, *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶9, 396 P.2d. 210, clarified "[i]nterlocutory orders that are not made subject to immediate appellate scrutiny may nevertheless obtain appellate scrutiny upon an appeal from a subsequent appealable order or judgment." The 2011 summary judgment was not a final judgment. Instead, it was a partial summary adjudication granted to one of the defendants in this ongoing action. Consequently, Lunn's motion to reconsider the partial summary judgment in favor of Hawker is not a motion for new trial filed pursuant to 12 O.S.2011 §653 or §1031 nor is it subject to the limitations set forth therein. We therefore hold the trial court was authorized to consider the merits of Lunn's motion to reconsider even though it was filed five (5) years after the entry of the summary judgment.

¶12 In this appeal, we must determine whether the trial court should have granted Lunn's motion to reconsider based on the alleged impropriety of the underlying summary judgment. Summary relief issues are reviewed *de novo. Reeds v. Walker*, 2006 OK 43, ¶9, 157 P.3d 100. Whereas, a trial court's denial of the relief requested in a motion to reconsider is reviewed for abuse of discretion. *Andrew,* 2017 OK 42 at ¶27. Because this Court's assessment of the trial court's exercise of discretion in denying Lunn's motion to reconsider "rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Reeds* at ¶9.

¶13 On appeal, Lunn's petition in error lists twenty-two (22) propositions of error. The gravamen of Lunn's appeal is that GARA does not preempt Lunn's state law design defect claims against Hawker. Alternatively, Lunn contends his action against Hawker is not barred by GARA's statute of repose under the "new parts" "rolling provision" and the "fraud, misrepresentation exception." Other than the arguments related to *Sikkelee*, most if not all of Lunn's arguments in the motion to reconsider were previously briefed and argued five (5) years earlier. Yet, Lunn insisted he is not seeking the proverbial "second bite at the apple" because there has been a change in controlling law and recently discovered evidence created a factual dispute.

¶14 Lunn argued the *Sikkelee* line of cases clarified neither his design defect claim nor his claim for the breach of Oklahoma's standard of care are preempted by GARA. *See e.g. Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016). After reviewing the cases cited by Lunn, we reject his argument. While the Third Circuit Court of Appeals held "Federal law does not preempt state design defect claims," it also recognized once GARA's statute of repose has run, then state law claims are preempted. *Sikkelee*, 822 F.3d 680 at 697. Because the trial court determined the statute of repose had run and was not tolled under any provision or exception, the *Sikkelee* preemption rulings are inapplicable.

¶15 Lunn next asserts new evidence discovered from Teledyne creates a factual dispute as to whether the placard provided adequate warnings and whether the placard's absence from the flight manual constitute defective "new parts" for purposes of GARA's "rolling provision." Because GARA's statute of repose is an affirmative defense, Hawker has the burden of showing the affirmative defense applies. *Million v. Million*, 2012 OK 106, ¶5, 292 P.3d 21. Once the showing is made, then Lunn has the burden to show facts that toll or create an exception to the repose period. *Owens v. Luckett*, 1943 OK 264, ¶4, 139 P.2d 806.

¶16 It is undisputed the alleged defective part (the fuel strainer) was the original part installed on the aircraft in 1977, more than 30 years prior to the 2007 accident. Thus, the "rolling provision" only applies if Lunn can show new parts replaced an item either originally in the aircraft or added to the aircraft and the new item caused the claimed damages. GARA §2(a)(2). Lunn claims a placard which instructs mechanics on the proper installation of the fuel strainer and service bulletins are "new parts" under GARA's "rolling provision." We conclude the placard, service bulletins and revisions to a maintenance manual are not "parts" under GARA's rolling provision. Our conclusion is supported by decisions from other jurisdictions. *See Moyer v. Teledyne Cont'l Motors, Inc.*, 979 A.2d 336, ¶9 (Pa. Super. Ct. 2009) ("given the continual issuance of service bulletins pertaining to a variety of topics, if the statute of repose were triggered every time a service bulletin was issued, the intent of GARA would be eviscerated."); *Crouch v. Honeywell Intern., Inc.*, 720 F.3d 333, 341 (6th Cir. 2013) (holding revision of overhaul of manual is not a replacement part of aircraft to trigger new 18-year period of repose); *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 276-77 (4th Cir. 2007) (holding a maintenance manual, in contrast to a flight manual, is not a "part of the aircraft"); and *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251, 1257 (S.D. Fla. 1993) (holding servicing and overhaul manual and repair guidelines sent to mechanics – which were issued within the repose period – are not new parts that toll the statute of repose). We therefore hold Lunn failed to sustain his burden of proving GARA's statute of repose was restarted by Hawker's issuance of the placard.

¶17 Lunn next argues the placard should have been an amendment to the *flight manual*, which is undeniably a "part" under GARA. Therefore, disputed facts exist as to whether the "rolling provision" was triggered by Hawker's omission of the placard from the flight manual. Revisions to a flight manual, which is an integral part of every general aviation aircraft sold by a manufacturer, may be a "part" under GARA's "rolling provision." *See Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155 (9th Cir. 2000); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1220-21 (10th Cir. 1991).

> [A] flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instructional guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it. It fits comfortably within the terminology and scope of GARA's rolling provision.

Caldwell, 230 F.3d at 1157.

¶18 However, in this proceeding, Judge Thornbrugh specifically held a flight manual was not implicated under the facts of this case. Because the placard's purpose was to instruct a mechanic on the correct installation of the fuel strainer, we agree the placard would not constitute an amendment to a flight manual. At most, the placard would constitute an amendment to the maintenance manual. "A maintenance manual is not comparable to a flight manual" because "a maintenance manual is not necessary to operate a plane." *South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 401 Ill. ApP.3d 424, 443, 927 N.E.2d 179, 196 (2010); and *Colgan Air, Inc.*, 507 F.3d 270 at

276-77. A maintenance manual "outlines procedures for servicing, troubleshooting and repairing aircraft and is used by a mechanic on the ground to service a plane, not by a pilot in the air to fly a plane." *South Side Trust and Sav. Bank of Peoria*, 927 N.E.2d 179 at 196. Unlike a flight manual which must be onboard the aircraft, a maintenance manual may be placed in a maintenance hangar or other facility. *Colgan Air, Inc.*, 507 F.3d at 277. After reviewing the above authorities, we reject Lunn's claim that the placard – which instructed mechanics on the correct installation of the fuel strainer – and the service bulletins constituted amendments to the flight manual. Because we hold in this manner, we reject Lunn's contention that the placard's omission from the flight manual constituted a "new part" to restate GARA's "rolling provision."

¶19 Lunn next asserts disputed facts exist as to whether Hawker triggered GARA's "fraud exception" when it failed to identify the engine failure problems, investigate the problems, and report a solution to the FAA, thereby breaching its duty to the FAA and to the public. Under GARA's "fraud exception" at §2(b)(1), the period of repose does not apply if Lunn sustains his burden of showing specific evidence that Hawker knowingly misrepresented, concealed, and withheld information from the FAA which is material and relevant to the performance, maintenance or operation of the aircraft. *Crouch*, 720 F.3d 333 at 344. Lunn claimed Hawker knowingly failed to inform the FAA about the internal memo predicting 50% noncompliance with the fix in the field. Judge Thornbrugh did not specifically address this issue in his journal entry. However, the record shows Judge Thornbrugh considered and rejected the "fraud exception" arguments. Judge Thornbrugh found Hawker repeatedly notified the FAA about the fuel strainer problem that might affect air worthiness; therefore, it was "incomprehensible" that Hawker knowingly withheld, misrepresented and concealed this information. Presumably, Judge Wall agreed with Judge Thornbrugh's determination. After reviewing the record, we cannot say Judge Wall's decision was in error or an abuse of discretion.

¶20 After *de novo* review, we also find GARA's eighteen (18) year statute of repose bars Lunn's action against Hawker for strict products liability, negligence and breach of warranty. Accordingly, we hold Judge Thornbrugh properly granted summary judgment to Hawker in 2011, and Judge Wall did not abuse her discretion when she denied the relief requested by Lunn in his motion to reconsider. Because we hold in this manner, it is unnecessary to address the remainder of Lunn's assignments of error on appeal. The trial court's order is affirmed.

¶21 AFFIRMED.

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

2018 OK CIV APP 13

ANDRE WILLIS, Plaintiff/Appellant, vs. RMLS HOP OKC, LLC, an Arizona limited liability company, Defendant/Appellee.

Case No. 116,372. January 31, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Tom M. Cummings, T.M. CUMMINGS, INC., Oklahoma City, Oklahoma, for Plaintiff/Appellant

Amy Sherry Fischer, Carri A. Remillard, FOLIART, HUFF, OTTAWAY & BOTTOM, Oklahoma City, Oklahoma, for Defendant/Appellee

KEITH RAPP, JUDGE:

¶1 The plaintiff, Andre Willis (Willis), appeals an Order dismissing his action with prejudice filed against the defendant, RMLS Hop OKC, LLC (RMLS). This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2017, Ch. 15, app. 1.

BACKGROUND

¶2 The pertinent facts are not disputed. Willis claimed that he sustained a work-related injury on August 14, 2013, while employed by RMLS and he filed a workers' compensation action. RMLS discharged him on May 14, 2014.

¶3 On July 11, 2014, Willis sued RMLS in District Court for retaliatory discharge. By that time the new law, Administrative Workers' Compensation Act (AWCA), became effective as Title 85A. Title 85A changed the retaliatory discharge remedy scheme from an action in District Court to an administrative action. 85A O.S. Supp. 2017, § 7. However, it appears that Willis alleged that he could proceed under the

prior law because the date of his injury preceded the enactment of the AWCA.

¶4 The District Court dismissed the action filed by Willis with prejudice. The court ruled that exclusive jurisdiction rested with the Workers' Compensation Commission under Title 85A. This ruling was equivalent to a ruling that the court did not have subject-matter jurisdiction.

¶5 Willis did not appeal. Instead, he filed his action with the Commission. On September 2, 2015, the Commission's administrative law judge entered an Order determining that jurisdiction rested with the District Court because the date of injury controlled and that date preceded the enactment of the AWCA.

¶6 On May 2, 2017, Willis filed the action here under review as a retaliatory discharge action under Title 85. He maintained that this was a different action and that he had originally proceeded under Title 85A and he now proceeded under Title 85.

¶7 On August 23, 2017, the trial court entered its ruling dismissing Willis' second law suit and applying claim preclusion to his action.

¶8 On September 12, 2017, the Oklahoma Supreme Court decided *Young v. Station 27, Inc.*, 2017 OK 68, 404 P.3d 829. The *Young* Court ruled that the date of injury controlled over whether the AWCA or prior law applied to retaliatory discharge actions. The appellate Record does not indicate that Willis filed any post-judgment motions to bring the *Young* decision to the attention of the trial court.

¶9 RMLS moved to dismiss the second action.[1] RMLS maintained that the new action was barred under both issue preclusion and claim preclusion doctrines. RMLS argued that the jurisdictional issue was decided, not appealed, and became final in that case between the parties. RMLS also argued that the claims in each case were the same, that is, retaliatory discharge, so that claim preclusion barred the current action.

¶10 The trial court dismissed the action. The trial court ruled that both actions concerned the same claim, that is, retaliatory discharge. Therefore, the trial court ruled that the current action was barred by claim preclusion.

¶11 Willis appeals.

STANDARD OF REVIEW

¶12 The petition sets out facts and background such that the review may be of the dismissal on the claim preclusion ground without treating the proceedings as a summary judgment.

> In reviewing a nisi prius disposition by dismissal, this court examines the issues *de novo.* Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. When considering a defendant's quest for dismissal, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them. A plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied. A petition can generally be dismissed only for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory. This recapitulation of the standards that govern when a case is decided on a motion to dismiss guides our review in this case.

Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208-09 (citations omitted).

