THE OKLAHOMA BAR
Journal
Volume 89 — No. 9 — 3/24/2018

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 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

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Postmaster Send address changes to the Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152-3036.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF WILLIAM PATRICK TUNELL JR., SCBD #6611 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Tuesday, April 17, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

OKLAHOMA BAR ASSOCIATION

table of contents

March 24, 2018 • Vol. 89 • No. 9

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Civil Appeals

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 pro-

fessional 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 20

RE: Suspension of Certificates of Certified Shorthand Reporters

SCAD-2018-17. March 12, 2018

ORDER

The Oklahoma Board of Examiners of Certified Shorthand Reporters has recommended to the Supreme Court of the State of Oklahoma the suspension of the certificate of each of the Oklahoma Certified Shorthand Court Reporters listed on the attached Exhibit for failure to comply with the continuing education requirements for calendar year 2017 and/or with the annual certificate renewal requirements for 2018.

Pursuant to 20 O.S., Chapter 20, App. 1, Rule 20(c), failure to satisfy the annual renewal requirements on or before February 15 shall result in administrative suspension on that date. Pursuant to 20 O.S., Chapter 20, App. 1, Rule 23(d), failure to satisfy the continuing education reporting requirements on or before February 15 shall result in administrative suspension on that date.

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

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 12th day of MARCH, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Exhibit

Name	CSR #	Reason
Lori Byrd	1981	Continuing Education & Renewal Fee
Tara Dale	1409	Continuing Education & Renewal Fee
Kristina Greene	1377	Continuing Education & Renewal Fee
Holly Hurley	1765	Continuing Education & Renewal Fee

2018 OK 21

FRANK BENEDETTI, Plaintiff/Petitioner, v. CIMAREX ENERGY COMPANY, a Foreign Corporation, Defendant/Respondent, CACTUS DRILLING COMPANY, LLC, a Domestic Limited Liability Company; ONSITE WELL SUPERVISION & LEASE MANAGEMENT, INC., a Foreign Corporation; and CLIFFORD BIRKETT, an Individual, Defendants.

Case No. 115,136. March 13, 2018

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II, ON APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY, STATE OF OKLAHOMA, HONORABLE GARY E. MILLER

¶0 Frank Benedetti was injured on the job at an oil-well site while working for Schlumberger Technology Corporation. Mr. Benedetti brought a negligence action in the District Court of Canadian County against the owner and operator of the well site, Cimarex Energy Company. Cimarex Energy Company moved to dismiss the case pursuant to 85 O.S. 2011 § 302(H), which provides that "any operator or

owner of an oil or gas well . . . shall be deemed to be an intermediate or principal employer" for purposes of extending immunity from civil liability. The district court granted the motion to dismiss, and Mr. Benedetti appealed. The Court of Civil Appeals affirmed. Pursuant to our decision in Strickland v. Stephens Production Co., 2018 OK 6, ___ P.3d ___, we conclude that § 302(H) of Title 85 is an impermissible and unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution. Subsection (H) shall be severed from the remainder of that provision.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S ORDER REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

Jacob W. Biby, Martin, Jean & Jackson, Tulsa, OK, for Plaintiff/Petitioner

Toby M. McKinstry, Tomlinson, Rust, McKinstry, Grable P.C., Oklahoma City, OK, for Defendant/Respondent

GURICH, V.C.J.

Facts & Procedural History

¶1 On December 9, 2013, Frank Benedetti, an employee of Schlumberger Technology Corporation, was working on an oil rig near El Reno, Oklahoma, when he slipped on an icy platform and fell more than thirty feet down a stairwell.[1] Mr. Benedetti filed an action in the District Court of Canadian County against Cimarex Energy Company, the owner and operator of the well site, and Cactus Drilling Company, the owner and operator of the oil rig, for negligence.[2]

¶2 Cimarex filed a motion to dismiss, arguing it should be dismissed pursuant to the exclusive remedy provision of the Oklahoma Workers' Compensation Code, 85 O.S. 2011 § 302(H), which provides in part that "[f]or the purpose of extending the immunity of this section, any operator or owner of an oil or gas well . . . shall be deemed to be an intermediate or principal employer . . . ." 85 O.S. 2011 § 302(H). Cimarex argued that as the operator of the well, it was Mr. Benedetti's principal employer and was statutorily immune from civil liability. Mr. Benedetti responded to Cimarex's motion to dismiss, arguing that § 302(H) was an unconstitutional special law under Art. 5, §§ 46 and 59 of the Oklahoma Constitution.

¶3 On March 25, 2016, the district court held a hearing on the motion to dismiss.[3] After argument from the parties, the court asked for supplemental briefing on the issue of whether § 302(H) was a special law. On June 1, 2016, the district court granted Cimarex's motion to dismiss and found that § 302(H) was not an unconstitutional special law. The district court certified the decision for immediate interlocutory review pursuant to 12 O.S. 2011 § 952(b)(3), and Mr. Benedetti filed a Petition for Certiorari to Review the Certified Interlocutory Order.

¶4 We treated the district court's certification as the functional equivalent of an "express determination that there [was] no just reason for delay" under 12 O.S. 2011 § 994(A) and allowed the cause to proceed as an accelerated appeal pursuant to Rule 1.36 of the Oklahoma Supreme Court Rules.[4] The appeal was assigned to the Court of Civil Appeals, Division II, which affirmed the district court's dismissal. Mr. Benedetti filed a Petition for Certiorari to review the January 23, 2017 opinion of the Court of Civil Appeals, and we granted certiorari on April 10, 2017.

Standard of Review

¶5 At issue in this case is the constitutionality of 85 O.S. 2011 § 302(H). "Issues of a statute's constitutional validity, construction, and application are questions of law subject to this Court's *de novo* review." Lee v. Bueno, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. In exercising *de novo* review, "this Court possesses plenary, independent, and non-deferential authority to examine the issues presented." Id., ¶ 6, 381 P.3d at 740. When determining the constitutionality of a statute, "courts are guided by well-established principles, and a heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality." Id., ¶ 7, 381 P.3d at 740. "The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution." Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr., 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

Analysis

¶6 Our decision in Strickland v. Stephens Production Co., 2018 OK 6, ¶ 8, ___ P.3d ___ disposes of Cimarex's arguments in this case.[5] Section 302(H) of Title 85 provides:

> For the purposes of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas *shall be deemed to be an intermediate or principal employer* for services performed at a drill site or location with respect to injured or deceased workers whose immediate employer was hired by such operator or owner at the time of such injury.[6]

This statute is identical to the last sentence of 85A O.S. Supp. 2013 § 5(A) with the exception of one minor difference.[7] In Strickland, we held that § 5(A) was an unconstitutional special law. For the reasons discussed in Strickland, we find 85 O.S. 2011 § 302(H) is an unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution, and it shall be severed from the remainder of § 302.

¶7 The district court did not address whether any other provision of the Workers' Compensation Code absolved Cimarex of liability for Mr. Benedetti's injuries. The district court dismissed Cimarex relying only on § 302(H). However, COCA found that Cimarex was Mr. Benedetti's principal employer under 85 O.S. 2011 § 314. Section 314 provides:

> In order for another employer on the same job as the injured or deceased worker to qualify as an intermediate or principal employer, the work performed by the immediate employer must be directly associated with the day to day activity carried on by such other employer's trade, industry, or business, or it must be the type of work that would customarily be done in such other employer's trade, industry, or business.[8]

The only evidence submitted to the district court by either party was the "Master Service Agreement" between Schlumberger and Cimarex, which was attached to Cimarex's motion to dismiss. COCA treated Cimarex's motion to dismiss as a motion for summary judgment solely because Cimarex attached the agreement to its motion to dismiss. However, neither the parties nor the district court treated the motion to dismiss as one for summary judgment.[9] Mr. Benedetti was not given the opportunity to conduct discovery, and the agreement between Schlumberger and Cimarex, without more, does not establish that Cimarex was Mr. Benedetti's principal employer under § 314.[10] On remand, the district court shall allow the parties to conduct discovery on the issue of whether Cimarex was Mr. Benedetti's principal employer at the time of Mr. Benedetti's injuries.[11]

Conclusion

¶8 We find that 85 O.S. 2011 § 302(H) is an unconstitutional special law in violation of Art. 5, § 59 of the Oklahoma Constitution. Subsection (H) shall be severed from the remainder of that provision. On remand, Cimarex is not precluded from rearguing exclusive remedy protections pending further discovery and submission of additional facts on the issue of whether Cimarex was Mr. Benedetti's principal employer at the time of his injuries.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S ORDER REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

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

¶10 Wyrick, J., not participating.

GURICH, V.C.J.

1. The record does not indicate whether Mr. Benedetti filed a workers' compensation claim, whether he has received any workers' compensation benefits, or whether his employer, Schlumberger Technology Corporation, paid any such benefits.

2. Mr. Benedetti filed an amended petition to add Defendants Onsite Well Supervision & Lease Management, Inc. (Onsite) and Clifford Birkett, an Onsite employee. Mr. Benedetti alleged that Cimarex, through its company man for this operation, Mr. Birkett, directed Cactus Drilling Company employees to spray pipes with steam to keep them from freezing, which caused the accumulation of ice on the nearby stairs. Mr. Benedetti alleged that Cimarex and Cactus Drilling created dangerous icy conditions, failed to warn of dangerous conditions, failed to properly manage drilling operations, and failed to hire, train, and supervise contractors on site.

3. Defendant Cactus Drilling did not file a motion to dismiss. Cactus Drilling, Defendant Clifford Birkett, and Defendant Onsite remain as parties to the action in district court, but are not parties to this appeal.

4. Section 994 allows a district court, when multiple parties are involved, to "direct the preparation and filing of a final judgment, decree, or final order as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay . . . ." 12 O.S. 2011 § 994(A).

5. Cimarex's only argument not directly addressed in Strickland is that "[s]ection 302(H) furthers the interests of the public good by channeling claims through the WCA system, thereby giving the injured employee faster access to funds and lowering the burden on backlogged state district courts." Record on Accelerated Appeal, Ex. 5 at 3. But again, as we discussed in Strickland, this is not a distinctive characteristic of the oil and gas industry providing a reasonable basis for the differential treatment of oil and gas operators in § 304(H).

6. 85 O.S. 2011 § 302(H) (emphasis added).

7. 85A O.S. Supp. 2013 § 5(A) ends with "at the time of the injury or death."

8. In Strickland, we stated that § 314 codified the necessary and integral test. Strickland, 2018 OK 6, ¶ 6, ___P.3d___ (citing 85 O.S. 2011 § 314). The necessary and integral test asks:

> [W]hether the work being performed by the independent contractor is specialized or non-specialized. If the work is specialized *per se*, then the hirer is not the statutory employer of the independent contractor. If the work is not specialized *per se*, the second tier asks whether the work being performed by the inde-

pendent contractor is the type of work that, *in the particular hirer's business*, normally gets done by employees or normally gets done by independent contractors. If the work normally gets done by independent contractors, then the hirer is not the statutory employer of the independent contractor. If the work is normally performed by employees, the third tier focuses on the moment in time the worker was injured, and asks whether the hirer was engaged in the type of work being performed by the independent contractor *at the time the worker was hurt*. If not, then the hirer is not the statutory employer of the independent contractor.

Hammock v. United States, 2003 OK 77, n.6, 78 P.3d 93, 97 n.6 (citing Bradley v. Clark, 1990 OK 73, 804 P.2d 425).