¶13 Questions of law are reviewed *de novo,* and appellate courts exercise plenary, independent, and non-deferential authority. *Welch v. Crow,* 2009 OK 20, ¶ 10, 206 P.3d 599, 603.

ANALYSIS AND REVIEW

¶14 There are three questions here. The first asks whether Willis has one claim, or two as he argued. If there are two distinct actions, then claim preclusion is not available. *Miller v. Miller*, 1998 OK 24, ¶ 24, 956 P.2d 887, 897. The second asks whether, assuming there is but a single claim, that claim has been precluded by the original decision which, as it turned out, was erroneous because of *Young v. Station 27, Inc.* The third question asks, What is the legal

consequence of the fact that *Young* was decided after the trial court entered its Order now on appeal?

¶15 For the following reasons, this Court holds that: (1) Willis has a single claim; and (2) The doctrine of claim preclusion does not bar this claim based upon the final, not appealed, first District Court decision. This second holding leads to the necessity to examine whether the doctrine of issue preclusion operates to bar Willis' claim.[2] *See National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, ¶ 10, 946 P.2d 662, 666. After this examination, this Court concludes that Willis' action is not precluded by the doctrine of issue preclusion.

A. Willis Has a Single Claim

¶16 The Oklahoma Supreme Court instructed in *Miller,* 1998 OK 24 ¶ 23, 956 P.2d at 896-97, that the "wrongful act" or "transaction" defines the cause of action.

> Under the principle of claim preclusion, a final judgment on the merits of an action precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action. The doctrine of claim preclusion is designed to prevent piecemeal litigation through the splitting of a single claim into separate lawsuits. When claim preclusion is asserted, the court must analyze the claim involved in the prior action to ascertain whether it is in fact the same as that asserted in the subsequent action. Defining the term "claim" is the most difficult aspect of applying claim preclusion.

¶17 In *Retherford v. Halliburton*, 1977 OK 178, ¶ 9, 572 P.2d 966, 968, the Court defined a cause of action as:

> The pivotal issue before the Court becomes, quite simply, what is a "cause of action"? A cause of action is a legal concept which has no separate existence in the natural order of things. It is what the makers of legal policy, the Legislature and the courts say it is. It exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice.

The *Retherford* Court continued:

> Courts, including this one, have at different times, with or without applying labels, used different definitions for a "cause of action." It has been defined by reference to the right or interest infringed upon.
>
> In more recent times, causes of action have been delineated by reference to the transaction, occurrence or wrongful act from which the litigation arises.
>
> As demonstrated by prior decisions of this Court . . . this jurisdiction is committed to the wrongful act or transactional definition of a "cause of action." Thus, no matter how many "rights" of a potential plaintiff are violated in the course of a single wrong or occurrence, damages flowing therefrom must be sought in one suit or stand barred by the prior adjudication. We feel this approach to the concept of a cause of action best accomplishes the goals the idea was originally conceptualized to serve without sacrificing the rights of any party or the public, in the efficient administration of justice, to the interests of either plaintiffs or defendants as a class of litigants.

Retherford, 1977 OK 178 ¶¶ 9-13, 572 P.2d at 968-69 (citations omitted).

¶18 Willis has a single claim and that is for retaliatory discharge. The "transaction" or "occurrence" was his discharge from employment and his allegation that the discharge was in retaliation for filing a workers' compensation claim. The single interest involved was his right to pursue a workers' compensation claim without retaliation. Title 85A does not create a new or distinct "transaction" or "occurrence" from the former Title 85, so as to give rise to discrete causes of action.[3]

¶19 The question then becomes whether Willis' claim of retaliatory discharge is precluded by the dismissal of his original District Court action on jurisdictional grounds.

B. Claim Preclusion/Issue Preclusion

¶20 The doctrine of claim preclusion provides that "a final judgment on the merits of an action precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action." *Miller,* 1998 OK 24 ¶ 23, 956 P.2d at 896. The

preclusive doctrines promote finality and certainty of judgments. The doctrines prevent piecemeal litigation and promote judicial economy. *Danner v. Dillard Dep't Stores, Inc.*, 1997 OK 144, 949 P.2d 680.

¶21 Here, the critical element of a "final judgment *on the merits*" is absent. Thus, the dismissal of Willis' lawsuit on the ground of claim preclusion is error. *See* 47 Am. Jur. 2d *Judgments* § 474. However, a correct judgment will be affirmed even though premised upon erroneous reasoning. *McDaniel v. McCauley*, 1962 OK 72, 371 P.2d 486. Thus, this Court will examine whether the dismissal of Willis' lawsuit can be sustained based upon the application of the doctrine of issue preclusion.

¶22 Issue preclusion is a different doctrine from claim preclusion, albeit fostered by similar policy.[4]

> Under the doctrine of issue preclusion (formerly known as collateral estoppel), once a court has decided an issue of fact or of law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim. Although the principle of issue preclusion operates to bar from relitigation both correct and erroneous resolutions of jurisdictional and nonjurisdictional challenges, the doctrine may not be invoked if the party against whom the earlier decision is interposed did not have a "full and fair opportunity" to litigate the critical issue in the previous case. The law affords no more than a *single opportunity* to litigate a disputed question of a tribunal's jurisdiction.

National Diversified Business Services, Inc., 1997 OK 36 ¶ 11, 946 P.2d at 666-67.

¶23 The facts in *National Diversified Business Services, Inc*., are that National, an Oklahoma Company, and CFO, a Texas company, had a contract with a forum selection clause calling for lawsuits to be filed in Texas. In its original action, National sued CFO in Oklahoma based upon the breach of their contract. The trial court dismissed the action without prejudice to a suit in Texas based upon the contract's forum selection clause. National did not appeal that decision and it became final.

¶24 National then brought a second action in Oklahoma. This new action was based upon a different theory, but the underlying facts did not change. CFO pled claim preclusion based upon the prior judgment and the trial court agreed and dismissed the case.

¶25 On appeal, the Supreme Court rejected National's argument that the change of theory changed the claim. However, the Court also concluded that claim preclusion did not apply because the first decision based on the forum selection clause was not a decision on the merits of the claim. The Court then proceeded to examine whether issue preclusion had application. The Court concluded:

> The first (September 11, 1991) dismissal, based on an adjudication upon the tendered forum-selection clause, determined a single issue *dehors* the merits. It decided no issues upon the claim or defenses pressed in *National I*. The sole remedy for correcting that determination was by appeal. Absent such appeal, the ruling became final in the issue-preclusion sense. Its terms are conclusive insofar as they declare that (a) Oklahoma is not an available forum to litigate rights derived from the parties' contract in which the forum-selection clause is found and (b) litigation of those rights may be conducted in a Texas forum.

National Diversified Business Services, Inc., 1997 OK 36 ¶ 14, 946 P.2d at 667.

¶26 The Court reasoned that both of National's lawsuits were lawsuits seeking to recover for rights arising from the parties' contract. As a result, the issue of the application of the forum selection clause could not be relitigated because of the doctrine of issue preclusion. The change of theory did not save National's lawsuit because the lawsuit arose from the contract with its forum selection clause.

¶27 This decision does not serve as a parallel or analogous authority. In Willis' case, the first decision dealt with subject-matter jurisdiction. In *National Diversified Business Services, Inc.*, the trial court had subject-matter jurisdiction, but enforced a contract provision that selected a forum. This forum selection issue could not be relitigated.

¶28 As a general rule, the doctrine of issue preclusion will apply whether the issue first adjudicated is personal jurisdiction or subject-matter jurisdiction when all criteria are met and no exception applies. *Veiser v. Armstrong*, 1984 OK 61, ¶ 18, 688 P.2d 796, 802. However, the doctrine applies only to the specific jurisdictional issue decided. Moreover, dismissal

for want of jurisdiction does not prevent filing a new lawsuit on the same cause of action because the matter had not been resolved on the merits. *Gottsch v. Ireland*, 1961 OK 4, ¶¶ 16-17, 358 P.2d 1097, 1100-01. The jurisdictional issue was subject-matter jurisdiction and the court held that the first action was not *res judicata* (claim preclusion) as the claim had not been tried. There, the first case was brought prematurely so that the court did not have jurisdiction "*at that time.*" *Gottsch*, 1961 OK 4 ¶ 14, 358 P.2d at 1100-01. However, the second case was not premature.

¶29 Likewise, in *Swan v. Sargent Industries*, 1980 OK CIV APP 49, ¶ 15, 620 P.2d 473, 477 (approved for publication by the Supreme Court)(emphasis added), the Court held that "while a dismissal for want of personal jurisdiction over the defendant does not preclude litigation of the merits before a court of proper jurisdiction that it does preclude relitigation of the question of the court's jurisdiction *at that time*.[5] It does not prevent a court acquiring jurisdiction by virtue of subsequent facts, e.g. later personal service on the defendant while he is present in the state." When applied to Willis' case, *Swan* means that Willis is precluded from relitigating the technical issue of the District Court's jurisdictional decision at that time, but subsequent events might change the result.

¶30 This Court concludes that the subject-matter decision in Willis' first action may be afforded issue preclusion effect unless there is an exception which results in the doctrine not being applied. In this connection, this Court observes that, as a general rule, in the cases where a decision is used for issue preclusion effect that decision was correct at the time made, or at least not palpably incorrect. In light of the numerous and diverse applications of the "law in effect at the time of injury" cases, the first decision in Willis' case cannot be found to have been correct when made and that conclusion is, of course, confirmed by *Young*.

¶31 Nevertheless, in some instances a change of law or facts has served to allow the second litigation notwithstanding the finality of a particular issue. *See, In re Johnson*, 85 P.3d 1252, 1256-57 (Kan. Ct. App. 2004) (Appellate Court examined the record, found new circumstances and did not apply issue preclusion to a prior determination of lack of jurisdiction).[6] Thus, a change in law serves to remove the issue preclusion effect of a prior decision. *In re Town of West Jordan, Inc.*, 326 P.2d 105 (Utah 1958); *see Soults Farms, Inc., v. Schafer,* 797 N.W.2d 92, 107 (Iowa 2011) (recognizing exception to application of doctrine identified in Restatement (Second) of Judgments § 28(2) "intervening change in the applicable law").

¶32 The Restatement recognizes exceptions to the application issue preclusion. Restatement (Second) of Judgments § 28.[7] One exception arises when there has been a change in the law.

¶33 This brings the matter to the third question because the *Young* decision came after the trial court's Order in this appeal. As a general rule, the appellate court applies the law in effect when the appeal is decided.[8] *Gentry v. Cotton Elec. Coop., Inc.*, 2011 OK CIV APP 24, 268 P.3d 534. Here, this would include *Young* and its clarification of the law notwithstanding the fact that *Young* was not available to the trial court when it decided the case.

¶34 Here, the first decision in Willis' case is now clearly erroneous in light of the Supreme Court's decision in *Young v. Station 27, Inc.* Without question this is both a material and a new-to-the-case circumstance. Whether *Young* be characterized as a clarification of existing law or new law is legally insignificant. This Court holds that to apply issue preclusion here will result in a manifestly inequitable administration of the laws.

¶35 The trial court here does have subject-matter jurisdiction. Therefore, a new determination of the subject-matter jurisdiction was warranted. The trial court erred by dismissing the action and the judgment is reversed.

¶36 Furthermore, after Willis' first petition was dismissed, he filed an action with the Workers' Compensation Commission asserting his retaliatory discharge claim. The RMLS filed a motion to dismiss, arguing that only the District Court had jurisdiction of that claim, based on the fact that Willis' date of injury predated the legislation creating the Commission. The Commission agreed and dismissed Willis' action.

¶37 In this case, Willis has filed his retaliatory discharge claim in the District Court. The doctrine of judicial estoppel applies to prevent the Employer from taking a position in this case that is inconsistent with the position the Employer successfully argued in the Commission. *Bank of the Wichitas v. Ledford*, 2006 OK 73, ¶ 23, 151 P.3d 103 (noting Oklahoma's recogni-

tion of the doctrine providing that "a party who has knowingly assumed a particular position dealing with matters of fact is estopped from assuming an inconsistent position to the detriment of the adverse party"). As a result, RMLS cannot deny that the District Court has jurisdiction of Willis' wrongful discharge claim.

SUMMARY

¶38 Willis claims that he sustained a work-related injury while employed by RMLS. The date of the injury preceded enactment of the Administrative Workers' Compensation Act. Willis filed a workers' compensation claim and was subsequently discharged.

¶39 Willis filed a retaliatory discharge action in District Court. Although this was the correct forum for his action, the District Court dismissed for lack of subject-matter jurisdiction and ruled that the new law and its procedures applied. Willis did not appeal. Instead, he filed with the Workers' Compensation Commission where the ruling was that the District Court, not the Commission, had jurisdiction due to the date of the injury. (*Young*, decided later, held that the date of injury controlled the forum selection.)

¶40 Willis then filed the present action in District Court. That court ruled that Willis' claim was barred by the doctrine of claim preclusion. This ruling was erroneous because the claim had not been previously litigated. Thus, the question became whether the prior subject-matter jurisdiction ruling operated to invoke the doctrine of issue preclusion.

¶41 The doctrine of issue preclusion applies in matters of personal or subject-matter jurisdiction. Thus, it would apply here unless an exception intervenes. One such exception is when a change of circumstances or law is such that to apply issue preclusion would result in a manifestly inequitable administration of the laws.

¶42 This Court holds that the exception applies here and issue preclusion will not lie to bar Willis' action. To rule otherwise would result in a manifestly inequitable administration of the laws. This Court further holds that the doctrine of judicial estoppel applies to prevent RMLS from taking inconsistent positions in different forums. Therefore, the judgment of the trial court is reversed and the cause is remanded for further proceedings.[9]

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

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

FISCHER, P.J., concurring in result:

¶1 After Willis's first petition was dismissed, he filed an action with the Workers' Compensation Commission asserting his retaliatory discharge claim. The Employer filed a motion to dismiss, arguing that only the district court had jurisdiction of that claim, based on the fact that Willis's date of injury predated the legislation creating the Commission. The Commission agreed and dismissed Willis's action.

¶2 In this case, Willis has filed his retaliatory discharge claim in the district court. I would apply the doctrine of judicial estoppel and prevent the Employer from taking a position in this case that is inconsistent with the position the Employer successfully argued in the Commission. *Bank of the Wichitas v. Ledford*, 2006 OK 73, ¶ 23, 151 P.3d 103 (noting Oklahoma's recognition of the doctrine providing that "a party who has knowingly assumed a particular position dealing with matters of fact is estopped from assuming an inconsistent position to the detriment of the adverse party"). As a result, in my view, the Employer cannot deny that the district court has jurisdiction of Willis's wrongful discharge claim. For this reason, I concur in the result reached by the Majority.

KEITH RAPP, JUDGE:

1. It is noted that RMLS sought dismissal of the first action on the ground that the Disrict Court did not have subject-matter jurisdiction. Then, when Willis filed in the administrative workers' compensation court, RMLS sought dismissal on the ground that that forum did not have subject-matter jurisdiction. Thus, RMLS took opposite positions in each forum. There is no indication in the appellate Record that Willis confronted RMLS's inconsistent position with an issue preclusion plea or claim of estoppel.

2. RMLS' argument before the trial court intermixed claim preclusion and issue preclusion. Record, Tab 2, pp. 4-5.

3. 85 O.S. Supp. 2017, § 7 prohibits an employer from discriminating or retaliating against an employee filing, in good faith, a workers' compensation action. Title 85 O.S.2011, § 341 also prohibited discharge for filing a claim in good faith. The fact that AWCA establishes a different forum and measure of compensation does not alter the fact that there is a single transaction or occurrence.

4. The general rule is set out in Restatement (Second) of Judgments § 27:

> § 27 Issue Preclusion – General Rule
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

The Oklahoma Supreme Court has accepted the wording of the Restatement (Second) on Judgments which defines the versions of the preclusion doctrines. *Veiser v. Armstrong*, 1984 OK 61, 688 P.2d 796.

5. 47 Am. Jur. 2d Judgments §557.

> Even though a judgment disposes of the action without a determination of the merits of the cause of action, it is neverthe-

less conclusive as to the issues or technical points actually decided therein, and this rule has been applied to a judgment based on want of jurisdiction, so as to render conclusive the prior court's determination of its lack of jurisdiction, as well as questions material to the issue of jurisdiction and actually decided by the judgment.

6. *See, In re Sporn*, 215 P.3d 615 (Kan. 2009) where there were no changes subsequent to the first judgment.

7. The Restatement reads, in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> . . . .
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or
>
> (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Comment c reads:

> *c. Change in applicable legal context; avoidance of inequitable administration of the laws.* Even when claims in two actions are closely related, an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties. Such reexamination is particularly appropriate when the application of the rule of issue preclusion would impose on one of the parties a significant disadvantage, or confer on him a significant benefit, with respect to his competitors… But even when such competition is lacking, reexamination is appropriate if the change in the law, or other circumstances, are such that preclusion would result in a manifestly inequitable administration of the laws.

8. Although the trial court did not have the benefit of *Young* when this case was decided, it is this Court's view that *Young* does not represent "new" law, but rather a clarification of existing law. Thus, the *Young* Court characterized the AWCA's retaliatory discharge provision as a "continuation of public policy" from prior workers' compensation law. Moreover, the "date of injury has long been the point in time in workers' compensation cases when rights of the parties become established." *Williams Companies v. Dunkelgod*, 2012 OK 96, ¶ 14, 295 P.3d 1107, 1111-12. There, the Court quoted *King Manufacturing v. Meadows*, 2005 OK 78, 127 P.3d 584, 589 (footnotes omitted), as follows:

> The general rule is that the law in effect at the time of an employee's injury controls in workers' compensation matters. A compensation claim is controlled by the laws in existence at the time of injury and not by laws enacted thereafter. The right of an employee to compensation arises from the contractual relationship existing between the employee and the employer on the date of injury. The statutes then in force form a part of the contract and determine the substantive rights and obligations of the parties. No subsequent amendment can operate retrospectively to affect in any way the rights and obligations which are fixed.

9. This Court expresses no views whatsoever about the merits of Willis' claim.

2018 OK CIV APP 14

JP ENERGY MARKETING, LLC, a foreign corporation, Plaintiff/Appellee, vs. COMMERCE AND INDUSTRY INSURANCE COMPANY, a foreign corporation, Defendant, ALTERRA AMERICA INSURANCE COMPANY, a foreign corporation, Defendant/Appellant, NAVIGATORS INSURANCE COMPANY, a foreign corporation, Defendant/Appellant, BITCO GENERAL INSURANCE CORPORATION, a foreign corporation, Defendant/Appellant.

No. 115,285; Consol. w/115,281; 115,293
March 20, 2017

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLAHOMA

HONORABLE STEPHEN R. KISTLER, JUDGE

AFFIRMED

Mark E. Dreyer, Isaac R. Ellis, CONNER & WINTERS, LLP, Tulsa, Oklahoma, for Plaintiff/Appellee,

Sarah J. Timberlake, DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P., Oklahoma City, Oklahoma, for Defendant/Appellant Alterra American Insurance Company,

R. Lawson Vaughn, CHEEK LAW FIRM, PLLC, Oklahoma City, Oklahoma, for Defendant/Appellant Navigators Insurance Company,

Phil R. Richards, Randy J. Lewin, Casper J. den Harder, RICHARDS & CONNOR, Tulsa, Oklahoma, for Defendant/Appellant BITCO General Insurance Corporation.

Kenneth L. Buettner, Chief Judge:

¶1 Defendants/Appellants BITCO General Insurance Corporation (BITCO), Alterra America Insurance Company (Alterra), and Navigators Insurance Company (Navigators) appeal from summary judgment granted in favor of Plaintiff/Appellee JP Energy Marketing, LLC (JP). After *de novo* review, we hold that JP is an additional insured under the terms of the insurance policies issued by BITCO, Alterra, and Navigators and that the insurers have a duty to indemnify and defend JP in the underlying litigation. The professional services and construction operations exclusions to coverage do not apply. The indemnity agreements and agreements to name JP as an additional insured do not violate Oklahoma's anti-indemnity statute, 15 O.S. § 221. Therefore, JP is entitled to judgment as a matter of law. AFFIRMED.

¶2 JP, formerly known as Parnon Gathering, Inc., owned the Great Salt Plains Pipeline in Payne County, Oklahoma. JP entered into an Engineering, Procurement and Construction Agreement (JP-IPS Contract) with IPS Engi-

neering, LLC (IPS) March 1, 2012. IPS was to serve as general contractor for the construction of the pipeline. IPS then entered into a subcontract with Global Pipeline Construction, LLC (Global) to perform construction services and had previously entered into a subcontract with Wilcrest Field Services, Inc. (Wilcrest) to perform certain engineering and related technical services. The JP-IPS Contract and the subcontracts required the subcontractors maintain certain insurance coverages and that they name JP or the project owner as an additional insured on their policies.

¶3 On August 4, 2012, a fire occurred where the pipeline was being constructed. Numerous property owners in multiple lawsuits sued JP, IPS, Global, and Wilcrest for damages resulting from the fire. JP requested defense and indemnity from Global and Wilcrest's insurance carriers. BITCO had issued insurance policies to Global. Alterra had issued an insurance policy to Global. Navigators had issued a policy to Wilcrest. BITCO, Alterra, and Navigators denied coverage.

¶4 JP filed a Petition for Declaratory Judgment March 26, 2015 seeking declaratory relief that it is an additional insured under the BITCO, Alterra, and Navigators policies for the claims alleged against it in the underlying litigation; that BITCO, Alterra, and Navigators are obligated to indemnify and defend JP in the underlying litigation; and that the trial court determine the priority of payments among the defendant insurers.[1] JP filed a Motion for Summary Judgment to which BITCO, Alterra, and Navigators responded and also sought summary judgment in their favor. The trial court held a hearing on the motions July 7, 2016. The trial court found JP was an additional insured under the insurance policies issued by BITCO, Alterra, and Navigators, granted JP's motion for summary judgment, and denied BITCO, Alterra, and Navigators' requests for summary judgment in their favor.[2] The Journal Entry on Motions for Summary Judgment was entered July 27, 2016. BITCO, Alterra, and Navigators appeal.[3]

¶5 We review the trial court's grant of summary judgment *de novo*. *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051. Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2011 ch. 2, app. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group,* 1999 OK 7, ¶ 7, 976 P.2d 1043. Where the facts are not disputed, an appeal presents only a question of law. *Jones v. Purcell Investments, LLC*, 2010 OK CIV APP 15, ¶ 2, 231 P.3d 706. Here, the material facts are not in dispute. The questions of law presented concern contract interpretation and statutory construction, which we review *de novo*. *See May v. Mid-Century Ins. Co.,* 2006 OK 100, ¶ 22, 151 P.3d 132 (contract interpretation); *Welch v. Crow*, 2009 OK 20, ¶ 10, 206 P.3d 599 (statutory construction).

¶6 The parties' dispute centers around whether JP is an additional insured under the terms of four insurance policies. BITCO, Alterra, and Navigators contend JP is not an additional insured, because they do not have a direct contractual relationship with JP. JP argues the additional insured endorsements do not require privity of contract. Instead, the policy language at issue requires only that both have agreed in a written contract that JP will be added as an additional insured. JP argues that, when read together, the JP-IPS Contract and the subcontracts satisfy this requirement.

¶7 Because the policy language is the same for the BITCO and Alterra policies, we will analyze them together.