9. "The procedure converting a motion to dismiss into a motion for summary judgment when matters outside the pleadings are presented applies only to motions to dismiss for failure to state a claim upon which relief can be granted." Samson Res. v. Newfield Exploration Mid-Continent, Inc., 2012 OK 68, n.5, 281 P.3d 1278 1281, n.5. Cimarex's Motion to Dismiss sought dismissal for "lack[] [of] subject matter jurisdiction." Record on Accelerated Appeal, Ex. 2 at 2. Thus, COCA should not have converted the motion to dismiss to a motion for summary judgment. See Samson, 2012 OK 68, ¶ 9, 281 P.3d at 1281.

10. Record on Accelerated Appeal, Ex. 2 at Ex. 1.

11. Although Cimarex argues Mr. Benedetti waived his right to ask for additional discovery with regard to whether Cimarex was Mr. Benedetti's principal employer, upon review of the record, we conclude Mr. Benedetti preserved the issue at the district court and on appeal. Record on Accelerated Appeal, Ex. 11 at 6-7; Petition for Certiorari Certified Interlocutory Order Ex. B.

2018 OK 22

IN THE MATTER OF THE REINSTATEMENT OF JONNA LYNN REYNOLDS TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

SCBD No. 6505. March 12, 2018

ORDER

Petitioner Jonna Lynn Reynolds was stricken from the roll of attorneys and suspended from the practice of law on November 20, 2012. On May 5, 2017, Reynolds petitioned this Court for reinstatement. As required by Rule 11.3 of the Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A, a Professional Responsibility Tribunal held a hearing on Reynolds's application. The Oklahoma Bar Association supported Reynold's application for reinstatement, and the panel subsequently recommended that Reynolds be reinstated.

Upon de novo review of the record, we find:

1. Reynolds has complied with the procedural requirements necessary for reinstatement;
2. Reynolds has established by clear and convincing evidence that she has not engaged in the unauthorized practice of law in Oklahoma during her suspension;
3. Reynolds has established by clear and convincing evidence that she possesses the good moral character and fitness necessary for reinstatement to the Oklahoma Bar Association; and
4. Reynolds has established by clear and convincing evidence that she possesses the competency and learning in the law required for reinstatement without re-examination.

The petition of Jonna Lynn Reynolds for reinstatement to the Oklahoma Bar Association is therefore GRANTED, and her membership shall be reinstated upon her payment of the costs associated with these proceedings in the amount of $172.78.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 12TH DAY OF MARCH, 2018.

/s/ Noma D. Gurich
VICE CHIEF JUSTICE

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

Combs, C.J., dissents.

2018 OK 23

PERRY ODOM and CAROLYN ODOM, Plaintiffs-Appellants, v. PENSKE TRUCK LEASING CO., Defendant-Appellee, and HENDRICKSON USA, LLC, Defendant.

No. 116,554. March 13, 2018

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

¶0 The United States Court of Appeals for the Tenth Circuit certified to this Court a question of state law pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S. 2011 §§ 1601-1611.

CERTIFIED QUESTION ANSWERED

Daniel E. Bryan, III and Lane Claussen, Hornbeek, Vitali & Bruan, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

L. Earl Ogletree and Cameron Ross Capps, Wiggins, Sewell & Ogletree, Oklahoma City, Oklahoma, for Defendant-Appellee.

Solicitor General Mithun S. Mansinghani and Assistant Solicitor General Michael K. Velchik, Office of the Attorney General, Oklahoma City, Oklahoma, for the State of Oklahoma.

COMBS, C.J.:

¶1 The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) certified a

question of state law to this Court under the Revised Uniform Certification of Questions of Law Act, 20 O.S. 2011 §§ 1601-1611. The question certified is:

> Under the dual-capacity doctrine, an employer who is generally immune from tort liability may become liable to its employee as a third-party tortfeasor, if it occupies, in addition to its capacity as an employer, a second capacity that confers obligations independent of those imposed on it as an employer.
>
> What is the effect of Oklahoma's Administrative Workers' Compensation Act (AWCA), Okla. Stat. Ann. tit. 85A, § 1 et seq., on the dual-capacity doctrine? In particular, does the AWCA's exclusive-remedy provision bar an employee from bringing a tort suit against a stockholder of his employer, even if the tort liability would arise from duties independent of the employment relationship? In other words, does this provision abrogate the dual-capacity doctrine as to an employer's stockholder?

I.
CERTIFIED FACTS AND PROCEDURAL HISTORY

¶2 The underlying facts in this matter are set out in the certification order from the Tenth Circuit. In answering a certified question, the Court does not presume facts outside those offered by the certification order. *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 2017 OK 14, ¶2, 391 P.3d 111; *Howard v. Zimmer, Inc.*, 2013 OK 17, n.5, 299 P.3d 463; *In re Harris,* 2002 OK 35, ¶4 n.5, 49 P.3d 710. Although this Court will neither add nor delete such facts, we may consider uncontested facts supported by the rec-ord. *Siloam Springs Hotel, LLC*, 2017 OK 14 at ¶2; *Howard*, 2013 OK 17 at n.5; *McQueen, Rains, & Tresch, LLP v. CITGO Petroleum Corp.*, 2008 OK 66, n.4, 195 P.3d 35.

¶3 Plaintiff-Appellant Perry Odom was an employee of Penske Logistics, LLC. Penske Logistics, LLC is a wholly owned subsidiary of Defendant-Appellee Penske Truck Leasing Co. (PTLC). After a trailer owned by PTLC fell on Odom and injured him, he filed a claim against his employer, Penske Logistics, LLC, pursuant to the Administrative Workers' Compensation Act (AWCA), 85A O.S. §§ 1-125. However, Perry Odom and his wife Carolyn Odom (collectively, the Odoms) also filed a lawsuit against PTLC in federal district court, alleging PTLC's tortious negligence caused Perry Odom's injury.

¶4 PTLC moved to dismiss the Odoms' federal district court action. PTLC argued the exclusive remedy provision of the AWCA, 85A O.S. Supp. 2013 § 5, barred the Odoms from suing a stockholder of Perry Odom's employer in district court, even if the alleged tort liability arose from duties independent of the employment relationship. The federal district court found that PTLC was the sole stockholder of Penske Logistics, and that dismissal was warranted pursuant to 85A O.S. Supp. 2013 § 5.

¶5 The Odoms appealed the district court's ruling to the Tenth Circuit. After briefs were submitted, the court held oral argument on November 13, 2017. On November, 22, 2017, the court certified its question of law to this Court. In its certification order, the Tenth Circuit noted the application of 85A O.S. Supp. 2013 § 5 to suits by an injured employee against an employer's stockholder appears to be a first impression issue in Oklahoma.

¶6 The Tenth Circuit cited *Shadid v. K 9 Univ., LLC*, 2017 OK CIV APP 45, 402 P.3d 698, for the proposition that 85A O.S. Supp. 2013 § 5 abrogated the dual-capacity doctrine as to employers, but concluded potential application to stockholders remains ambiguous from the statutory language read in context with the interpretation of Arkansas' very similar provision. The Tenth Circuit concluded by noting the wide-ranging consequences for tort law should 85A O.S. Supp. 2013 § 5 be interpreted to bar all suits by an injured employee against any stockholder of the employer for independent acts, and indicated it did not wish to make such an interpretation given the ambiguity of the relevant provision.

II.
REQUIREMENTS FOR ANSWERING CERTIFIED QUESTIONS

¶7 This Court has the power to answer certified questions of law if the certified questions are presented in accordance with the provisions of the Revised Uniform Certification of Questions of Law Act, 20 O.S. 2011 §§ 1601-1611. *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 2017 OK 14, ¶14, 391 P.3d 111; *Gov. Emps. Ins. Co. v. Quine*, 2011 OK 88, ¶13, 264 P.3d 1245. This Court's discretionary power to answer is set out in 20 O.S. 2011 § 1602, which provides:

> The Supreme Court and the Court of Criminal Appeals may answer a question of law certified to it by a court of the United States, or by an appellate court of another state, or of a federally recognized Indian tribal government, or of Canada, a Canadian province or territory, Mexico, or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or statute of this state.

Accordingly, in assessing whether a certified federal question of law should be answered by this Court, both factors mentioned by 20 O.S. 2011 § 1602 should be addressed: 1) would the answer be dispositive of an issue in pending litigation in the certifying court; and 2) is there established and controlling law on the subject matter? *Siloam Springs Hotel, LLC*, 2017 OK 14 at ¶14; *Quine*, 2011 OK 88 at ¶13.[1] In this matter, it appears the question certified would be both dispositive to the underlying suit in the federal courts, and there is no controlling Oklahoma precedent on the subject matter given the recent adoption of the AWCA and changes made to the exclusive remedy provision.

¶8 This Court also possesses discretionary authority to reformulate the question(s) certified. *Siloam Springs Hotel, LLC*, 2017 OK 14 at ¶15; *McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp.*, 2008 OK 66, ¶1 n.1, 195 P.3d 35; *Tyler v. Shelter Mut. Ins. Co.*, 2008 OK 9, ¶1 n.1, 184 P.3d 496. This authority is set out in 20 O.S. 2011 § 1602.1, which provides: "[t]he Supreme Court of this state may reformulate a question of law certified to it." The certification order from the Tenth Circuit acknowledges this Court's power to reformulate the question certified as we see fit.

¶9 As we are constrained by those facts presented in the certification order, this Court's examination is confined to resolving questions of law. *Quine,* 2011 OK 88 at ¶14; *Russell v. Chase Inv. Servs. Corp.*, 2009 OK 22, ¶8, 212 P.3d 1178. The question presented to this Court by the Tenth Circuit concerns the interpretation and application of the AWCA, 85A O.S. §§ 1-125; specifically, the AWCA's exclusive remedy provision codified at 85A O.S. Supp. 2013 § 5. Statutory interpretation presents a question of law. *Corbeil v. Emricks Van & Storage, Guar. Ins.*, 2017 OK 71, ¶10, 404 P.3d 856; *Legarde-Bober v. Okla. State Univ.*, 2016 OK 78, ¶5, 378 P.3d 562; *Fulsom v. Fulsom*, 2003 OK 96, ¶2, 81 P.3d 652.

III.
ANALYSIS

¶10 At issue in this matter is the interpretation of 85A O.S. Supp. 2013 § 5(A), which provides:

> The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death. Negligent acts of a co-employee may not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have. For the purpose of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas shall be deemed to be an intermediate or principal employer for services performed at a drill site or location with respect to injured or deceased workers whose immediate employer was hired by such operator or owner at the time of the injury or death.

The Tenth Circuit wishes to know the effect of this provision on the dual-capacity doctrine, specifically with regard to stockholders of an employer.

1. The dual-capacity doctrine previously permitted suits by employees against employers if the employer occupied a second capacity that conferred upon them obligations independent of those imposed upon them as an employer.

¶11 In order to answer the question certified, it is helpful to discuss this Court's prior application of the dual-capacity doctrine under the now-repealed Oklahoma Workers' Compensa-

tion Act (OWCA). Recognizing that the OWCA did not prohibit an employee from maintaining a common-law action against a negligent third person, in *Weber v. Armco, Inc.* this Court explained the dual-capacity doctrine in the following manner: an employer who was generally immune from tort liability might become liable to their employee as a third-party tortfeasor; if they occupied, in addition to their capacity as an employer, a second capacity that conferred upon them obligations independent of those imposed upon them as an employer. 1983 OK 53, ¶5, 663 P.2d 1221.

¶12 In *Weber*, the Court explained the parameters of the dual-capacity doctrine in the context of products liability lawsuits, and that analysis is worth revisiting here:

> This concept of duality, which confers third-party status upon the employer, is more meaningful when viewed in terms of an employer having a dual persona. An employer may become a third person if he possesses a second persona so completely independent from and unrelated to his status as an employer, that by established standards, the law recognizes it as a separate legal person. The determinative issue is one of identity, not of activity or relationship. Duality may be created by statute, e.g., a one-man corporation [the corporation is a separate legal person because the statute so decrees]; or it may be recognized by long-established precedent in common-law or equity such as the status of a trustee or guardian. The term dual persona provides legal clarity because it focuses upon the identity of the employer and not upon activity or relationship. A single legal person may be said to have many capacities, as the term capacity has no fixed legal meaning. As a result, few courts have extended the dual-capacity doctrine far enough to destroy employer immunity when only a separate relationship or theory of liability existed.
>
> The majority of jurisdictions have refused to apply the dual-capacity doctrine under a products liability theory, when the employer manufactures, modifies, distributes or installs a product used in the employee's work. Application of the dual-capacity doctrine requires that the second persona of the employer be completely independent from his obligations as an employer. If the employer is also the manufacturer of the product which caused the employee's injury, the two personas of manufacturer and employer are interrelated. An employer has a duty to provide a safe workplace for his employees. If an employer provides an employee with a defective machine or tool to use in his work, he has breached his duty as a manufacturer to make safe machinery, and his duty as an employer to provide a safe working environment. Yet, the two duties are so inextricably wound that they cannot be logically separated into two distinct legal personas.

1983 OK 53 at ¶¶6-7 (footnotes omitted).

2. Title 85A O.S. Supp. 2013 § 5 abrogates the dual-capacity doctrine with regard to employers.

¶13 Prior decisions of this Court concerning the dual-capacity doctrine relied upon previous iterations of the exclusivity provisions of Oklahoma workers' compensation law that are markedly different from the current exclusivity provision of the AWCA at issue in this matter. *See Price v. Howard*, 2010 OK 26, 236 P.3d 82; *Dyke v. St. Francis Hosp., Inc.*, 1993 OK 114, 861 P.2d 295; *Deffenbaugh v. Hudson*, 1990 OK 37. *Compare* 85A O.S. Supp. 2013 § 5 *with* 85 O.S. 2011 § 302 (Repealed by Laws 2013, SB 1062, c. 208, § 171, eff. February 1, 2014); 85 O.S. Supp. 2010 § 12 (Repealed by Laws 2011, SB 878, c. 318, § 87, eff. August 26, 2011).

¶14 The plain language of 85A O.S. Supp. 2013 § 5 unambiguously abrogates the dual-capacity doctrine with regard to employers as defined in the AWCA. The Court of Civil Appeals recognized this change in *Shadid v. K 9 Univ., LLC,* 2017 OK CIV APP 45, 402 P.3d 698. The pertinent language of 85A O.S. Supp. 2013 § 5 states:

> No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

¶15 The question at issue in this cause that most concerns the Tenth Circuit, however, is different than the question considered by the Court of Civil Appeals in *Shadid*. The plaintiff in *Shadid* sued her *employer* in an attempt to

invoke the dual-capacity doctrine. In contrast, the Tenth Circuit's certification order in this matter establishes that PTLC was not Perry Odom's employer, but rather a stockholder of the employer. Perry Odom's employer, Penske Logistics, LLC, is in fact a wholly-owned subsidiary of PTLC.[2]

3. The language and effect of 85A O.S. Supp. 2013 § 5 on the dual-capacity doctrine with regard to stockholders is ambiguous.

¶16 The issue in this cause, then, is what effect 85A O.S. Supp. 2013 § 5 has on suits filed by an injured employee against a stockholder of their employer. It is this issue that raises the question of potential ambiguity in the language of 85A O.S. Supp. 2013 § 5(A).

¶17 The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent and purpose as expressed by the statutory language. *Am. Airlines, Inc. v. State, ex rel. Okla. Tax Comm'n*, 2014 OK 95, ¶33, 341 P.3d 56; *Ledbetter v. Howard*, 2012 OK 39, ¶12, 276 P.3d 1031; *Villines v. Szczepanski*, 2005 OK 63, ¶9, 122 P.3d 466. It is presumed that the Legislature has expressed its intent in a statute's language and that it intended what it so expressed. *McClure v. ConocoPhillips Co*., 2006 OK 42, ¶12, 142 P.3d 390; *Villines*, 2005 OK 63 at ¶9; *TXO Prod. Corp. v. Okla. Corp. Comm'n,* 1992 OK 39, ¶7, 829 P.2d 964.

¶18 Only where legislative intent cannot be ascertained from the language of a statute, as in cases of ambiguity, are rules of statutory interpretation employed. *Rouse v. Okla. Merit Prot. Comm'n,* 2015 OK 7, n.13, 345 P.3d 366; *Am. Airlines, Inc*., 2014 OK 95 at ¶33; *Villines,* 2005 OK 63 at ¶9. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. *American Airlines, Inc.*, 2014 OK 95 at ¶33; *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶6, 136 P.3d 656; *In re J.L.M.,* 2005 OK 15, ¶5, 109 P.3d 336. Where a statute is ambiguous, or its meaning uncertain, it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. *Am. Airlines, Inc.*, 2014 OK 95 at ¶33; *Wylie v. Chesser,* 2007 OK 81, ¶19, 173 P.3d 64; *TRW/Reda Pump v. Brewington,* 1992 OK 31, ¶5 , 829 P.2d 15. The legislative intent will be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. *American Airlines, Inc.*, 2014 OK 95 at ¶33; *Keating v. Edmondson,* 2001 OK 110, ¶8, 37 P.3d 882, 886; *State ex rel. Dept. of Human Servs. v. Colclazier*, 1997 OK 134, ¶9, 950 P.2d 824, 827.

¶19 Ambiguity arises in this instance when one considers the application of 85A O.S. Supp. 2013 § 5(A) to entities other than an employer, because the language of the statute is susceptible to more than one reasonable interpretation. The first sentence of 85A O.S. Supp. 2013 § 5(A) makes the AWCA the exclusive remedy for employees seeking to recover for injury against not just the employer, but other entities related to the employer, including stockholders. It provides:

> The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, **stockholder**, partner, or prime contractor of the employer on account of injury, illness, or death.

Title 85A O.S. Supp. 2013 § 5(A) (emphasis added).

The third sentence of 85A O.S. Supp. 2013 § 5(A) addresses the dual-capacity doctrine directly and is where ambiguity arises.[3] For purposes of analysis, the third sentence of 85A O.S. Supp. 2013 § 5(A) is best broken down into its two main clauses. The first portion of the sentence provides: "[n]o role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, ..." Title 85A O.S. Supp. 2013 § 5(A). The sentence then concludes with a second clause, which provides: "and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have." Title 85A O.S. Supp. 2013 § 5(A).

¶20 The Tenth Circuit noted the multiple potential interpretations of the relevant provisions of 85A O.S. Supp. 2013 § 5(A) in its certification order. On the one hand, the Tenth Circuit noted the inclusion of the term "stockholder" in multiple provisions of 85A O.S. Supp. 2013 § 5(A) suggests an attempt by the Legislature to broaden the exclusive remedy

provision's applicability to entities such as stockholders of the employer. Certification of Question of State Law, p. 5. On the other hand, the final clause of the third sentence of 85A O.S. Supp. 2013 § 5(A) seems to address the dual-capacity doctrine directly and yet omits any reference to stockholders. In fact, it seems to concern only the dual capacities of the employer: "and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas **the employer may be deemed to have**." Title 85A O.S. Supp. 2013 § 5(A) (emphasis added).

¶21 The Tenth Circuit reached the conclusion that the statute is ambiguous in this context. Further, the Tenth Circuit expressed concern through a hypothetical that certain interpretations of 85A O.S. Supp. 2013 § 5(A) could have wide-ranging consequences, especially if the provision serves to bar suits against stockholders of an employer even if the tort liability arises completely independent of the employment relationship.[4]

¶22 The Odoms assert that even though the terms "employer" and "employee" are defined in the AWCA,[5] "stockholder" is not. The Odoms also assert that the term "stockholder" is not found within the AWCA's definition of "employer." Therefore, the Odoms assert the language of 85A O.S. Supp. 2013 § 5(A) is indicative of legislative intent that specific relationships beyond those of "employer" and "employee" do not matter for purposes of the exclusive remedy provision.[6] Accordingly, the Odoms press this Court to adopt an interpretation of 85A O.S. Supp. 2013 § 5(A) where only those principals, officers, directors, or stockholders of an employer who are acting in their role, capacity, or persona as an employer, be shielded from third-party tort liability under the exclusive remedy provision. Or, as they put it "there is absolutely no legislative intent behind shielding a separate corporate entity from liability for its own **independent** conduct merely because it owns stock in an injured worker's employer." Appellant's Brief in Chief, p. 6.

¶23 The Odoms also argue that such an interpretation is consistent with the Court of Civil Appeals' holding in *Shadid*, because that cause involved a traditional dual-capacity case: an employer with multiple roles, capacities, or personas. PTLC, the Odoms argue, is not an employer with multiple roles but simply a stockholder, and therefore should be liable for its independent conduct.

¶24 The Odoms further agree with the Tenth Circuit's concerns that any other interpretation would produce potentially absurd results, where individuals who happen to own a single share of stock in an employer could escape liability for completely independent and unrelated torts committed against an employee.

¶25 PTLC, however, asserts 85A O.S. Supp. 2013 § 5(A) unambiguously expands the protections provided by the exclusive remedy provision in a broad fashion, and protects the entire set of categories – "employer, principal, officer, director, employee, or stockholder" – from suit regardless of any other capacity or role they may possess. In other words, PTLC asserts the intent of the Legislature was to abrogate the dual-capacity doctrine with respect to the same classes to which it was providing exclusive remedy protections.

¶30 However, PTLC urges this Court not to consider hypothetical outcomes posited by the Tenth Circuit and by the Odoms. Rather, PTLC essentially argues that application of 85A O.S. Supp. 2013 § 5(A) must still hinge, to some extent, upon the nature of the conduct and the relationship between the parties, and it is that relationship which allows 85A O.S. Supp. 2013 § 5(A) to shield PTLC from suit.

¶31 PTLC argues it is the sole stockholder and parent corporation of the employer, Penske Logistics, rather than some minority stockholder. PTLC argues it owns the trucks used by its subsidiary, the employer, and Perry Odom. Further, it argues the trucks were used in furtherance of the employment relationship and related directly to the business of the employer. "If not for the employment status, his employer would not have provided that equipment to Mr. Odom. Thus, the use of equipment provided by an employer is directly associated with the employment relationship unlike the dog bite hypothetical." Appellee's Brief, p. 15. Essentially, PTLC argues that its duties did not arise independently from the employment relationship, and 85A O.S. Supp. 2013 § 5(A) should therefore bar the Odoms' suit even if Section 5 did not fully and automatically bar all suits against the enumerated categories for employment-related injuries.

¶32 Both parties appear to recognize that in order to avoid the sweeping and potentially absurd results posited by the Tenth Circuit, there must be some relationship between a stockholder such as PTLC and the employment

of the injured employee in order for the exclusive remedy provisions of 85A O.S. Supp. 2013 § 5(A) to attach and bar suit.

¶33 Both parties and the Tenth Circuit also reference the Arkansas exclusive-remedy provision, noting the Arkansas administrative workers' compensation framework was a large influence on the drafting and adoption of the AWCA.[7] However, the Arkansas exclusive remedy provision is not identical to 85A O.S. Supp. 2013 § 5(A). It provides:

> The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner **acting in his or her capacity as an employer, or prime contractor of the employer,** on account of the injury or death, and the negligent acts of a coemployee shall not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

Ark. Code. Ann. § 11-9-105(a) (emphasis added).

The emphasized language in the Arkansas provision above is not present in 85A O.S. Supp. 2013 § 5(A), even though the Oklahoma provision does contain the later language of "other than that existing in the role of employer of the employee." This discrepancy is part of why the Tenth Circuit has asked this Court for guidance.