BITCO COMMERCIAL LINES POLICY AND BITCO UMBRELLA POLICY ISSUED TO GLOBAL

¶8 At the time of the fire, Global was insured by a $2,000,000.00 per occurrence Commercial Lines Policy issued by BITCO (BITCO general policy) and a $5,000,000.00 Commercial Umbrella Policy also issued by BITCO (BITCO umbrella policy). The BITCO general policy contains an Oil and Gas Extended Liability Coverage Endorsement that defines who is an insured:

> SECTION II - WHO IS AN INSURED is amended to include:
>
> Any person or organization for whom you are performing operations **if you and such person or organization have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured on your policy** but only with respect to "bodily injury," "property damage" or "personal and advertising injury"

caused, at least in part, by your negligence and with respect to liability resulting from:

1. Your ongoing operations for the additional insured(s), or

2. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.

¶9 The BITCO umbrella policy insures any organization which qualifies as an insured in any underlying insurance designated on the declarations page. The schedule of underlying insurance on the declarations page includes the BITCO general policy. Therefore, the definition of "insured" in the BITCO general policy applies to the BITCO umbrella policy.

ALTERRA EXCESS LIABILITY POLICY ISSUED TO GLOBAL

¶10 At the time of the fire, Global was also insured by a $5,000,000.00 Commercial Excess Liability Policy issued by Alterra. The Alterra policy defines "insured" as "the Named Insured shown in the declarations and any other person or organization qualifying as an Insured under the 'Underlying Insurance.'" The schedule of underlying insurance on the declarations page lists the BITCO umbrella policy. Therefore, the BITCO general policy supplies the applicable definition of "insured" for the BITCO general policy, the BITCO umbrella policy, and the Alterra policy.

ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT BETWEEN JP AND IPS (JP-IPS CONTRACT)

¶11 The JP-IPS Contract provides that any subcontract entered into by IPS is required to incorporate the JP-IPS Contract's terms and conditions and any subcontractor is thereby required to accept its terms and conditions in writing. The JP-IPS Contract requires IPS to name JP as an additional insured, which, in turn, means all subcontractors are required to name JP as an additional insured. The JP-IPS Contract requires IPS and each of its subcontractors to provide commercial general liability coverage of $1,000,000.00 per occurrence and umbrella liability insurance of $10,000,000.00 in excess of primary coverage.

IPS-GLOBAL SUBCONTRACT

¶12 IPS entered into a subcontract with Global for construction services. The IPS-Global Subcontract provides that the IPS-Global Subcontract, including Exhibits A through C and the Principal Contract, constitute the entire Subcontract between the parties. The Principal Contract is the JP-IPS Contract. The IPS-Global Subcontract states that Global and its permitted subcontractors shall carry and maintain during the performance of the work the insurance coverages sets forth on the attached Exhibit C, unless the JP-IPS Contract requires different or greater insurance coverage than the subcontractor, in which case the JP-IPS Contract prevails. Exhibit C states the insurance required shall be endorsed to include IPS and Owner as additional insureds. Owner is defined in IPS-Global Subcontract as JP.

¶13 BITCO and Alterra contend that to add JP as an additional insured, the BITCO policy requires a written contract or agreement *between Global and JP* that JP will be added as an additional insured. The BITCO policy defines "you" as referring to Global. According to the additional insured endorsement, an entity qualifies as an additional insured only if "you and such person or organization have agreed in a written contract or written agreement . . . that such person or organization will be added as an additional insured on your policy." No such agreement exists between Global and JP. BITCO and Alterra argue the trial court rewrote the policy by relying on the JP-IPS Contract and the IPS-Global Subcontract to satisfy the requirements of the additional insured endorsement. JP is not "such person or organization" with whom Global executed a written contract. The court would have to delete the phrase "and such person or organization," modifying the term to "any person or organization for whom you are performing operations if you ~~and such person or organization~~ have agreed in a written contract or written agreement executed prior to any loss that such person or organization will be added as an additional insured on your policy." The court would also have to rewrite "a written contract or written agreement" to "written contracts or written agreements." BITCO and Alterra contend the policy language requires the agreement to be memorialized in a single writing. BITCO and Alterra also argue they were not parties to the JP-IPS Contract or the IPS-Global Subcontract and, therefore, cannot be bound by their terms.

¶14 An insurance policy is a contract. *See Cranfill v. Aetna Life Ins. Co.*, 2002 OK 26, ¶ 5, 49 P.3d 703. The Supreme Court of Oklahoma has

summarized the well-settled law governing insurance contracts:

> Parties may contract for risk coverage and will be bound by policy terms. When policy provisions are unambiguous and clear, the employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties' intentions. The policy is read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof. This Court may not rewrite an insurance contract to benefit either party. . . . We will not impose coverage where the policy language clearly does not intend that a particular individual or risk should be covered.

BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co., 2005 OK 65, ¶ 6, 148 P.3d 832 (footnotes omitted).

> An insurance policy is a contract, and a contract is to be construed as a whole, giving effect to each of its parts. The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law. An insurance contract is ambiguous only if it is susceptible to two constructions on its face from the standpoint of a reasonably prudent layperson, not from that of a lawyer. However, this Court will not indulge in forced or constrained interpretations to create and then construe ambiguities in insurance contracts.

Haworth v. Jantzen, 2006 OK 35, ¶ 13, 172 P.3d 193 (footnotes omitted).

¶15 Whether this policy language requires a direct contract between the parties is an issue of first impression in Oklahoma. We hold the BITCO general policy language is unambiguous. While a direct contract between JP and Global would satisfy the additional insured provision, a direct contract is not necessarily required by the plain language of the policy. The ordinary, plain meaning is that JP is an insured if both JP and Global agree, in writing, that JP will be added as an additional insured to Global's policies and the other criteria are satisfied. What is essential is that both parties agree in writing. It is undisputed that in the JP-IPS Contract, JP and IPS agreed all subcontractors would be bound by the terms and conditions of the JP-IPS Contract, which included providing certain insurance coverages and naming JP as an additional insured. It is also undisputed that in the IPS-Global Subcontract, Global fully agreed to the terms and conditions of the JP-IPS Contract and that its policies would be endorsed to include JP as an additional insured. Therefore, we hold JP is an additional insured under the BITCO general policy, BITCO umbrella policy, and Alterra policy.[4]

¶16 The weight of authority from courts in other jurisdictions supports our decision. *See First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.*, 48 F.Supp.3d 158, 166 (D. Conn. 2014), *aff'd*, 660 F.App'x 30 (2d Cir. 2016), (holding the agreement could be memorialized in separate contracts without requiring a direct contractual relationship between the parties); *Millis Dev. & Constr., Inc. v. America First Lloyd's Ins. Co.*, 809 F.Supp.2d 616, 626-27 (S.D. Tex. 2011) (holding the policy language does not require a direct contract); *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F.Supp.2d 242, 252 (D. Me. 2011) (holding the policy language does not require a direct contract); *but see Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 118 (2011) (holding the policy language requires a direct, written agreement between the parties).[5]

¶17 Nothing in the BITCO general policy explicitly requires a direct contractual relationship between JP and Global. To accept BITCO and Alterra's position that a direct contract is required, we would need to rewrite the policy by adding language, such as "between" or "direct" with respect to the written contract or written agreement, or by adding to "have agreed in a written contract or written agreement" the words "with you," "with each other," or "together." *See First Mercury*, 48 F.Supp. 3d at 167; *Millis*, 809 F.Supp.2d 616, 626-27; *Pro Con*, 794 F.Supp.2d at 251. Furthermore, we agree with the court's assessment in *Pro Con* that the policy's "repeated use of the phrase 'such person or organization' does not plainly restrict additional insured status only to those entities that have contracted directly with the named insured." 794 F.Supp.2d at 252. A reasonably prudent layperson, without specialized training in law or insurance, would have no reason to read this language as mandating privity of contract. *See id.*

¶18 We are also not persuaded by BITCO and Alterra's arguments they are not bound by the terms of the JP-IPS Contract and IPS-Global Subcontract. Under the terms of the insurance policies, contracts to which BITCO and Alterra are parties, BITCO and Alterra agreed to the additional insured endorsement and that they would provide coverage to any person or organization meeting the following criteria: (1)

Global is performing operations for such person and organization, and (2) Global and the person or organization have agreed in writing such person or organization will be added as an additional insured. BITCO and Alterra do not control for whom Global performs operations and who Global agrees to add as additional insureds. In this case, the person or organization was JP.

¶19 Next, we consider the Navigators policy. Navigators asserts the same argument that JP is not an additional insured, because there is no direct contract between JP and Wilcrest.

NAVIGATORS EXCESS LIABILITY POLICY ISSUED TO WILCREST

¶20 At the time of the fire, Wilcrest was insured by a $10,000,000.00 Commercial Excess Liability Policy issued by Navigators. The Navigators policy insures any person or organization that is an insured in controlling underlying insurance. The controlling underlying insurance is a $1,000,000.00 per occurrence commercial general liability policy issued by Employers Insurance Company of Wausau (Liberty Mutual).[6] The additional insured endorsement to the Liberty Mutual policy defines "insured" as:

> A. Section II - Who Is An Insured is amended to include as an additional insured **any person or organization to whom you are obligated by a written agreement to procure additional insured coverage**, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
>
> 1. In the performance of your ongoing operations; or
>
> 2. In connection with premises owned by you
>
> provided that:
>
> (a) The "bodily injury", "property damage" or "personal and advertising injury" giving rise to liability occurs subsequent to the execution of the agreement; and
>
> (b) The written agreement is in effect at the time of the "bodily injury", "property damage", "personal injury" or "advertising injury" for which coverage is sought.

IPS-WILCREST SUBCONTRACT

¶21 IPS entered into a Master Subcontractor Services Agreement (IPS-Wilcrest Subcontract) with Wilcrest for engineering and related technical services. The IPS-Wilcrest Subcontract was not specific to the Great Salt Plains Pipeline project. The IPS-Wilcrest Subcontract was executed prior to the JP-IPS Contract and does not incorporate the terms and conditions of the JP-IPS Contract. The IPS-Wilcrest Subcontract obligates Wilcrest to procure certain insurance coverages and states that coverages "shall be endorsed to include IPS and Owner as additional insureds." The IPS-Wilcrest Subcontract does not define "Owner."

¶22 The Navigators policy language is broader than the language in the BITCO general policy. However, our analysis is essentially the same. We find the Navigators policy language is unambiguous. According to the ordinary, plain meaning of the additional insured provision, JP is an additional insured. The IPS-Wilcrest Subcontract, alone, satisfies the requirements of the additional insured endorsement in the Navigators policy. The IPS-Wilcrest Subcontract is a written agreement that obligates Wilcrest to procure additional insured coverages for IPS and the Owner. It is undisputed that the IPS-Wilcrest Subcontract includes Wilcrest's agreement to provide certain services for the pipeline project and that JP owns the pipeline. Therefore, we hold JP is an additional insured under the Navigators policy.

¶23 Navigators argues that even if JP is an additional insured, the professional services and construction operations exclusions found in both the underlying Liberty Mutual policy and the Navigators policy apply. The three endorsements defining professional services in the Liberty Mutual policy provide, in pertinent part:

> **Exclusion - Designated Professional Services**
>
> . . .
>
> This insurance does not apply to "bodily injury," "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services.
>
> **Schedule**
>
> Description of Professional Services

ANY AND ALL CONSULTING AND ENGINEERING SERVICES

-and-

Exclusion - Engineers, Architects or Surveyors Professional Liability

. . .

This insurance does not apply to "bodily injury," "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and

b. Supervisory, inspection, architectural or engineering activities.

-and-

Exclusion - Contractors - Professional Liability

. . .

1. This insurance does not apply to "bodily injury," "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:

a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and

b. Providing, or hiring independent professionals to provide, engineering, architectural and surveying services in connection with construction work you perform.

2. Subject to Paragraph 3. below, professional services include:

a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and

b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

The professional services exclusion in the Navigators policy provides, in pertinent part:

A. The following is added to SECTION I - COVERAGE,

2. Exclusions:

This insurance does not apply to any liability arising out of the rendering or failure to render any "professional services;"

B. The following is added to SECTION V - DEFINITIONS:

"Professional services" includes but is not limited to:

. . .

b. preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs, drawings or specifications;

c. engineering, architectural, inspection or surveying services, including related supervisory services[.]

¶24 We find the professional services exclusions do not apply. It is undisputed the allegations in the underlying litigation are that those performing welding services on the pipeline did not follow proper fire safety precautions by measuring the wind speed and using safety aids such as fire blankets. The parties agree Wilcrest was to perform quality assurance related to the welds, specifically inspecting the welds. A professional service arises out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, which is predominantly mental or intellectual, rather than physical or manual. *See Mutual Assurance Adm'rs, Inc. v. U.S. Risk Underwriters, Inc.*, 1999 OK CIV APP 129, ¶ 993 P.2d 795. Inspecting welds is not a professional service. Furthermore, welding, measuring wind speeds, using fire blankets, or supervising these activities, are not professional services.

¶25 Navigators suggests the insurance does not cover any of Wilcrest's activities, all of which may be considered "consulting and engineering activities" and/or supervisory and inspection activities.[7] Rather than adopt this unreasonable result making the policy illusory, we find the limited services provided here do not come within the professional services exclusions.

¶26 Navigators also argues that the construction operations exclusion to the additional insured endorsement in the Liberty Mutual policy applies. The additional insured endorsement provides, in pertinent part:

> **C. Exclusions**
>
> This insurance does not apply to:
>
> 1. Any premises or equipment leased to you.
>
> 2. Any construction, renovation, demolition or installation operations performed by you or on behalf of you, or those operating on your behalf.

Navigators has not provided any authority supporting the proposition inspecting welds constitutes construction operations and comes within the exclusion. We find the construction services exclusion does not apply.

¶27 Navigators and BITCO both make arguments related to the exhaustion of policy limits. The policy limits are not material as to whether JP is an additional insured and the defendant insurers have a duty to indemnify and defend JP. The policy limits do not prevent summary judgment in this declaratory judgment action.

ANTI-INDEMNITY STATUTE

¶28 Finally, we arrive at the second issue of first impression presented in this appeal. BITCO and Navigators defend the declaratory judgment action by arguing Oklahoma's anti-indemnity statute, 15 O.S. § 221, precludes coverage for JP under the policies as a matter of law. The anti-indemnity statute provides, in pertinent part:

> B. Except as provided in subsection C or D of this section, any provision in a construction agreement that requires an entity or that entity's surety or insurer to indemnify, insure, defend or hold harmless another entity against liability for damage arising out of death or bodily injury to persons, or damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers, is void and unenforceable as against public policy.
>
> C. The provisions of this section do not affect any provision in a construction agreement that requires an entity or that entity's surety or insurer to indemnify another entity against liability for damage arising out of death or bodily injury to persons, or damage to property, but such indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor, its agents, representatives, subcontractors, or suppliers.
>
> D. This section shall not apply to construction bonds nor to contract clauses which require an entity to purchase a project-specific insurance policy, including owners' and contractors' protective liability insurance, project management protective liability insurance, or builder's risk insurance.
>
> E. Any provision, covenant, clause or understanding in a construction agreement that conflicts with the provisions and intent of this section or attempts to circumvent this section by making the agreement subject to the laws of another state, or that requires any litigation, arbitration or other dispute resolution proceeding arising from the agreement to be conducted in another state, is void and unenforceable.

15 O.S.2011 § 221. Oklahoma enacted the anti-indemnity statute in 2006, and this is the first appellate court to examine the statute.

¶29 Most states have some form of anti-indemnity legislation either prohibiting an indemnitor from indemnifying an indemnitee for the indemnitee's sole negligence or prohibiting an indemnitor from indemnifying an indemnitee for any of the indemnitee's own negligence, sole or partial. *See* Dean B. Thomson & Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States*, 8 J. Amer. College of Constr. Lawyers, August 2014, at 1. Oklahoma's anti-indemnity statute is the latter, prohibiting both broad and intermediate form indemnity agreements in construction contracts. *Id*. In Oklahoma, "an indemnitor can be required to indemnify the indemnitee only to the extent of the indemnitor's own negligence. The indemnitor cannot be held responsible for the indem-

nitee's negligence, no matter the degree." *Id*. Thomson and Bruns discuss the rationale behind this type of anti-indemnity statute:

> These statutes reflect a belief that it is against public policy to require a non-negligent party to be responsible for an act or omission for which it was not at fault because an indemnitee who knows that another party is ultimately responsible for the indemnitee's negligent acts (or omissions) may not act as carefully as it otherwise might if it knows it will be responsible for its own acts.

Id.

¶30 The parties do not dispute that the IPS-Global Subcontract and the IPS-Wilcrest Subcontract are construction contracts within the meaning of Oklahoma's anti-indemnity statue.[8] Here, Global and Wilcrest are the indemnitors, and JP is the indemnitee. The indemnity agreement in the IPS-Global Subcontract provides:

> [Global] further agrees to indemnify, defend and hold harmless [JP] from and against any and all claims, liabilities, losses or damages to persons or property [including, without limitation, for attorneys' fees and costs] arising out of or related to (i) negligent or otherwise deficient performance of the Work, and/or (ii) *any act of omission of [Global]*, and/or its employees, agents, subcontractors or representatives, that fails to meet the standard of due care under the circumstances.

The indemnity agreement in the IPS-Wilcrest Subcontract provides, in pertinent part:

> [Wilcrest] further agrees to indemnify, defend and hold harmless [JP] from and against any and all claims, liabilities, losses or damages to persons or property including, without limitation, for attorneys' fees and costs arising out of or related to (i) the performance of the Services, and/or (ii) *any act of omission of [Wilcrest]*, and/or its employees, agents, sub-subcontractors or representatives.

Both indemnity agreements comply with § 221(B) of Oklahoma's anti-indemnity statute. Subcontractors Global and Wilcrest agree to indemnify and defend JP for liability arising from Global and Wilcrest's acts and omissions. Global and Wilcrest do not agree to defend and indemnify JP for liability arising from JP's own negligence.

¶31 The plain language of the statute also prohibits contract provisions requiring the indemnitor to insure another entity for liability arising out of the indemnitee's own negligence. *See* 15 O.S. § 221(B); Thomson & Bruns, *supra.* This includes agreements that the indemnitor will name the indemnitee as an additional insured in the indemnitor's policy or procure additional insured coverage for the indemnitee.[9]

¶32 Global was obligated to name JP as an additional insured, which covers JP for losses arising from Global's fault, not JP's fault. The BITCO policy's additional insured endorsement provides coverage to JP for damages "caused, at least in part, by [Global's] negligence[.]" The insurance does not apply to "'bodily injury' or 'property damage' resulting from any act or omission of [JP] or any of their employees, other than the general supervision of work performed for [JP] by [Global]." The policy does not cover JP against its own negligence. We hold the agreements to name JP as an additional insured in the IPS-Global Subcontract and the BITCO insurance contract do not violate § 221(B) nor do they conflict with the provisions and intent of Oklahoma's anti-indemnity statute. *See* 15 O.S. § 221(E).

¶33 Wilcrest was obligated to name JP as an additional insured, which covers JP for losses arising from Wilcrest's fault, not JP's fault. The Navigators coverage does not apply if the controlling underlying insurance does not apply. The Liberty Mutual policy's additional insured endorsement provides coverage to JP for damages "caused, in whole or in part, by [Wilcrest's] acts or omissions or the acts of those acting on [Wilcrest's] behalf."[10] The policy does not cover JP against liability for its own negligence. We hold the agreements to name JP as an additional insured in the IPS-Wilcrest Subcontract and the Navigators insurance contract do not violate § 221(B) nor do they conflict with the provisions and intent of Oklahoma's anti-indemnity statute. *See* 15 O.S. § 221(E).

¶34 No provision in the subcontracts and insurance contracts requires Global, Wilcrest, or their respective insurers to indemnify, insure, defend or hold harmless JP against liability for damage to property, which arises out of the negligence or fault of JP. Here, the indemnity agreements and additional insured provisions in the subcontracts and additional

insured coverage in the insurance contracts do not violate 15 O.S. § 221 and are valid and enforceable.

¶35 BITCO and Navigators argue the only basis for JP's liability in the underlying litigation is JP's own negligence and, therefore, they do not have a duty to defend JP. BITCO and Navigators contend JP cannot be held vicariously liable for Wilcrest and Global's negligence or fault, because there is no agency relationship between Wilcrest and JP or Global and JP. They also assert that JP cannot be held jointly liable for Wilcrest and Global's negligence, pursuant to 23 O.S. § 15.[11] Navigators contends liability cannot arise out of Wilcrest's negligence, because a jury in one of the nineteen cases in the underlying litigation returned a verdict attributing 0% liability to Wilcrest, and Wilcrest has since been dismissed from all other related cases.

¶36 BITCO and Navigators' argument is misplaced. As discussed above, the anti-indemnity statute prohibits Global and Wilcrest from indemnifying, insuring, and defending JP against liability *arising out of JP's own acts and omissions*. The indemnity agreements and insurance contracts provide coverage to JP for liability *caused, at least in part, by Global and Wilcrest's acts and omissions* and do not violate 15 O.S. § 221. One must look to the petitions in the underlying litigation to determine whether the claims arise out of Global and Wilcrest's acts and omissions or JP's acts and omissions. The duty to defend is triggered by the claims made in underlying litigation, not the ultimate outcomes in those cases. *See Honeywell v. GADA Builders, Inc.*, 2012 OK CIV APP 11, ¶ 26 n.11, 271 P.3d 88 (citing *First Bank of Turley v. Fidelity & Deposit Ins. Co. of Md.*, 1996 OK 105, ¶ 13, 928 P.2d 298). If, in the underlying litigation, the plaintiffs alleged JP is vicariously liable for the negligence of Global and Wilcrest, the duty to defend has been triggered. If they allege the harm resulted from JP's own acts and omissions, Wilcrest and Global do not have a duty to defend JP. JP claims vicarious liability is asserted in the underlying litigation. BITCO and Navigators have not submitted any evidence to the contrary.[12] Therefore, we hold BITCO and Navigators owe a duty to defend JP.[13]

¶37 We hold JP is entitled to summary judgment. JP is an insured under the terms of the BITCO general policy, the BITCO umbrella policy, the Alterra policy, and the Navigators policy. BITCO, Alterra, and Navigators owe a duty to indemnify and defend JP. The professional services and construction operations exclusions do not apply. The indemnity agreements and additional insured provisions do not violate Oklahoma's anti-indemnity statute.

¶38 AFFIRMED.

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

Kenneth L. Buettner, Chief Judge:

1. Commerce Industry Insurance Company (CIIC) was also named a defendant in this declaratory judgment action. JP dismissed without prejudice its request for a determination of the priority of insurance coverage among the defendant insurers. As a result, CIIC was dismissed as a party.

2. The trial court denied JP's motion for summary judgment to the extent it sought judgment against Defendant CIIC.

3. No. 115,285, No. 115,281, and No. 115,293 were consolidated under surviving No. 115,285 by order of the Supreme Court of Oklahoma August 26, 2016.

4. We note that even if the BITCO general policy requires a direct, written agreement between JP and Global, the IPS-Global Subcontract satisfies this requirement. The JP-IPS Contract required subcontractors to maintain certain insurance coverages and add JP as an additional insured. The IPS-Global Subcontract fully incorporates the terms and conditions of the JP-IPS Contract. JP agreed to the JP-IPS Contract and, by executing the IPS-Global Subcontract, Global also agreed to the JP-IPS Contract.

5. The policy language in these cases is substantially similar to the the definition of "insured" in the BITCO general policy:

> [A]ny person or organization **when you and such a person or organization have agreed in writing in a contract, agreement or permit that such person or organization be added as an additional insured on your policy** to provide insurance such as afforded under this coverage part.

Millis Dev. & Constr., Inc. v. America First Lloyd's Ins. Co., 809 F.Supp.2d 616, 621 (S.D. Tex. 2011).