¶34 Arkansas court decisions interpreting that state's exclusive remedy provision imply some nexus between a shareholder and the employment relationship is necessary for the exclusive remedy provision to attach. *See Honysuckle v. Curtis H. Stout, Inc.*, 2010 Ark. 328, 368 S.W.3d 64, 69 (2010); *Stocks v. Affiliated Foods Sw., Inc*., 363 Ark. 235, 236-237, 213 S.W.3d 3, 4-5 (2005) (remanding for a determination on whether stockholder was acting in capacity of employer at the time of employee's injury, and hence whether workers' compensation was the exclusive remedy); *Zenith Ins. Co. v. VNE, Inc.*, 61 Ark. App. 165, 172, 965 S.W.2d 85, 808 (Ark. App. 1998) (holding employer was a persona of its sole owner and officer, because sole owner and officer was acting as owner, agent, and employee of employer at time of injury).

¶35 As the above discussion illustrates, 85A O.S. Supp. 2013 § 5(A) is subject to more than one reasonable interpretation and is therefore ambiguous. *See Am. Airlines, Inc*., 2014 OK 95 at ¶33; *YDF, Inc.*, 2006 OK 32 at ¶6; *In re J.L.M.*, 2005 OK 15 at ¶5. Because of this ambiguity, it must be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. *Am. Airlines, Inc.*, 2014 OK 95 at ¶33; *Wylie,* 2007 OK 81 at ¶19; *TRW/Reda Pump*, 1992 OK 31 at ¶5. This Court is also required to strictly construe the provisions of the AWCA in the event of ambiguity. Title 85A O.S. Supp. 2013 § 106; *Brown v. Claims Mgmt. Res., Inc*., 2017 OK 13, ¶21, 391 P.3d 111.[8] Further, we must interpret statutes in a manner which renders every word and sentence operative, not in a manner which renders a specific statutory provision nugatory. *Brown*, 2017 OK 13 at ¶22; *TWA v. McKinley,* 1988 OK 5, ¶9, 749 P.2d 108; *In re Supreme Court Adjudication of Initiative Petition in Tulsa, Concerning a One Cent Sales Tax Increase for Funding Additional Police Personnel and Comp*., 1979 OK 103, ¶ 7, 597 P.2d 1208.

4. The dual-capacity doctrine is not fully abrogated with regard to stockholders of an employer.

¶36 Close examination of the provisions of 85A O.S. Supp. 2013 § 5(A) indicates that even though the provision lacks the "acting in his or her capacity as an employer" language found in the Arkansas provision, the bar against filing suit against stockholders of an employer cannot be absolute. For one, it would lead to the potential absurd consequences that so concerned the Tenth Circuit in its certification order, and this Court is bound to find a construction that would avoid such absurdities. Further, such an interpretation does not make sense in the context of the rest of the provision referencing the dual-capacity doctrine, which provides:

> No role, capacity, or persona of any employer, principal, officer, director, employee, or

> stockholder **other than that existing in the role of employer of the employee** shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the **employer** may be deemed to have.

Title 85A O.S. Supp. 2013 § 5(A) (emphasis added).

Statutes must be read to render every part operative, and to avoid rendering it superfluous or useless. *Bryant v. Comm'r of the Dep.t of Pub. Safety, State of Okla.*, 1996 OK 134, ¶11, 937 P.2d 496; *Medina v. State*, 1993 OK 121, ¶8 n.10, 871 P.2d 1379.

¶37 Recent decisions of this Court have stressed that the workers' compensation system is a mutual compromise between employers and employees, and that exclusivity was at the heart of the grand bargain between employers and employees. *See Vasquez v. Dillard's, Inc.*, 2016 OK 89, ¶26, 381 P.3d 768; *Evans & Assocs. Util. Services v. Espinosa*, 2011 OK 81, ¶14, 264 P.3d 1190. In that context, abrogation of the dual-capacity doctrine with respect to employers is in keeping with this compromise because what matters for the purposes of exclusivity is the employment relationship and not any other role the employer may have. *See* 85A O.S. Supp. 2013 § 5(A). But an interpretation that extends the protections of the exclusivity provision absolutely to potentially legally distinct non-employer entities such as stockholders, regardless of how passive their connection to the employment relationship is, goes far beyond that original purpose and conflicts with later portions of 85A O.S. Supp. 2013 § 5(A).

¶38 The language of the statute implies an inversion of the traditional dual-capacity doctrine set out in *Weber.* Under that rule, an employer could become a third person if the employer possessed a second persona so completely independent from and unrelated to the status of an employer, that by established standards the law recognized it as a separate legal person. *Weber,* 1983 OK 53, ¶6. What mattered, we explained, was not activity or relationship, but identity. *Weber,* 1983 OK 53, ¶6.

¶39 The role of employer to employee is the only role, capacity, or persona of the stockholder that matters for purposes of the AWCA. A stockholder may lose its status as a legal third person and fall under the exclusive remedy protections of 85A O.S. Supp. 2013 § 5(A) if the stockholder possesses a persona that is **not** independent from that of the employer. More simply stated, is the stockholder acting in the role of employer, rather than being a mere passive stockholder? Whether this test is satisfied must be determined on a case-by-case basis. Making that determination in this matter involves facts and analysis beyond the scope of the question of law certified to us by the Tenth Circuit. *See Quine*, 2011 OK 88 at ¶14; *Russell v. Chase Inv. Services. Corp.*, 2009 OK 22, ¶8, 212 P.3d 1178.

5. The Odoms' constitutional claims are outside the scope of the question certified.

¶40 The Odoms also assert constitutional claims, arguing that an affirmative answer to the Tenth Circuit's certified question would render 85A O.S. Supp. 2013 § 5(A) unconstitutional as a special law in violation of Okla. Const. art. 5, § 46, and would violate the due process requirements of Okla. Const. art. 2, § 7 and the access to the courts provisions of Okla. Const. art. 2, § 6. PTLC, however, asserts that the Odoms' constitutional claims are beyond the scope of the question certified by the Tenth Circuit, and further, were not timely raised in the underlying federal litigation and therefore should not be considered by this Court.

¶41 PTLC also raises the procedural requirements of Fed. R. Civ. P. 5.1[9] and asserts the Odoms failed to comply with the requirements of the rule, and failed to in any way question the constitutionality of 85A O.S. Supp. 2013 § 5(A) prior to the federal district court's initial dismissal of PTLC, raising it only on a motion to reconsider. Regardless, it does not appear from the record before this Court that the constitutionality of 85A O.S. Supp. 2013 § 5(A) was considered or ruled upon by the federal courts prior to the Tenth Circuit's certification order.

¶42 In general, the questions certified define the scope of this Court's decision when answering certified questions of law. *See Avemco Ins. Co. v. White*¸ 1992 OK 147, ¶¶5-6, 841 P.2d 588; *Fairview State Bank v. Edwards*, 1987 OK 53, n.1, 739 P.2d 994; *Ladd Petroleum Corp. v. Okla. Tax. Comm'n,* 1980 OK 159, n.4, 619 P.2d 602. Further, Rule 1.10(f) of the Oklahoma Supreme Court Rules provides that briefs are to be strictly limited to the question certified. 12 O.S. Supp. 2013, ch. 15, app. 1. Perhaps most importantly, this Court refrains from applying rules of federal procedure, such as Fed. R. Civ. P. 5.1, on the issues, facts, and proof in causes under-

lying certified federal questions, and further, refrains from consideration of constitutional issues not embraced in or inextricably intertwined with the certified question. In *City of Tahlequah v. Lake Region Elec., Co-op, Inc.*, we explained:

> Because the appeal from which the certified question emanates is not before us for resolution, **we refrain (1) from applying the declared *state-law* response to the facts elicited in the federal-court litigation and (2) from passing upon the effect of federal procedure on the issues, facts and proof in the case.** We have briefly outlined the case's factual underpinnings to place the certified question in a proper perspective. It is for the United States Tenth Circuit Court of Appeals to analyze our answer's impact on the case and facts ultimately before it. Lastly, we note that City raises constitutional questions (based upon the Legislature's alleged repeal of an act and its effect upon vested rights and proceedings instituted to enforce the same) which are neither embraced in nor inextricably intertwined with the U.S. Court of Appeals for the Tenth Circuit's certified question. **To the extent that issues (constitutional or otherwise) are raised in the parties' briefs which are beyond the certified question's scope, the Court refrains from addressing the same.**

2002 OK 2, ¶5, 47 P.3d 467 (emphasis added).

¶43 Finally, the Odoms' own arguments concerning the constitutionality of 85A O.S. Supp. 2013 § 5(A) hinge upon a particular answer to the certified question before us. Because this Court does not answer the certified question strictly in the affirmative, the Odoms' constitutional issues are not implicated, by their own admission. For all of the above reasons, the Court declines to exceed the bounds of the question certified by the Tenth Circuit and consider the constitutionality of 85A O.S. Supp. 2013 § 5(A) in this instance.

IV.
CONCLUSION

¶44 In answer to the question of law certified to this Court by the Tenth Circuit, the AWCA abrogated the dual-capacity doctrine with regards to employers. Title 85A O.S. Supp. 2013 § 5(A) does not bar an employee from bringing a cause of action in tort against a stockholder of their employer for independent tortious acts when the stockholder is not acting in the role of employer.

CERTIFIED QUESTION ANSWERED

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER,

EDMONDSON, COLBERT, and WYRICK, JJ.

DISSENT: REIF, J. (by separate writing)

Reif, J., dissenting:

¶1 The United States Court of Appeals for the 10th Circuit has presented this Court with a certified question of unsettled Oklahoma law, as provided in 20 O.S.2011, §§ 1601 - 1611. The 10th Circuit has a pending appeal that involves a controversy over the exclusive remedy/immunity provisions in section 5 of Oklahoma's Administrative Workers' Compensation Act, 85A O.S. Supp. 2016, § 1 et seq. The appeal arose from a tort suit brought by Perry and Carolyn Odom against Penske Truck Leasing Co., the parent company of Mr. Odom's direct employer Penske Logistics, LLC. The Odoms seek to recover for injuries Mr. Odom sustained while working for Penske Logistics and for which workers' compensation benefits were paid. The United States District Court for the Western District of Oklahoma dismissed this suit because (1) Penske Truck Leasing is the sole stockholder in Penske Logistics and (2) the first sentence in section 5(A) extends exclusive remedy/immunity protection to a "stockholder" of an employer who is subject to the Workers' Compensation Act.

¶2 The Odoms appealed this dismissal, contending that the exclusive remedy protection in the first sentence in section 5(A) is qualified by the third sentence in this section. The Odoms basically argue that the third sentence limits immunity to instances where the stockholder has acted in "the role of employer." The Odoms assert Penske Truck Leasing did not fulfill this role in regard to Mr. Odom's employment. The task for this Court is to determine Legislative intent concerning exceptions to the exclusive remedy/immunity protection provided by workers' compensation.

¶3 From the inception of workers' compensation in Oklahoma, the rule that workers' compensation provides the exclusive remedy for job-related injuries has been founded on statute. Laws 1915, ch. 246, art. 2, § 2. This first statute contained a single exception for cases where the employer had failed to secure the

payment of compensation. In such cases, an action in court to recover damages was allowed, but this claim was to be prosecuted by the State Industrial Commission on behalf of the employee. An amendment in 1919 kept most of the language in the first statute, but specified the action for damages was to be brought by the injured employee or his representative, not the Commission. Laws 1919, ch. 14, § 5.