> Any person or organization for whom you are performing operations **when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.**

First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc., 48 F.Supp.3d 158, 166 (D. Conn. 2014); *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F.Supp.2d 242, 250 (D. Me. 2011); *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 116-17 (2011).

6. Liberty Mutual agreed to defend JP in the underlying litigation and paid its policy limits in settling the underlying claims.

7. According to the IPS-Wilcrest Subcontract, Wilcrest was to perform certain engineering and related technical services. The scope of services was to be established in task orders from IPS. Task orders included the coordination and supervision of the daily inspection for the pipeline construction and providing welding, utility, and civil-mechanical inspectors.

8. Title 15, § 221 provides, in pertinent part:

> A. For purposes of this section, "construction agreement" means a contract, subcontract, or agreement for construction, alteration, renovation, repair, or maintenance of any building, building site, structure, highway, street, highway bridge, viaduct, water or sewer system, or other works dealing with construction, or for any moving, demolition, excavation, materials, or labor connected with such construction.

15 O.S.2011 § 221(A).

9. The Oregon Supreme Court held that a similar anti-indemnity statute prohibits not only "direct" indemnity agreements between parties to construction contracts but also "additional insured" agreements by which one party is obligated to procure insurance for losses arising in whole or in part from the other's fault. *See Walsh Constr. Co. v. Mutual of Enumclaw*, 104 P.3d 1146, 1150 (Or. 2005); Or. Rev. Stat. Ann. § 30.140 (West 2008).

10. The Liberty Mutual additional insured endorsement also provides:

> There is no coverage for the additional insured for "bodily injury", "property damage" or "personal and advertising injury" arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured, except as provided below.

If the written agreement to indemnify an additional insured requires that you indemnify the additional insured for its sole negligence, then the coverage for the additional insured shall conform to that agreement; provided, however, that the contractual indemnification language of the agreement is valid under the law of the state where the agreement was formed. If the written agreement provides that a particular state's law will apply, then such provision will be honored.

The Navigators policy does not provide coverage for damages arising out of JP's sole negligence. The indemnity agreement in the IPS-Wilcrest Subcontract does not require Wilcrest to indemnify JP for JP's sole negligence.

11. Title 23, § 15 provides:

A. In any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor.

B. This section shall not apply to actions brought by or on behalf of the state.

C. The provisions of this section shall apply to all civil actions based on fault and not arising out of contract that accrue on or after November 1, 2011.

23 O.S.2011 § 15.

12. The petitions filed in the underlying litigation were not attached to the motions for summary judgment or responses. It was requested that the trial court take judicial notice of the allegations in the petitions, which were also before the trial court.

13. We note BITCO, Alterra, and Navigators' duty to indemnify JP for damages is limited to the percentage of negligence or fault attributed to Global and Wilcrest. *See* 15 O.S.2011 § 221(C).

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, February 15, 2018

F-2017-209 — William Mead, Appellant, was tried in a non-jury trial for the crimes of Lewd Molestation, After Former Conviction of a Felony (Count 1), and two counts of Forcible Sodomy, After Former Conviction of a Felony (Counts 3 & 4), in Case No. CF-2015-289 in the District Court of Atoka County. The Honorable Paula Inge found Mead guilty and sentenced him to twenty years imprisonment on each count with the sentences to be served concurrently. From this judgment and sentence William Mead has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Mead's application to supplement appeal record or in the alternative remand for evidentiary hearing on Sixth Amendment claims is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-425 — Petitioner Marion Milton-Otis Toehay, Sr., entered a blind *Alford*[1] plea in the District Court of Caddo County, Case No. CF-2015-245, to one count of Child Sexual Abuse. After a hearing on February 14, 2017, the Honorable Wyatt Hill accepted the plea. On March 30, 2017, Petitioner was sentenced to life in prison. On April 6, 2017, Petitioner timely filed a Motion to Withdraw Plea. After a hearing on April 19, 2017, the motion was denied. Petitioner appeals the denial of his motion. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur in Results; Rowland, J., Concur in Results.

1. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

F-2016-1119 — Appellant Hao Trung Le was tried by jury and convicted of First Degree Murder, Case No. CF-2015-2330 in the District Court of Tulsa County. The jury recommended as punishment life imprisonment without the possibility of parole and the trial court sentenced accordingly. From this judgment and sentence Hao Trung Le 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-2016-1039 — Appellant Kiwane Hobia was tried by jury for First Degree Felony Murder (Count I) and Conspiracy (Count II) in the District Court of Pottawatomie County, Case No. CF-2015-395D. Appellant was found guilty of the lesser included offense of Second Degree Felony Murder in Count I and the jury recommended as punishment thirty (30) years imprisonment. Appellant was found guilty as charged in Count II and the jury recommended as punishment ten (10) years in prison. The trial court sentenced accordingly, ordering the sentences to run consecutively. The trial court sentenced accordingly. From this judgment and sentence Kiwane Hobia 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., Specially Concurring.

C-2017-656 — Joshua Ryan Boffer, Petitioner, entered a blind plea of guilty to the crimes of Using a Vehicle To Facilitate the Discharge of a Firearm, After Former Conviction of Two or More Felonies (Count 1), and Felon in Possession of a Firearm, After Former Conviction of Two or More Felonies (Count 2), in Case No. CF-2016-3454 in the District Court of Tulsa County. The Honorable James M. Caputo accepted Boffer's plea and sentenced him to forty-five years imprisonment on each of Counts 1 and 2 with the sentences running concurrently. Judge Caputo imposed a fine of $500.00 on each count and assessed various costs and fees. Boffer filed a timely motion to withdraw his plea that Judge Caputo heard and denied. Boffer appeals the denial of this motion. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

RE-2016-929 — In the District Court of Payne County, Case No. CF-2008-447, Appellant, Johnny Frank Martin, while represented by counsel, entered pleas of guilty to two counts of Rape in the Second Degree. In accordance

with a plea agreement, the Honorable Stephen Kistler, Associate District Judge, on May 22, 2009, sentenced Appellant to a term of fifteen (15) years imprisonment for each count, to be served concurrently with one another and with all but the first six (6) years conditionally suspended under written rules of probation. On September 27, 2016, Judge Kistler found Appellant had violated his probation and revoked the suspension order in full. Appellant appeals that final order of revocation. REVERSED AND REMANDED for rehearing. Opinion by: Lewis, V.P.J.; Lumpkin, P.J. concurs; Hudson, J.; concurs; Kuehn, J., concurs; Rowland, J.; concurs.

C-2017-554 — Cassandra Lynne Allen, Petitioner, entered a negotiated plea of no contest to the crimes of Possession of MDMA/Ecstasy (Count 1) and Possession of Methamphetamine (Count 2) in Case No. CF-2017-198 in the District Court of Bryan County. The Honorable Mark R. Campbell, District Judge, accepted Allen's no contest plea and deferred sentencing for five years on each count with the counts to run concurrently and imposed a fine of $100.00. Allen filed a timely application to withdraw plea which was denied following a hearing. Cassandra Lynne Allen appeals the denial of her application to withdraw her plea. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-241 — Joseph Tunley, Jr., Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon in Case No. CF-2011-4648 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at twenty-five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Joseph Tunley, Jr. has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-406 — On June 27, 2014, Appellant Terry Lee Broughton Jr. entered pleas of guilty in Ottawa County District Court Case Nos. CF-2014-188 and CF-2014-204 and stipulated to an application to accelerate filed in Case No. CF-2014-151. Appellant was admitted to the Ottawa County Drug Court Program pursuant to a Drug Court Plea Agreement and his sentencing was delayed. On October 16, 2015, the State filed an application to terminate Appellant's participation in Drug Court. Following a hearing on the application, the Honorable Robert G. Haney, District Judge, sustained the State's application and sentenced Appellant pursuant to his Drug Court Plea Agreement. Appellant appeals. The termination of Appellant's participation in Drug Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J.: Concur; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur.

F-2016-947 — On April 27, 2016, in the District Court of Delaware County, Appellant, Jonathan Robert O'Neal, while represented by counsel, entered pleas of guilty in Case No. CF-2016-11 to Count 1: Knowingly Receiving Stolen Property, Count 2: Burglary in the Second Degree, Count 3: Attempted Larceny of Automobile, Count 4: Malicious Injury to Property over $1,000.00, and Count 5: Breaking and Entering Dwelling without Permission. Additionally, Appellant stipulated to an application seeking to accelerate imposition of judgments and sentences in Case No. CM-2014-645 for Count 1: Driving without a License, Count 2: Failure to Maintain Security Verification, and Count 3: Failure to Pay Vehicle Taxes Due State. Pursuant to an agreement for Appellant's guilty pleas and stipulation, the Honorable Robert G. Haney, District Judge, conditionally delayed the imposition of judgment and sentence pending Appellant's completion of the Delaware County Drug Court Program. Subsequently, the State filed applications seeking termination of Appellant from Drug Court. On October 3, 2016, following an evidentiary hearing on those applications, Judge Haney ordered Appellant terminated from Drug Court, entered judgments of guilt, and sentenced Appellant in accordance with the terms of his Drug Court plea agreement. Appellant appeals the final order terminating him from Drug Court. AFFIRMED. Opinion by: Lumpkin, P.J., Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, February 22, 2018

RE-2016-1019 — Appellant, Jerry Lynn Clemons, entered a plea of guilty in Muskogee County District Court Case No. CF-2014-478 on April 15, 2016, to Home Repair Fraud. He was sentenced to ten years suspended, with rules and conditions of probation, to run concurrent with Case No. CF-2015-172 and all pending cases. He was also fined $500.00. In Muskogee County District Court Case No. CF-

2015-172 Appellant entered a plea of guilty on April 15, 2016, to Count 1 – Robbery By Force of Fear, a felony, and Count 2 – Malicious Injury to Property Under $1000, a misdemeanor. Appellant was sentenced to fifty years suspended on Counts 1 and 2 to run concurrent with each other and with Case No. CF-2014-478 and all pending cases, with rules and conditions of probation. Appellant was fined $500.00 on Count 1 and $250.00 on Count 2. The State filed an application to revoke Appellant's suspended sentences on June 7, 2016. A revocation hearing was held on October 28, 2016, before the Honorable Michael Norman, District Judge. Following the hearing, Judge Norman revoked Appellant's suspended sentences in full. Appellant appeals from the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED but REMANDED to the District Court to modify its revocation orders to properly reflect that the sentences are to be served concurrently. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Specially Concur; Rowland, J.: Concur.

J-2017-957 — On December 19, 2016, Appellee, M.M., was charged as a Youthful Offender with multiple counts of Lewd Acts With a Child Under the Age of 16 in Oklahoma County Case No. CF-2016-9887. On September 12, 2017, the District Court of Oklahoma County, the Honorable Geary Walke, Special Judge, denied M.M.'s request for juvenile certification and youthful offender status and granted the State's motion to sentence M.M. as an adult. M.M. appeals. The District Court's order granting the State's motion to sentence M.M. as an adult is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recuse.

Friday, February 23, 2018

C-2017-403 — Roshane Demare Roberts, Petitioner, pled guilty in the District Court of Tulsa County to the following charges: Case No. CF-2016-1753: Count 1, first degree robbery; Case No. CF-2016-3167: Count 1, failure to register as a sex offender; Case No. CF-2016-3908: Count 1, failure to register as a sex offender and Count 2, falsely personate another to create liability. The Honorable James M. Caputo, District Judge, found Petitioner guilty after former conviction of two or more felonies, and imposed sentences of eighteen years imprisonment in each count, concurrent with each other, and with sentences in other felony cases. Petitioner filed a timely motion to withdraw his plea, which the trial court denied after evidentiary hearing. Roshane Demare Roberts now seeks the writ of certiorari. The Petition for the Writ of Certiorari is DENIED. The judgments and sentences of the district court are AFFIMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

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

114,949 — In The Matter of the Richard Nelson Rogers Family Living Revocable Trust: Robyn Prince, Appellant, vs. Marc Rogers, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Glassco, Judge. Appellant, Robyn Prince, granddaughter of Edris Rogers and former co-trustee of the Richard Nelson Rogers Family Living Revocable Trust, filed an application for approval of her trust accounting on January 14, 2016. On March 7, 2016, the trial court declined to approve Appellant's accounting, removed Appellant as trustee, while continuing to impose upon Appellant the responsibility to provide further accounting of trust assets, and imposed a surcharge upon Appellant in the amount of $27,885.33, and the cost of the accounting in the amount of $24,648. The March 2016 order also removed the ward/trust beneficiary (Edris Rogers) as the co-trustee, and appointed a successor trustee. Appellant then filed a post-trial motion to reconsider or in the alternative a motion for new trial, which requested the court to examine additional records and evidence not presented at the hearing. In her appeal, Appellant does not ask to be reinstated as trustee, but requests removal or reversal of the surcharge, reversal of the order requiring her to personally pay the costs of the accounting, requests the accounting be approved, or alternatively order a new trial or reduce the surcharge by the amount indicated in the new evidence provided in Appellant's post-trial motion. Edris Rogers and her late husband established the above named revocable trust for their benefit in 1994. In 2009, Mrs. Rogers went to an attorney at the behest of at least one of her children and several grandchildren and secured the 2009 Edris Ilene Rogers Revocable Trust, which subsumed all the property and assets of the 1994 trust, removed the trustees of the 1994 trust and appointed Appellant, Robyn Prince, and the trust beneficiary, Edris Rogers, as co-trustees. In 2016, Appellant

requested approval of her trust accounting spanning from the 2009 creation of the latest trust to 2016. To this end, the trial court was clearly unsatisfied with Appellant's deficient record keeping as trustee. The trial court also found the accounting was "based on incomplete information provided by the Trustee." "The subject of trusts and the control of trust estates is cognizable only by courts of equity. *McCoy v. McCoy*, 30 Okl. 379, 121 P. 176. "In an equitable matter, the Court will examine the whole record and weigh the evidence, but the trial court's findings will not be disturbed in that review unless they are clearly against the weight of the evidence or some governing principle of law. *Estate of Sneed*, 1998 OK 8, ¶ 8, 953 P.2d 1111, 1115." *In re Lorice T. Wallace Revocable Trust*, 2009 OK 34, ¶2, 219 P.3d 536, 537. With respect to Appellant's post trial motion, requesting the court to modify its order or grant a new trial, the appellate court will review the denial of the motion for new trial using an abuse of discretion standard. *Oklahoma Transp. Auth. v. Turner,* 2008 OK CIV APP 31, ¶7, 183 P.3d 168, 171-72. Appellant's first proposition of error alleges the trial court's decision to impose a surcharge on her due to harm to the trust is not supported by corresponding proof. The record indicates there was considerable waste of trust assets under Appellant's tenure as trustee, with tens of thousands of dollars flowing out of the trust, reducing the trust by as much as ten to twenty percent. Appellant requested this approval hearing but did not provide the court with very much in the way of evidence to support her accounting. Based upon the record provided we do not find the trial court's ruling imposing the surcharge was against the clear weight of the evidence or contra to a governing principle of law. Appellant's second proposition of error asserts the trial court's imposition of the surcharge, requiring Appellant to personally pay for the accounting and removing her as trustee amount to an improper punitive punishment and should be reversed. The trial court's decision imposing the surcharge and declining to allow Appellant access to trust funds to pay for the remaining accounting costs was in keeping with the statute's guidance and did not impose punitive damages. Appellant's third proposition of error takes issue with the trial court's criticism of her willingness to forgive loans or gifts made by Mrs. Rogers from trust assets. We note that Appellant was not required to repay, nor was she surcharged, for funds corresponding to those attributed to the loan forgiveness. As the trial court's order did not include a directive for Appellant to repay these funds, we do not find any relief is warranted for this proposition of error. Appellant's fourth proposition of error asserts the trial court improperly refused to consider Appellant's post-hearing submission of evidence in conjunction with her motion to reconsider/new trial motion, wherein Appellant presented further receipts and documentation which she asserts demonstrate she did in fact keep records and could effectively supplement her initial accounting. Under 12 O.S. 2001 §651(7), Appellant needed to demonstrate how the evidence she wished to present after the hearing was "newly-discovered" evidence and was not available to her with the exercise of "reasonable diligence" during the hearing phase of the proceedings. She was not able to do this and no relief is warranted. Appellant's fifth proposition asserts she was denied the opportunity for a full and fair hearing, because the court indicated it would address both the approval of the accounting and Marc Rogers' request that Appellant be removed at the same hearing. Appellant's objection to the combined hearing was overruled. We do not find the trial court's order to be beyond its authority under the statute and the appellate court engages in the presumption that the trial court's findings are correct. 60 O.S. §175.23; *In re Lorice T. Wallace Revocable Trust*, 219 P.3d at 537. Appellant's sixth proposition of error argues that Marc Rogers as a contingent remainder beneficiary of the trust is not able to participate in this proceeding without the consent and participation of the other limited co-guardian. However, under the statute (60 O.S. §173.23(C)) the co-guardian of the ward who is the beneficiary of the trust in this case, may act on behalf of the ward/beneficiary, who is considered a "person affected by the administration of the trust estate[.]" Appellant's seventh proposition of error raises a number of errors concerning the admission of evidence. Appellant has not demonstrated how she was "substantially prejudiced" by the admission of the alleged improper evidence and as such the trial court decision will not be disturbed. *Kendall v. Sharp*, 1967 OK 66, 426 P.2d 707, 709. The order of the trial court is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,061 — HSBC Bank, N.A., as Trustee for Wells Fargo Home Equity Asset-backed Securities 2006-2 Trust, Home Equity Asset-backed Certificates, Series 2006-2, Plaintiff/Appellee,

vs. Wesley B. Lyon and Pamela S. Lyon, Defendants/Appellants, and The Vintage at Verdigris Homeowners Association, State of Oklahoma *ex rel.* Oklahoma Tax Commission, Midland Funding LLC, John Doe, and Jane Doe, Defendants. Appeal from the District Court of Rogers County, Oklahoma. Defendants/Appellants Wesley B. and Pamela S. Lyon appeal summary judgment granted to Plaintiff/Appellee HSBC Bank USA, N.A. (Bank). The summary judgment record shows Bank had standing at the time it filed its Petition and the undisputed facts show the Lyons were in default and Bank was entitled to judgment as a matter of law. The Lyons have not presented authority supporting their argument that Bank could not refile its case within one year of dismissing it without prejudice. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Friday, February 23, 2018

114,749 — Drew W. Duncan, Plaintiff/Appellee, vs. Angela Jane Duncan, Defendant/Appellant. Appeal from the District Court of Tulsa County, Hon. Tammy Bruce, Trial Judge. Appellant Angela Duncan (now Johnson) appeals the district court's order granting a motion to enforce visitation filed by Appellee Drew Duncan. Angela presented no evidence to support her contention that the district court lacked the authority to grant Drew's motion, nor did she point to any evidence in the record showing that the court abused its discretion or acted against the child's best interests. Consequently, the district court's order awarding additional visitation to Drew is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

(Division No. 3)
Friday, February 16, 2018

115,327 — Leslie Lee Cline, Plaintiff/Appellant, vs. Chad A. Cline, Co-Trustee; Charles C. Cline, III, Co-Trustee; Bette L. Cline Living Trust; and Dallas D. Cline, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Trial Judge. Plaintiff/Appellant, Leslie Lee Cline, seeks review of the trial court's judgment in favor of Defendants/Appellees, Chad A. Cline and Charles C. Cline, III, co-trustees of the Bette L. Cline Living Trust, and Dallas D. Cline, in Leslie's action for breach of trust. We affirm because the trial court's judgment is neither clearly against the weight of the evidence nor contrary to law. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

115,580 — In Re the Marriage of Tyna Marie Barnett and Alvin James Barnett, Jr.: Tyna Marie Barnett, Petitioner/Appellee, vs. Alvin James Barnett, Jr., Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Owen Evans, Judge. Respondent/Appellant Alvin James Barnett, Jr. (Father) appeals from an order of the trial court finding that Father had not overpaid child support arrearage or interest to Petitioner/Appellee Tyna Marie Barnett (Mother). On appeal, Father raises several challenges to an accounting prepared by Mother's expert witness. We find the court's finding that the accounting conformed with the child support allocation requirements provided in *Roca v. Roca*, 2014 OK 55, 337 P.3d 97, was not clearly contrary to the weight of the evidence. Nor did the court err as a matter of law by finding the accounting was not defective because the expert used a different method for calculating interest than that used by the Department of Human Services. We also find the court did not abuse its discretion by refusing to vacate numerous child support arrearage judgments and rulings. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,610 — Toby Brent Chadrick, Plaintiff/Appellee, vs. Mary Michelle Roberson, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. Defendant/Appellant Mary Michelle Roberson, natural mother of minor child A.E.R., d.o.b. 8/20/2012, appeals the trial court's award of equal unsupervised visitation between the parties and the grant of legal custody to Plaintiff/Appellee Toby Brent Chadrick, the natural father of the minor child. The trial court abused its discretion when it supported its custody and visitation ruling solely on its determination that Mother interfered with Father's parental rights. The paramount consideration must be the best interests of the minor child, and all factors relevant to this determination must be considered by the trial court. 43 O.S. 2011 §109(A); *Daniel v. Daniel*, 2001 OK 117, ¶21, 42 P.3d 863, 871. The trial court's decision is REVERSED and REMANDED for a new trial on custody and visitation. On remand, the trial court is instructed to consider all factors relevant to the determination

of the minor child's best interests. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,786 — In the Matter of M.R., Adjudicated Deprived Child: Marcus Russell, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Gregory J. Ryan, Judge. Appellant Marcus Russell (Father) appeals an order of the trial court terminating his parental rights as to minor child M.R. pursuant to 10A O.S. § 1-4-904 (B) (5) for a failure to correct the conditions that led to the adjudication of the child as deprived, and finding that a termination of Father's parental rights is in the child's best interests. The record indicates that the State met its burden of proving by clear and convincing evidence that Father failed to correct the conditions that led to the deprived adjudication, and that termination of Father's parental rights is in the best interests of the minor child. Accordingly, we AFFIRM the trial court's order. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

116,112 — Joseph K. Goerke, Plaintiff/Appellee, vs. Fairmount Land & Minerals, LLC, Defendant/Appellant, and Ferrelloil Co., LLC, Defendant. Appeal from the District Court of Blaine County, Oklahoma. Honorable Paul K. Woodward, Judge. The trial court granted summary judgment in favor of Plaintiff, Joseph K. Goerke, in his action to quiet title to mineral interests that were once owned by his deceased father, Earl Goerke. The basic question in the district court was whether Earl conveyed those mineral interests in 1993 or if they were distributed by the court when his estate was probated in 2006. We observe that the trial court determined the property rights in a way that is inconsistent with the probate court's order, and without record support that the probate judgment was facially void. Therefore, Plaintiff was not entitled to judgment as a matter of law, and the case must be remanded for further proceedings. REVERSED AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,212 — In the Matter of X.R., a Deprived Child: State of Oklahoma, Petitioner/Appellee, vs. Howard Rollins, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Doris Fransein, Judge. Respondent/Appellant Howard Rollins (Father) appeals from an order accepting the jury's verdict and terminating his parental rights to his daughter, X.R. Father's sole proposition of error on appeal is that the court abused its discretion by denying his request to continue the trial based on Petitioner/Appellee the State of Oklahoma (the State)'s alleged failure to provide essential discovery. We find the court did not abuse its discretion. The evidence at issue – a document from the Department of Human Services concluding that DHS had substantiated allegations of sexual abuse against Father – was not essential to Father's cause. Father had other documents showing that DHS had substantiated the claims, and the State relied on victim testimony, rather than DHS records, to prove its case. Further, Father's attorney had ample time to obtain the document at issue prior to trial. Accordingly, we AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Friday, February 16, 2018