¶4 An amendment in 1951 added language that declared workers' compensation was not only exclusive, but also "in place of all other liability of the employer . . . at common law or otherwise." 85 O.S.1951, § 12. This amendment also extended protection to "any . . . employees," and made exclusivity binding on the an employee's "spouse, personal representative, parents, dependents, or any other person." *Id.* Like prior versions, there was a single exception for cases where the employer failed to secure compensation. *Id.* This amendment clearly expanded the scope of exclusive remedy protection as a substitute for liability "at common law or otherwise."

¶5 In 1982, the Legislature again amended the statute making workers' compensation the exclusive remedy for job-related injuries. 85 O.S. Supp. 1982, § 12. This amendment referred to the exclusive remedy rule as "immunity" for the first time. *Id*. The amendment also specially addressed the liability of other employers and their employees on the same job as the injured worker. The amendment stated that immunity would not extend to such other employers and their employees unless the other employer stood "in the position of an intermediate or principal employer," including the situation of special master to a loaned servant. *Id.* In this amendment, the Legislature demonstrated that it would specifically and clearly address any employment relationships it intended to be excepted from the exclusive remedy/immunity protection of workers' compensation.

¶6 In 1984, a special rule of immunity was added. Architects, professional engineers and land surveyors were extended immunity for "services performed at or on the site of a construction project . . . but not [for] negligent preparation of design plans and specifications." 85 O.S. Supp. 1984, § 12. Again, the Legislature clearly and specifically addressed the scope of the exclusive remedy/immunity rule and an exception therefrom.

¶7 The statutory language addressing the exclusive remedy rule and immunity provided by workers' compensation was again amended in 2011. 85 O.S.2011, § 302. The most noticeable change made by this amendment is the division of the statute into subsections (A) - (I). The second most noticeable change is the addition in subsection (A) of a second exception to the exclusive remedy/immunity rule. This new exception applies in cases of an intentional tort committed by an employer, as more fully explained in subsection (B). The third change made by the legislature was to specially provide in subsection (H) that operators and owners of oil and gas wells and other drilling operations would be treated as "immediate employers" entitled to immunity.[1] Once again, the Legislature has clearly and specifically addressed employment relationships covered by the exclusive remedy/immunity rule and an exception to the rule.

¶8 The current statutory law governing the exclusive remedy and immunity protection of workers' compensation is 85A O.S. Supp. 2016, § 5. This statute has preserved for the administrative system nearly all of the legislative enactments on this subject since the inception of workers' compensation. The first sentence in subsection 5(A) continues the long standing rule that "the rights and remedies granted to an employee subject to . . . *Workers' Compensation . . . shall be exclusive of all other rights and remedies . . . .*" *Id*. (emphasis added). In addition, the first sentence preserves the long standing application of this rule to employers and their employees.

¶9 The first sentence in subsection 5(A) also does something new, however, by extending the exclusive remedy/immunity protection to "any" principal, officer, director, stockholder, partner, or prime contractor of the employer. These are the common agents, along with employees, through whom artificial entity employers act.

¶10 Although a new provision, the second sentence of section 5(A) reinforces exclusivity and immunity. The second sentence prohibits imputing the negligent act of a co-employee to the employer.

¶11 A more difficult challenge is presented by the third sentence in section 5(A). The first clause in the third sentence cryptically declares that "No role, capacity, or persona of any employer, principal, officer, director, employee,

or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration of the purposes of this act . . . ." *Id.* To be sure, the relationship of this declaration to existing law is not as readily apparent as in the case of the first sentence.

¶12 While lacking a counterpart in prior statutory law, this declaration does address and eliminate the case law exception to exclusive remedy/immunity recognized in *Weber v. Armco, Inc.*, 1983 OK 53, ¶10, 663 P.2d 1221, 1226-7. This case said workers' compensation would not be the exclusive remedy where "the employer . . . step[s] outside the boundaries of the employer-employee relationship [and] creat[es] separate and distinct duties to the employee . . . ." *Id.*; 663 P.2d at 1227. Legislative intent to nullify this "outside role or persona" exception is found in the further declaration in the second clause: "the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have." 85A O.S. Supp. 2016, §5.

¶13 Perhaps the best reason to reject the Odoms' interpretation of the cryptic first clause in sentence three is that it results in an exception to the exclusive remedy/immunity rule that the Legislature did not clearly and explicitly provide. The Legislature considered and addressed the subject of exceptions in section 5(B). In doing so, the Legislature provided only two exceptions; one in cases where the employer fails to secure the payment of compensation and the other in cases of injuries caused by the intentional torts of the employer. The failure to secure compensation exception has existed since the inception of workers' compensation. The intentional tort exception with special conditions has been the subject of legislation since 2011.

¶14 Moreover, in section 5(H), the Legislature also provided a special exception in cases of architects, professional engineers, and land surveyors. These parties are shielded by the exclusive remedy/immunity rule "for services performed at or on the site of a construction project, but . . . not [for] the negligent preparation of design plans and specifications." *Id*.

¶15 If the Legislature intended to limit or qualify the right of principals, officers, directors, employees, stockholders, partners and prime contractors to claim exclusive remedy/immunity, it would have expressly done so as it did in sections 5(B) and 5(H), and has consistently done in the past. Instead, the Legislature extended the protection to "any" principal, officer, director, employee, stockholder, or prime contractor of the employer. The use of the word "any" within a statute is equivalent and has the force of "every" and "all." *State ex rel Porter v. Ferrell,* 1998 OK 41, ¶9, 959 P.2d 576, 578. These terms reflect intent that the subject matter which they modify have "broad and expansive reach." *Prescott v. Oklahoma Capitol Preservation Commission*, 2015 OK 54, ¶4, 373 P.3d 1032, 1033.

¶16 Finally, the statutory command that the Administrative Workers' Compensation Act is to be strictly construed weighs against recognizing exceptions not clearly stated by the Legislature. 85A O.S.2011, § 1. A strict construction of subsection 5(A) would be as follows: (1) "The rights and remedies granted to an employee subject to the Administrative Workers' Compensation Act shall be *exclusive of all other rights and remedies* . . . against the employer . . . on account of injury, illness, or death." 85 O.S. Supp. 2016, § 85 (emphasis added); (2) this exclusivity applies "regardless of the multiple roles, capacities, or personas the employer may be deemed to have," because the only "relevant role" for purposes of the Act is "the role of employer;" and (3) an employer who has liability under the Act for an injury, illness or death is protected from civil suit by the exclusive remedy/immunity provisions along with the employer's principals, officers, directors, employees, stockholders, partners, and prime contractors, unless one the specific exceptions to exclusivity applies. This is the general sense of the subsection 5(A) when read in its entirety.

¶17 In the case at hand, Penske Truck Leasing established (1) Mr. Odom worked for Penske Logistics at the time of his job-related injury, (2) Penske Logistics paid workers' compensation benefits to Mr. Odom, and (3) Penske Truck Leasing is a stockholder in Penske Logistics. By virtue of the express language in subsection 5(A), workers' compensation is Mr. Odom's exclusive remedy and Penske Truck Leasing, as a stockholder of Penske Logistics, is immune from civil suit to recover "other rights and remedies." Subsection 5(A) imposes no other burden or condition on Penske Truck Leasing to establish and to enforce its immunity. This is the answer I would give to 10th Circuit's certified question.

COMBS, C.J.:

1. As this Court noted in *Siloam Springs Hotel, LLC v. Century Sur. Co.*, we have routinely declined to answer certified questions of law for a host of reasons:

> "We have elected to decline to answer questions certified in a number of causes. Scottsdale Ins. Co. v. Tolliver, 2005 OK 93, 127 P.3d 611 [Declined to answer certified question where controlling Oklahoma precedent existed on the issue certified.]; Hammock v. United States, 2003 OK 77, 78 P.3d 93 [Declined to answer one of two certified questions because of lack of legal relationship necessary to determine the issue.]; Bituminous Casualty Corp. v. Cowen Constr. Co., 2002 OK 34, 55 P.3d 1030, 106 A.L.R.5th 713 [Declined to answer one of two questions certified where response to one question disposed of the case.]; Cray v. Deloitte Haskins & Sells, 1996 OK 102, 925 P.2d 60 [Declined to answer certified question since federal judge made final determination on issue of duty such that Supreme Court was without judicial authority to either affirm or reverse that judgment.]"

2017 OK 14, ¶14 n.1, 391 P.3d 111 (quoting *Ball v. Wilshire Ins. Co.*, 2007 OK 80, ¶4 n. 8, 184 P.3d 463).

2. Perry Odom has separately pursued remedies against his employer, Penske Logistics, LLC, before the Oklahoma Workers' Compensation Commission. Certification of Question of State Law, p.3.

3. The meaning and application of the second sentence of 85A O.S. Supp. 2013 § 5(A), which provides "[n]egligent acts of a co-employee may not be imputed to the employer" is not an issue in this matter. The last sentence of 85A O.S. Supp. 2013 § 5(A) makes owners and operators of oil and gas wells principal employers for purposes of extending immunity from civil liability. This provision was recently determined to be an unconstitutional special law by this Court in *Strickland v. Stephens Prod. Co.*, 2018 OK 6, – P.3d – . The offending provision was severed from the remainder of 85A O.S. Supp. 2013 § 5(A).

4. The Tenth Circuit's certification order provides:

> The interpretation of the provision can have wide-ranging consequences. Consider the following example. Jones works for National Cable, a publicly traded company, as a service installer. Jones goes to Smith's home to set up his cable service. As part of a diversified portfolio, Smith happens to hold several shares of National Cable stock. Unfortunately for Jones, Smith has a pit bull Smith knows to be violent. While Jones is installing the cable, Smith's pit bull gets loose from a kennel that Smith has negligently closed. The pit bull attacks and injures Jones. If the AWCA bars suit against stockholders of an employer even if the tort liability arises from duties independent of the employment relationship, then Jones cannot sue Smith for what would otherwise be obviously tortious conduct.

Certification of Question of State Law, pp. 5-6

5. The definitions are found at 85A O.S. Supp. 2013 § 2(18)(a) and (19), and provide:

> 18. a. "Employee" means any person, including a minor, in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government on having been convicted of a criminal offense or while incarcerated. "Employee" shall also include a member of the Oklahoma National Guard while in the performance of duties only while in response to state orders and any authorized voluntary or uncompensated worker, rendering services as a firefighter, peace officer or emergency management worker. Travel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment.
>
> ...
>
> 19. "Employer" means a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term "employee" as defined in this section. Employer may also mean the employer's workers' compensation insurance carrier, if applicable. Except as provided otherwise, this act applies to all public and private entities and institutions. Employer shall not include a qualified employer with an employee benefit plan as provided under the Oklahoma Employee Injury Benefit Act in Sections 107 through 120 of this act;

6. In support of this argument, the Odoms cite to the following language in Section 5:

> **No role, capacity, or persona** of any employer, principal, officer, director, employee, or stockholder **other than that existing in the role of employer of the employee** shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

85A O.S. Supp. 2014 § 5(A) (emphasis added).

7. Generally, where one state has adopted the uniform laws or statutes from another state, at the time of such adoption, decisions from the latter state are persuasive in the former state's construction of such laws. *Price v. Sw. Bell Telephone Co.*, 1991 OK 50, ¶11, 812 P.2d 1355.

8. As this Court has previously noted:

> [T]he rule of strict construction, as applied to statutes, does not mean that words shall be so restricted as not to have their full meaning, but merely means that everything shall be excluded from the operation of the statutes so construed which does not clearly come within the meaning of the language used.

Am. Airlines, Inc. v. State ex rel. Okla. Tax Comm'n, 2014 OK 95, ¶ 31, 341 P.3d 56 (quoting *Colcord v. Granzow*, 1928 OK 211, ¶ 18, 278 P. 654).