115,223 (Companion to Case No. 115,044) — In the Matter of the Estate of Harold Lee Harrington, Deceased, Tim Goedecke and D.E. Dismukes, Appellants, v. Heirs of Harold Lee Harrington, Appellees. Appeal from an order of the District Court of Delaware County, Hon. Barry V. Denney, Trial Judge, regarding jurisdiction over the assets of Arkansas decedents, the choice of law to be applied, and the removal of the administrator of an estate. We hold the trial court erred when it held that it lacked subject matter jurisdiction over the personal assets once belonging to Arkansas resident Bonnie Mae Harrington, who died intestate, or to her only lawful heir, Harold Lee Harrington, who also died intestate as an Arkansas resident, but which assets are now held in the Administrator's Oklahoma attorney trust account. The trial court further erred when it removed Administrator from that position. We hold the trial court does have subject matter jurisdiction over the personal assets in question; that it correctly held under Arkansas law that those personal assets now belong to Harold Lee Harrington, or to his only lawful heir, his spouse; and that the trial court correctly found that Tim Goedecke cannot inherit those personal assets from Harold Lee Harrington under Arkansas law. Therefore, we reverse the trial court's order and remand the matter to the trial court to enter an order directing Administrator to transfer the personal property at issue to Willa Jean Harrington, as personal representative of the Arkansas Estate of Harold Lee

Harrington, for distribution to his lawful heirs under Arkansas law. The Oklahoma probate proceeding regarding the distribution of Harold Lee Harrington's Oklahoma property, and its distribution under the appropriate state law, shall continue below. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,044 (Companion to Case No. 115,223) — In the Matter of the Estate of Bonnie Mae Harrington, Deceased, Tim Goedecke and D.E. Dismukes, Appellants, v. Willa Jean Harrington, Appellee. Appeal from an order of the District Court of Delaware County, Hon. Barry V. Denney, Trial Judge, regarding jurisdiction over the assets of Arkansas decedents, the choice of law to be applied, and the removal of the administrator of an estate. We hold the trial court erred when it held that it lacked subject matter jurisdiction over the personal assets once belonging to Arkansas resident Bonnie Mae Harrington, who died intestate, or to her only lawful heir, Harold Lee Harrington, who also died intestate as an Arkansas resident, but which assets are now held in the Administrator's Oklahoma attorney trust account. The trial court further erred when it removed Administrator from that position. We hold the trial court does have subject matter jurisdiction over the personal assets in question; that it correctly held under Arkansas law that those personal assets now belong to Harold Lee Harrington, or to his only lawful heir, his spouse; and that the trial court correctly found that Tim Goedecke cannot inherit those personal assets from Harold Lee Harrington under Arkansas law. Therefore, we reverse the trial court's order and remand the matter to the trial court to enter an order directing Administrator to transfer the personal property at issue to Willa Jean Harrington, as personal representative of the Arkansas Estate of Harold Lee Harrington, for distribution to his lawful heirs under Arkansas law. The Oklahoma probate proceeding regarding the distribution of Harold Lee Harrington's Oklahoma property, and its distribution under the appropriate state law, shall continue below. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Friday, February 23, 2018

116,191 — James Thomas, Plaintiff/Appellant, v. Synergy Motorworks, LLC, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Millie Otey, Trial Judge. The trial court plaintiff, James Thomas (Thomas), appeals Orders granting the defendant's Synergy Motorworks, LLC (Synergy), petition to vacate default judgment and denying Thomas' Motion to Reconsider. The parties generally agree as to the sequence of events. Thomas sued Synergy in Small Claims Court and trial was set for October 18, 2016. On that date, Synergy did not appear and the trial court granted Thomas a default judgment. On January 20, 2017, Thomas issued execution resulting in attachment of funds belonging to Synergy. On February 10, 2017, Synergy entered its appearance through counsel. Synergy also filed a petition to vacate the default judgment. This Court notes that the Small Claims Procedure Act does not provide a means for vacating judgments. Nevertheless, Small Claims Court judgments have been vacated. Here, the parties and the trial court proceeded under the provisions of 12 O.S. 2011, § 1031, and following, in their filings, arguments and rulings. Notwithstanding the informality of the process, the Small Claims Court is permitted to apply applicable rules of law to decide cases. Therefore, "given the latitude of discretionary power of a trial judge in a small claims action," this Court holds that the Small Claims Court may look to and apply Section 1031 and following to proceedings to vacate a Small Claims Court judgment. The decision to vacate a judgment is measured by the abuse of discretion standard and a stronger showing of an abuse of discretion must be made when the trial court has vacated a judgment. After review, this Court concludes that the trial court did not abuse its discretion by considering and applying Section 1031 and following. In addition, Thomas has not demonstrated that the trial court abused its discretion by its decision to vacate the judgment. Therefore, the judgments of the trial court vacating the default judgment and thereafter denying the motion to reconsider are affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., concurs in result.

ORDERS DENYING REHEARING
(Division No. 4)
Friday, February 23, 2018

116,268 — Oana Mischiu, Plaintiff/Appellant, vs. Thomas Elmer Wiley, Defendant/Appellee. Appellee's Petition for Rehearing is hereby *DENIED*.

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POSITIONS AVAILABLE

THE UNIVERSITY OF TULSA COLLEGE OF LAW INVITES APPLICANTS for one full-time entry-level assistant professor of legal writing position beginning in August 2018. https://utulsa.edu/about/working-at-tu/available-positions/assistant-professor-legal-writing-college-law/.

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

THE LAW FIRM OF PIERCE COUCH HENDRICKSON BAYSINGER & GREEN is seeking the opportunity for consideration within the following area of law: general litigation attorney with a minimum of 2-5 years of experience. This position will be located at the Oklahoma City branch location. PCHB&G offers competitive compensation and comprehensive benefits that include employer paid health insurance, disability insurance, 401(k) plan, among others. Please submit resumes to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSOCIATE ATTORNEY POSITION WITH EXCELLENT WORK ENVIRONMENT. Starting pay is commensurate with experience, not to exceed $60,000. We are looking for someone who is vibrant, high-achieving and dependable. Position will focus on personal injury and other civil litigation, but criminal and domestic law will also be significant practice areas. Please submit resume to Price & Sears, PC, P.O. Box 3098, Claremore, OK 74018.

POSITIONS AVAILABLE

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

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

THE PANTEX PLANT IN AMARILLO, TX IS LOOKING FOR AN ATTORNEY with well-developed counseling, investigative and negotiation skills who has at least five years of experience representing employers in private practice or in a corporate law department as labor and employment counsel. Candidates must possess strong interpersonal, writing and verbal skills, the ability to manage simultaneous projects under deadline, and flexibility to learn new areas of law. Candidates must be licensed to practice law in at least one state and must be admitted, or able to be admitted, to the Texas bar. For more information on the position please visit www.pantex.energy.gov, Careers, Current Opportunities and reference Req #18-0273 (Legal General Sr. Associate-Specialist). Pantex is an equal opportunity employer.

OKLAHOMA CITY LAW FIRM, DEBEE GILCHRIST, SEEKS INDIVIDUAL OF HIGH INTEGRITY, who is diligent, accurate and very detail oriented to perform legal work as a legal assistant/paralegal in the Aviation Department. Applications must have significant job experience in a professional environment, working where accuracy and detailed performance was essential; previous legal experience is helpful, but not essential; experience with MS Office products, to include Outlook, Word and Excel; and skills with database software and other software applications. Duties and responsibilities include creating document and working with a database where documents are stored relating to the sale, purchase, financing, leasing and registration of aircraft. This is a salary position with bonus opportunities, and a benefit package that includes health, dental, retirement, paid time off, parking and other employee benefits. Under cover letter, please send resumes to HR@debeegilchrist.com.

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

POSITIONS AVAILABLE

EDMOND/OKC LAW FIRM SEEKS TITLE ATTORNEY. Experience with Oklahoma title and HBP title preferred. Please submit cover letter, resume and references to Bcato@dcslawfirm.com.

EDMOND FIRM SEEKING OIL AND GAS TITLE ATTORNEY. Prefer 3+ years' experience rendering Oklahoma title opinions. Pay commensurate with experience. Please send resume and example title opinion to edmondattorney@gmail.com.

THE U.S. ATTORNEY'S OFFICE FOR THE WESTERN DISTRICT OF OKLAHOMA is seeking applicants for one or more assistant U.S. attorney positions. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction), and have at least three years post-J.D. legal or other relevant experience. See vacancy announcement 18-OKW-10148775-A-01 at www.usajobs.gov (Exec Office for U.S. Attorneys). Applications must be submitted online. See "How to Apply" section of announcement for specific information. Questions may be directed to Denea Wylie, Human Resources Officer, via email at Denea.Wylie2@usdoj.gov. This announcement is open through 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. Turn-key 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.

FOR SALE: Desk glass top, two chairs, two credenzas one hutch, one glass top executive chair. Call/text 405-741-8715 or e-mail Lpartin@cox.net.

CLASSIFIED INFORMATION

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

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DO NOT STAPLE BLIND BOX APPLICATIONS.

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

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

Oklahoma Bar Center - Live Webcast Available

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

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

PROGRAM PLANNER:

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

Topics & Presenters:

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

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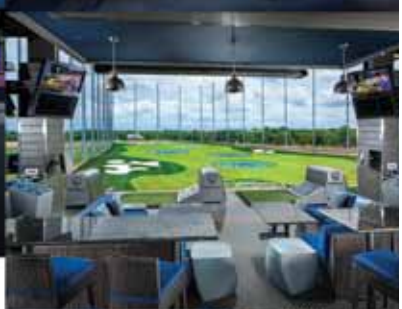

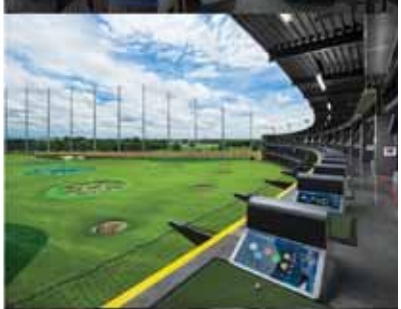

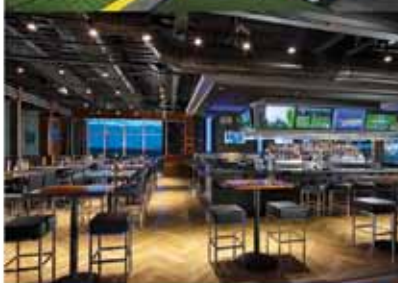

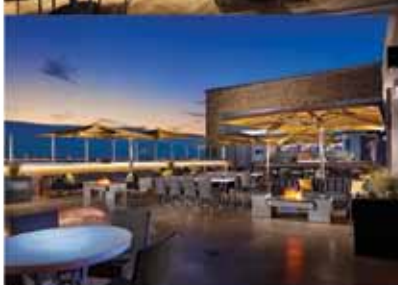

TOPGOLF ETHICS

with Travis Pickens

THURSDAY, MAY 3, 5:30 - 8:20 P.M. 2/2

TOPGOLF, 13313 Pawnee Dr., OKC

REGISTRATION INCLUDES

- 2 hours of ethics CLE
- 2 hours of unlimited TopGolf play
- **A LIFETIME TOPGOLF MEMBERSHIP**
- Game demonstration and dedicated event ambassador
- Fajita Fiesta Buffet:
  Steak and chicken fajitas with peppers, cilantro savory rice, chipotle braised black beans, chips & salsa, tortillas (gluten-friendly upon request), pico de gallo, cheese & sour cream, chocolate chip cookie bites.
- Bottomless Soda, Iced Tea, Coffee and Water
- Cash bar
- Discounts not available and **NO WALK-INS**

$125 for early-bird registrations with payment received by April 26th; $150 for registrations with payment received after April 26th and before May 3, 2018.

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