9. Fed. R. Civ. P. 5.1 provides:

> (a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:
> (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:
> (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or
> (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and
> (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned – or on the state attorney general if a state statute is questioned – either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.
> (b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.
> (c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.
> (d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Reif, J., dissenting:

1. This provision was carried over to section 5, but was subsequently found to be unconstitutional in *Strickland v. Stephens Production Company,* 2018 OK 6, __ P.3d __..

2018 OK 24

OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, S. KIM HATFIELD, and LUKE ESSMAN, Petitioners, v. RAY H. POTTS, MICHAEL O. THOMPSON, and MARY LYNN PEACHER, Respondents.

No. 116,679. March 19, 2018

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795

¶0 This is an original proceeding to determine the legal sufficiency of Initiative Petition

No. 416, State Question No. 795. The petition seeks to amend the Oklahoma Constitution by adopting Article XIII-C, a new Article. The proposed Article XIII-C would primarily serve to increase funding for public education through an increase in the gross production tax. The opponent petitioners allege the petition is unconstitutional because it creates a retroactive tax in violation of U.S. Const. amend. V. and because it violates the one general subject rule of Okla. Const. art. 24, § 1. Upon review, we hold that the petition is legally sufficient.

INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

Robert G. McCampbell, Adam C. Doverspike, and Jake M. Krattiger, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

Anthony J. Ferate, Edmond, Oklahoma, for Petitioner Oklahoma Independent Petroleum Association.

Joel L. Wohlgemuth, Ryan A. Ray, Alix R. Newman, Norman Wohlgemuth Chandler Jeter Barnett & Ray, P.C., Tulsa, Oklahoma, for Respondents.

COMBS, C.J.

¶1 On December 20, 2017, Respondents Michael O. Thompson, Ray H. Potts, and Mary Lynn Peacher (collectively, Proponents) filed Initiative Petition No. 416, State Question No. 795 (IP 416) with the Oklahoma Secretary of State. IP 416 would create a new Article XIII-C in the Oklahoma Constitution. IP 416 contains 8 sections, which Proponents assert will levy a new 5% gross production tax on oil and gas production from certain wells, and provide for the deposit of the proceeds primarily in a new fund entitled the "Oklahoma Quality Instruction Fund" (the Fund). Monies from the Fund will be distributed: 1) 90% to common school districts of the State of Oklahoma to increase compensation and benefits for certified personnel, and the hiring, recruitment and retention thereof; and 2) 10% to the State Department of Education to promote school readiness, and to support compensation for instructors and other instructional expenses in "high-quality early learning centers" for at-risk children prior to entry into the common education system.

¶2 Section 1 of IP 416 creates the Fund. Section 2 creates the Oklahoma Quality Instruction Reserve Fund to ensure the Fund always has sufficient resources, and provides mechanisms for the transfer of monies. Section 3 levies a 5% tax on the gross value of the production of oil, gas, or oil and gas from all oil and gas wells spudded after July 1, 2015, during the first thirty-six months of production, commencing with the month of first production, from and after the effective date of the article. Section 4 provides for a $4,000 increase in compensation for certified personnel, including teachers, but excluding superintendents and assistant superintendents. Section 5 provides for the distribution of funds according to the percentage scheme noted in the previous paragraph above. Section 6 attempts to ensure that the new funds will be used to supplement existing funding rather than supplant it, and grants the Board of Equalization the power to specify the amount that was supplanted or replaced, preventing the Legislature from making appropriations until it makes an appropriation to replace the supplanted amount. Sections 7 and 8 provide an effective date and severability provision, respectively.

¶3 On January 10, 2018, Petitioners Oklahoma Independent Petroleum Association, S. Kim Hatfield, and Luke Essman (collectively, Protestants), timely filed an Application to Assume Original Jurisdiction in this Court protesting the sufficiency of IP 416 and the basis that it fails to pass constitutional muster.

I.
STANDARD OF REVIEW

¶4 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 403,* 2016 OK 1 at ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729,* 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1.

¶5 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48 at ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶6 This Court has generally refused to declare a ballot initiative invalid in advance of a vote of the people except where there is a clear or manifest showing of unconstitutionality. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3; *In re Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶7, 870 P.2d 782. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> "Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts."**

In re Initiative Petition No. 403, 2016 OK 1 at ¶3 (quoting In re Initiative Petition No. 382, 2006 OK 45 at ¶3).

Accordingly, Opponents in this matter bear the burden of demonstrating the proposed initiative petition is clearly and manifestly unconstitutional. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

II.
ANALYSIS

¶7 Opponents in this matter allege IP 416 is insufficient and must not be submitted to the voters as it stands because it is unconstitutional. Opponents challenge the constitutionality of IP 416 on two grounds: 1) Section 3 of IP 416 creates a retroactive tax in violation of U.S. Const. amend. V; and 2) IP 416 violates the single-subject requirements of Okla. Const. art. 24, § 1.

A. The new article proposed by IP 416 does not create a retroactive tax in violation of U.S. Const. amend. V.

¶8 Opponents assert that IP 416 is unconstitutional because, due to a potential drafting error, the new proposed article creates a retroactive tax in violation of U.S. Const. amend. V.[1] The alleged issue is the language of section 3, which provides in pertinent part:

> There is hereby levied a Gross Production Tax of five percent (5%) on the gross value of the production of oil, gas or oil and gas from all oil and gas wells spudded after July 1, 2015, during the first thirty-six (36) months of production, commencing with the month of first production, **from and after the effective date of this Article XIII**. (Emphasis added).

¶9 Opponents allege that because the last sentence of the above-quoted portion of IP 416 specifies "this Article XIII" and not "this Article XIII-C," the tax provision is effective from the effective date of Article XIII and not the new Article XIII-C, creating a retroactive tax because Article XIII has been in effect in various forms for decades. Under Opponents' interpretation, the new Article would levy a new five percent tax on the gross value of the production of oil, gas, or oil and gas from all oil and gas wells spudded after July 1, 2015, for the first thirty-six months of production, applicable all the way back to July 1, 2015, itself.[2]

¶10 Because of this problem, Opponents argue IP 416 will levy a retroactive tax in violation of U.S. Const. amend. V, as interpreted by the Supreme Court of the United States. In *U.S. v. Carlton*, 512 U.S. 26, 30-31, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994), the Court stated that any retroactive tax legislation must: 1) be supported by a legitimate legislative purpose furthered by rational means; and 2) the period of retroactivity must be modest, lest it run afoul of U.S. Const. amend. V. The *Carlton* Court upheld as constitutional a piece of retroactive tax legislation that it viewed as curative, and therefore reasonable, with a moderate period of retroactivity:

> We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unan-

> ticipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable.

512 U.S. at 32.[3]

¶11 Opponents admit that the reference to Article XIII rather than Article XIII-C may be a typographical error, but argue this Court lacks the authority to redraft a petition in the same way it is allowed to redraft a ballot title per 34 O.S. Supp. 2015 § 10.[4] Opponents argue the only remedy is to declare IP 416 insufficient and allow the proponents of the petition to withdraw it and refile pursuant to 34 O.S. Supp. 2015 8(E).[5]

¶12 However, this Court need not determine if the tax levied by IP 416 satisfies the requirements of *Carlton*, because an interpretation of IP 416 is possible that prevents any retroactive application of the tax provision. Further, such an interpretation is possible without this Court redrafting any part of the petition.

¶13 Proponents argue that there was no drafting error and the only reasonable interpretation of the language of Section three is that the effective date is that of the new article, Article XIII-C. Proponents focus on specific language: "from and after the effective date of **this** Article XIII." They argue use of the term "this" necessarily is self-referencing, and thus as drafted the tax must begin from the effective date of *this* Article XIII, which is Article XIII-C. Such an interpretation removes any retroactivity problem: per Section 7, the effective date of Article XIII-C will be the January 1 following the article's passage or the first day of the calendar month which is at least sixty days after the article's passage, whichever is sooner.

¶14 Under Proponents interpretation, should the article be adopted, on the effective date in Section 7, the tax will begin to be levied on the production from all oil and gas wells spudded after July 1, 2015, for however much of their first thirty-six (36) months of production still remains after the effective date. Given how Section 3 of IP 416 is worded, this is not the only possible interpretation of the language in question. However, it is the interpretation that avoids any potential retroactive application of the tax in question that might invalidate the provision on constitutional grounds. Because the right of the initiative is so precious, **all doubt** as to the construction of pertinent provisions is resolved in favor of the initiative. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3; *In re Initiative Petition No. 382*, 2006 OK 45 at ¶3.

¶15 The above rule is consistent with how this Court has long-handled constitutional challenges in other areas such as statutes, and indeed, is perhaps more forgiving due to the precious nature of the people's right to initiative. In *Calvey v. Daxon*, this Court explained of constitutional challenges to legislation:

> If there are two possible interpretations — one of which would hold the legislation unconstitutional, the construction must be applied which renders them constitutional. Unless a law is shown to be fraught with constitutional infirmities beyond a reasonable doubt, this Court is "bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision."

2000 OK 17, ¶24, 997 P.2d 164 (quoting *In Re: Okla. Capitol Improv.*, 1998 OK 25, ¶8, 958 P.2d 759) (footnotes omitted).

The ambiguous meaning of the pertinent provision of Section 3 is resolved in favor of an interpretation that does not create a retroactive tax in violation of U.S. Const. amend. V.

B. The new article proposed by IP 416 does not violate the single-subject requirements of Okla. Const. art. 24, § 1.

¶16 Petitioners also assert IP 416 is legally insufficient because the proposed article violates the single-subject requirements of Okla. Const. art. 24, § 1.[6] Proposed amendments to the Oklahoma Constitution, even when made by article, must still embrace a single general subject. *See In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶¶1-2, 367 P.3d 472; *In re Initiative Petition No. 342, State Question No. 628*, 1990 OK 76, ¶¶1-4 797 P.2d 331; *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶¶2-5, 797 P.2d 326. This Court applies a germaneness test to initiative petitions that seek to amend the Oklahoma Constitution by article, in order to determine

whether they embrace a single general subject. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶5; *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶15, 927 P.2d 558.[7] In *In re In re Initiative Petition No. 363*, the Court described the test in the following manner:

> [W]hen the proposed *constitutional amendment is by a new article* the test for gauging multiplicity of subjects is whether the changes proposed are *all germane* to a singular common subject and purpose or are essentially unrelated one to another.
>
> When testing a proposed constitutional amendment for its components' germaneness, we look to whether each of its several facets bears a common concern or impacts one general object or subject.

1996 OK 122, ¶¶15-16, 927 P.2d 558.

¶17 Fairly recently, this Court applied the germaneness test to a substantially similar initiative petition to IP 416, and determined that the initiative petition in question did not violate the single-subject requirements of Okla. Const. art. 24, § 1. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶2. The proposal at issue in that cause would have funded a constitutionally-set teacher pay raise via a new sales tax, as opposed to a new gross production tax. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶11. The proposed Article XIII-C at issue in that cause would also have distributed the funds to more sources and for more educational funding purposes:

> In the case before us, the proposed Article 13-C consists of seven sections. Section 1 creates the Oklahoma Education Improvement Fund. Section 2 levies an additional 1% sales and use tax with "[a]ll revenue from the sales tax and the use tax levied" being used to fund the Oklahoma Education Improvement Fund created by Section 1. Section 3 directs the percentage distribution of the monies in the Fund for certain educational purposes including, common education (69.5%), higher education (19.25%), career and technology education (3.25%), and early childhood education (8%). Section 4 provides for a $5,000 increase in teacher salaries to be funded with 86.33% of the common education distribution under Section 3. Section 5 directs that funds "expended or distributed from the Oklahoma Education Improvement Fund shall supplement, and shall not be used to supplant or replace, other state funds" supporting education. Section 5 also directs the State Board of Equalization to "examine and investigate appropriations from the Fund each year," and if it finds that education funding was supplanted by monies from the Fund, the State Board of Equalization must "specify the amount by which education funding was supplanted." If education funding was supplanted by monies from the Fund, Section 5 directs that "the Legislature shall not make any appropriations for the ensuing fiscal year until an appropriation in that amount is made to replenish the Oklahoma Education Improvement Fund." Section 6 provides the effective date of the proposed amendment, and Section 7 provides a severability clause.

In re Initiative Petition No. 403, 2016 OK 1 at ¶11 (footnotes omitted).

The similarities between the two proposals are readily apparent from the above description.

¶18 Opponents assert IP 416 is distinguishable from Initiative Petition No. 403, described above, and make several arguments as to why IP 416 violates the single-subject requirements of Okla. Const. art. 24, § 1. Opponents argue IP 416: 1) creates an unprecedented constitutionally-mandated pay raise for one profession; 2) reverses a 2014 legislative compromise that the oil and natural gas industry relied upon in drilling wells; 3) applies a retroactive tax to wells drilled in reliance upon that compromise; 4) targets for taxation an industry that the Legislature has historically set taxes on itself; 5) targets only one industry that is particularly important to Oklahoma's economy; 6) levies a tax within the Oklahoma Constitution itself; and 7) improperly rearranges the separation of powers by vesting new authority over legislative appropriations in the Board of Equalization.

¶19 Opponents stress the unique nature of the changes proposed by IP 416 as the reason it embraces more than one general subject. For example, Opponents stress it creates a new constitutional pay raise for all certified education personnel, written into the Oklahoma Constitution, which has never been done before. Opponents do not appear to argue that the Constitution cannot contain such a provision, but that the unique nature of the changes in and of itself gives rise to a single subject that must be considered on its own.

¶20 Opponents also take issue with the gross production tax imposed by IP 416 that will fund the increased pay for all certified personnel. Opponents argue that the effect of IP 416 is to undo recent legislation passed in 2014 that altered the gross production tax, and negatively affects those who relied on what they describe as a "legislative compromise." They also assert the new tax is effectively retroactive because it applies to production on wells drilled after July 1, 2015. As discussed in Part II.A, *supra*, the tax in question is not in fact retroactive, as it will not be applied to production prior to the effective date of the new Article XIII-C. However, Opponents still argue the tax will be applied to some production on wells drilled based on the assumption of a lower gross production tax, and this momentous shift justifies the new gross production tax being treated as a separate subject. Similarly, Opponents stress the constitutional nature of the tax and its targeting of one specific industry that is very important to Oklahoma as other reasons for why the new gross production tax constitutes a single subject that voters should consider on its own.

¶21 What Opponents present to this Court, however, are at their root policy arguments concerning IP 416. Arguments concerning whether the changes to be written into the Oklahoma Constitution by IP 416 are advisable are best made to Oklahoma voters, not to this Court. Under a single-subject analysis of a new proposed amendment by article, this Court looks to the proposed changes to determine if they are all germane to a singular common subject and purpose or are essentially unrelated one to another, not to whether they are novel or ill-advised. *See In re In re Initiative Petition No. 363,* 1996 OK 122 at ¶15.

¶22 This Court's recent decision in *In re Initiative Petition No. 403*, 2016 OK 1 at ¶12, is highly instructive. This Court explained of that initiative petition:

> The subject of the proposed amendment is the Oklahoma Education Improvement Fund. Each section of the proposed amendment is "'reasonably interrelated and interdependent, forming an interlocking "package"'" [sic] deemed necessary by the initiatives' drafters to assure effective public education improvement funding. Proponents drafted the petition with each component being necessary to the accomplishment of one general design. The proposal stands or falls as a whole. For example, if a voter agrees that the Oklahoma Education Improvement Fund should be created but does not agree that an additional one cent sales tax is the appropriate funding mechanism to do so, then the voter must choose whether to approve the proposal based on such considerations. If, on the other hand, a voter agrees that an additional one cent sales tax is the appropriate funding mechanism to fund the Oklahoma Education Improvement Fund, but does not agree with the percentage distribution of the monies as set forth in Section 3, then again, the voter must choose whether to approve the proposal based on such considerations. Such choices are the consequence of the voting process rather than any constitutional defect in the proposal. The proposed initiative petition clearly constitutes a single scheme to be presented to voters, and each section is germane to creating and implementing the Oklahoma Education Improvement Fund.

In re Initiative Petition No. 403, 2016 OK 1 at ¶12 (footnotes omitted).

Much like the proposal in *In re Initiative Petition No. 403,* each section of the new proposed article in IP 416 is reasonably interrelated and interdependent, forming an interlocking package to achieve the goal of improving public education funding. Here, rather than the "Oklahoma Education Improvement Fund," we have the "Oklahoma Quality Instruction Fund." The type of tax levied is different, and the fund distribution is not identical (it is less complex and varied, in fact). However, the logic by which this Court determined each section of Initiative Petition No. 403 to be germane to creating and implementing its fund applies equally here. Each component was deemed by the drafters necessary to accomplish one general design, to improve funding for public education. Hard choices, such as determining whether the new gross production tax amount is the appropriate funding mechanism for the proposed increases in education funding, are the consequence of the voting process. They are not a constitutional defect.

¶23 Opponents' arguments concerning the powers granted to the Board of Equalization by the proposed new article are unpersuasive for similar reasons. Opponents discuss the hypothetical effects the powers granted to the Board of Equalization might have on the entire state

budgeting process, asserting that when there is a budget shortfall, "education funding" would be required to be held constant resulting in a situation where "millions of dollars of additional cuts will have to be suffered by other agencies." Brief In Support of Application and Petition to Assume Original Jurisdiction and Review the Constitutionality of Initiative Petition No. 416, p.12. They also assert these powers are novel and would negatively affect the balance of separation of powers in Oklahoma.

¶24 These arguments, however, are almost identical to those made by the petitioners in *In re Initiative Petition No. 403* and rejected by this Court. Concerning the speculative nature of the effect on the appropriations process, we noted:

> [A]ny suggestion ... that the implementation of the Education Improvement Fund would negatively affect the legislative appropriations process or usurp legislative fiscal policy-making is entirely speculative at this point. We decline, at the pre-election stage, to declare the proposal unconstitutional on nothing more than speculation.

In re Initiative Petition No. 403, 2016 OK 1 at ¶17 (footnotes omitted).

Further, Opponents' arguments in this cause ignore the fact that the Board of Equalization already possesses much of the same power proposed by IP 416, pursuant to Okla. Const. art. 10, § 41 and other statutory provisions.

¶25 This Court described those powers in some detail in *In re Initiative Petition No. 403.* For purposes of comparison, that explanation is worth restating at length here:

> In the case before us, opponents argue the proposal is misleading because voters will "think they are voting for teacher pay raises, when in fact, they are voting to significantly change our state's fiscal structure to give the Board of Equalization control over their local Representative and Senators deciding on education appropriations." This argument ignores the powers already conferred to the State Board of Equalization in the Oklahoma Constitution. Article 10, § 21 of the Oklahoma Constitution provides that the duty of the State Board of Equalization "shall be to adjust and equalize the valuation of real and personal property of the several counties in the state, ***and it shall perform such other duties as may be prescribed by law*** . . . ." Okla. Const. Art. 10, § 21(A) (emphasis added). In Art. 10, § 23, entitled "Balanced Budget," Section 23(1) states that "prior to the convening of each regular session of the Legislature, the State Board of Equalization shall certify the total amount of revenue which accrued during the last preceding fiscal year to the General Revenue Fund and to each Special Revenue Fund appropriated directly by the Legislature, and shall further certify amounts available for appropriation . . . of the revenues to be received by the state under the laws in effect at the time such determination is made, for the next ensuing fiscal year . . . ." Article 10, § 23(2) goes on to provide that "[t]he Legislature shall not pass or enact any bill, act or measure making an appropriation of money for any purpose until such certification is made and filed. . . ." All appropriations made in excess of such certification shall be "null and void" unless the Legislature follows certain specific procedures to adjust the certification amount.
>
> In Art. 10, § 41, entitled the Oklahoma Education Lottery Trust Fund, the State Board of Equalization acts "to ensure that the funds from the trust fund are used to enhance and not supplant funding for education," and "examine[s] and investigate[s] appropriations from the trust fund each year." Art. 10, § 41(D). The State Board of Equalization "shall issue a finding and report which shall state whether appropriations from the trust fund were used to enhance or supplant education funding. If the State Board of Equalization finds that education funding was supplanted by funds from the trust fund, the Board shall specify the amount by which education funding was supplanted. In this event, the Legislature shall not make any appropriations for the ensuing fiscal year until an appropriation in that amount is made to replenish the trust fund." Id.
>
> In Section 1521 of Title 69, which creates the Rebuilding Oklahoma Access and Driver Safety Fund, the State Board of Equalization also acts to "ensure that the funds from the ROADS Fund are used to enhance and not supplant state funding for the Department of Transportation," and "the State Board of Equalization shall examine and investigate expenditures from the fund each year." 69 O.S. Supp. 2013 § 1521(E). If the State Board

of Equalization finds that funds were used to supplant state funding for the Department of Transportation, the Board "shall specify the amount by which such funding was supplanted," and in this event, "the Legislature shall not make any appropriations for the ensuing fiscal year until an appropriation in that amount is made to replenish state funding for the Department of Transportation."

The State Board of Equalization already examines the General Revenue Fund and each Special Revenue Fund and certifies to the Legislature the amounts available for appropriation in the upcoming fiscal year. The State Board of Equalization audits the Lottery Education Fund in the same way it would audit the Education Improvement Fund. The Lottery Education Fund was proposed and passed by the people in 2004.

In re Initiative Petition No. 403, 2016 OK 1 at ¶¶14-17 (footnotes omitted).

¶26 Opponents fail to demonstrate that the changes proposed by IP 416 are not all germane to a singular common subject and purpose. IP 416, much like Initiative Petition No. 403 on which it is obviously modeled, does not constitute logrolling and constitutes a single scheme to be presented to the voters of the State of Oklahoma.

III.
CONCLUSION

¶27 After fully considering Opponents' two constitutional challenges, this Court concludes that the new article proposed by IP 416 does not create a retroactive tax in violation of U.S. Const. amend. V and does not violate the single-subject requirements of Okla. Const. art. 24, § 1. It is the determination of this Court that IP 416 is legally sufficient for submission to the people of Oklahoma. Any petition for rehearing in this matter shall be filed no later than five (5) days from the date this opinion is handed down.

INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER (by separate writing), WINCHESTER, EDMONDSON, and REIF, JJ.

CONCUR SPECIALLY: WYRICK, J. (by separate writing)

RECUSED: COLBERT, J.

KAUGER, J., with whom WINCHESTER, J., joins in concurring:

¶1 I concur by reason of stare decisis based on this Court's decision in In Re Initiative Petition No. 403 State Question No., 779, 2016 OK 1, 367 P.3d 472.

Wyrick, J., concurring specially:

¶1 Given our very recent decision in *In re Initiative Petition No. 403*, 2016 OK 1, 367 P.3d 472, where we rejected similar challenges to a similar initiative petition, I agree that Initiative Petition No. 416 must be allowed to proceed to the signature-collection stage. Were we to hold otherwise, our decision would appear driven by our views on the policies embodied in the initiative petition, rather than on the petition's legal sufficiency under our governing precedents.

¶2 I write separately to explain that Initiative Petition No. 416 should be allowed to proceed to the signature stage based also on the text and original meaning of our Constitution, neither of which empower the Court to issue the requested relief.

I.

¶3 In Oklahoma, all governmental powers are derived from the People.[1] When the People of Oklahoma came together to form their state government, they vested the new government with certain powers, but specifically reserved others, most notably their power to make law directly, rather than through their elected representatives. Oklahoma's Constitution was, in fact, the first state constitution to include a citizen-initiative provision when first adopted, and "[i]n many ways . . . represents the high-water mark of the populist movement in the United States."[2]

¶4 For example, Oklahoma's Bill of Rights begins with the recognition that "[a]ll political power is inherent in the People; and government is instituted for their protection, security, and benefit, and to promote their general welfare."[3] And given that the government is by the People, for the People, "they have the right to alter or reform the same whenever the public good may require it."[4] The first section of Article V, establishing a legislature, likewise emphasizes and reiterates that while "[t]he Legis-

lative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives[,] . . . *the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature*, and also reserve power at their own option to approve or reject at the polls any act of the Legislature."[5] Article V, Section 2 meanwhile dictates that "fifteen per centum of the legal voters shall have *the right* to propose amendments to the Constitution by petition," and emphasizes (again) that "[t]he first power reserved by the people is the initiative."[6] Indeed, when reading our Constitution in whole, it is striking how vociferous the People were with regard to their power to make law directly. By my count, the Constitution contains *twenty-three* provisions that specifically mention the People's initiative power.[7]

¶5 Importantly, the initiative power is not one granted by the Constitution, but rather one possessed by the People and predating their charter of a government. Thus, the Constitution does not define what initiative power the People possess, but rather what limitations, if any, the People opted to place on their inherent power. Thus, any legislative or judicial act that impairs the ability of the People to make law by initiative petition must be explicitly authorized by the People in their Constitution.

II.

¶6 In recent decades this Court has claimed both (1) the power to prevent the circulation of an initiative petition whose statement of the gist doesn't meet substantive standards invented by the Court,[8] and (2) the power to opine more broadly on the constitutionality of not-yet-enacted measures,[9] including whether they meet Article XXIV, Section 1's "one general subject requirement." Neither is authorized by the Constitution.

A.

¶7 The Constitution says nothing about a gist; it merely requires that "every [initiative] petition shall include the full text of the measure so proposed."[10] The notion of a gist comes from statute, where the Legislature has required that in addition to the full text of the measure, each initiative petition contain a "simple statement of the gist of the proposition" that is "printed on the top margin of each signature sheet."[11] That's it. Neither the Constitution nor statute imposes any substantive requirements on this "statement," other than that it must be "simple." Crafting a statement of the gist is thus an inherently subjective exercise, requiring judgment calls as to what stays and what gets cut in order to boil down a lengthy proposition (in this case, three-and-a-half pages) into a simple statement of "the pith of the matter"[12] capable of fitting in the "top margin" of a signature page.

¶8 Despite the People and the Legislature's decision to impose no specific requirements on the contents of the "statement of the gist," this Court has made law on the subject, mandating that the statements of the gist be "free from the taint of misleading terms or deceitful language,"[13] that they "put [the signatories] on notice of the changes being made," and that they adequately "explain the proposal's effect"[14] – not "*every* regulatory detail" or "theoretical effect," of course, but only the "practical" ones.[15] And lest we forget, "[t]he explanation of the effect on existing law . . . does not extend to describing policy arguments for or against the proposal"[16] – which could either mean that gists failing to describe policy arguments for or against the proposal *will* be upheld, or that gists describing such policy arguments will *not* be upheld (I, for one, can't tell which it is). Those trying to comply with these requirements must surely be scratching their heads trying to decide if they've said too much, not enough, or just enough.

¶9 When amorphous standards like these are applied, the results are predictably inconsistent. We have criticized a single gist statement for simultaneously containing both "too much and not enough information,"[17] and we have invalidated a gist for failing to mention that grocery stores had to be located more than 2,500 feet from the nearest licensee in order to be eligible for the newly proposed liquor license[18] – precisely the sort of regulatory detail that one might expect to be omitted from the summary of a proposal. The result of this confusion is that, intentionally or not, we have created a "gist" jurisprudence that involves the Court in unnecessary parsing of inherently subjective matters, which opens it up to criticism that its invalidations are driven by policy concerns rather than by the text of any law.

¶10 Moreover, these judge-made standards are unnecessary. Unlike the ballot title, the gist is not part of the final enactment stage, but rather the preliminary, signature-gathering stage. And unlike the ballot title, which is the

only thing a voter has before them in the voting booth, the statement of the gist must be accompanied by the full text of the petition itself,[19] meaning that every person contemplating signing the petition has the opportunity to read the full text of the proposed law before signing. If there is any question about the effect of the law or the details of its enactment, or just plain confusion regarding the gist statement, the solicited signatory need only flip the page in order to clarify. It then makes perfect sense that the Legislature has imposed strict requirements on ballots titles, but has declined to do so with the gist, requiring nothing more of a gist statement than that it be short and simple enough to fit in the upper margin of a single page. Given that the Legislature made that decision, this Court has no business imposing substantive requirements that have no basis in the text of any statute or constitutional provision.

B.

¶11 The Constitution says the judicial power of this State is vested in part in this Court,[20] but the power conferred is specific and limited. "It is within the power of the courts to determine what the law is, after it has been enacted . . . but the courts are without power to say what law shall or shall not be enacted."[21] That is the nature of judicial power, and what distinguishes it from the power to legislate.[22] Likewise, the Constitution allows us to exercise our power to state what the law is only in the context of a justiciable case.[23] As this Court has said before:

> The powers of the courts are exercised when questions arise in causes brought before them in the ordinary course of litigation, in passing upon the substantial rights of parties thereto; and then only are they called upon to decide whether a law has been legally enacted, or whether any change in the Constitution has been legally effected.[24]

Not surprisingly then, it was the rule in this State from the time of statehood until this Court's 1975 decision in *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma,* 1975 OK 36, 534 P.2d 3, that this Court would *not* entertain pre-enactment challenges to the constitutionality of initiative petitions.[25] We have since abandoned these defining characteristics of the American judiciary[26] in favor of an unusual practice of pre-enactment review of a proposed measure's constitutionality.[27] In my view, this practice not only exceeds the limits placed on our power as judges under the Constitution, but also invades the legislative power of the People – the power to say "what law shall or shall not be enacted."

¶12 There are both legal and prudential reasons to abandon our practice. First, we lack the power to judge the constitutionality of a measure before it actually becomes the law. If our job is to "say what the law is," and in a constitutional challenge thus to say whether the Constitution prohibits another law from having an effect on these parties, then we cannot do that without first having a law. Otherwise, all we are doing is advising that we would draft the proposal differently or not at all – i.e., saying what the law *ought to be,* not what it *is*.

¶13 A pre-enactment challenge also necessarily lacks a plaintiff with the requisite injury-in-fact. Whether a controversy is "justiciable," determines whether we have a "case" over which the Constitution gives us the power to adjudicate.[28] A fundamental component of a justiciable controversy is that the plaintiff have an actual or imminent injury.[29] The challengers here can demonstrate neither, as the proposed amendment has not been enacted (meaning it cannot have actually injured them), nor has it even been placed on the ballot (meaning any potential injury is purely speculative – dependent on a fickle political process that may or may not result in its placement on the ballot and enactment).

¶14 As a matter of prudence, we have also always adhered to the practice of declining to opine on questions of constitutionality unless absolutely necessary.[30] This canon of constitutional avoidance represents the judiciary's long-standing recognition of the need to defer to the constitutional judgments of our co-equal branches. That is why we recognize that until we have an actual case or controversy presenting the constitutional issue in a manner that cannot be avoided, it is the Legislature's duty to make the law in accordance with the Constitution, and the Executive's duty to "cause the laws of the State,"[31] including the Constitution, to be faithfully executed. We should not abandon these principles when it is the People who are contemplating a measure, rather than the Legislature.[32] The People are, after all, the parent of this government, not its child, and it is "the function of the citizen to keep the Government from falling into error,"[33] not the other way around.

¶15 Moreover, the Court's description of the enactment of a measure that will later be deemed contrary to federal law as an "ultimately meaningless act[] in an elaborate charade,"[34] represents a fundamental misapprehension of the nature of the People's sovereign power. The People have the right to articulate the policy of their state, and while that policy may well yield to federal policy through operation of the Supremacy Clause, that doesn't render the articulation of state policy a "meaningless act."

¶16 First, there is play in the joints between things required by federal law and things barred by state law. For example, if the federal courts said that the federal Constitution granted a right to a physician-assisted suicide, the People of Oklahoma would be perfectly within their rights to enact a constitutional provision announcing a state policy against the practice if the People wanted to ensure that state actors take no action to further such suicides. In other words, Oklahoma might have to *allow* the suicides, but it doesn't have to *facilitate* them, at least not under well-accepted anti-commandeering principles.[35] The Oklahoma constitutional provision, despite being preempted in one respect, would nonetheless have the effect of preventing the Legislature and other state officials from taking affirmative actions to further federal policy. Given that federal law recognizes the states' right to decline to implement federal policies with which they disagree, I am baffled as to why this Court has adopted a jurisprudence of bending the knee to federal power when no federal law requires such an abdication of state sovereignty.

¶17 Second, allowing the People to amend their Constitution to articulate a policy that may currently be preempted by federal policy allows the People to anticipate and be prepared for changes in federal policy by having a state law that will immediately spring into full effect upon the change. The People need not wait for a United States Supreme Court decision and then spend many months or years getting a new state constitutional provision in place. If the political will exists *now* to announce a state policy on a particular subject, the People should be allowed to do so, even if subsequent federal action is needed to fully animate it.

¶18 Third, depriving the People of their right to amend their constitution impairs their ability to shape the development of federal law. United States Supreme Court decisions on certain constitutional issues often turn on surveys of the prevailing national trends, whereby the Court examines the states' policies, as articulated in their constitutions and statutes, to determine the prevailing attitudes on the topic.[36] The People of this state have a right to participate in that process by enacting laws that, while presently pre-empted, might serve to convince the federal courts to change federal law. That is why we say that "[s]tate sovereignty is not just an end in itself," but rather exists for the protection of individuals by ensuring the counterbalancing exercise of power by *both* federal and state government.[37] I would hope, for example, that after a misguided and tragic decision like that rendered by the United States Supreme Court in 1857's *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the People of this State could amend their Constitution to announce that it was the policy of *this* state that slavery was illegal and that no person could ever be considered another's property and deprived of their citizenship within our borders. Under our Court's jurisprudence, because such a measure would have been contrary to the then-prevailing interpretation of the federal Constitution, the People of Oklahoma would have been forbidden from casting their votes in favor of such a law. That shouldn't be the case.

¶19 The People's ability to express their views through constitutional amendment thus *matters*, even when those views don't align with federal policies. The People are either sovereign, or they are not. If we believe – as I do – that they are, we should rethink these precedents to re-establish the high-water mark of populist power that our founders envisioned.

* * *

¶20 For these reasons, I concur in the majority's conclusion that there are no legal barriers to Initiative Petition No. 416's circulation. I would prefer to resolve the case, however, based on the text and original understanding of our Constitution, rather than on this Court's overreaching initiative-petition jurisprudence.

COMBS, C.J.

1. U.S. Const. amend. V provides:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. As Proponents note, Article XIII has been changed many times over past decades, making it difficult to pin down a single "effective date" for the Article. Regardless, such a date would be prior to July 1, 2015.

3. Opponents cite cases from other jurisdictions to support their arguments that wholly new, rather than curative, legislation that is retroactive is not passed for a legitimate legislative purpose, *see NetJets Aviation, Inc. v. Guillory,* 207 Cal. App. 4th 26, 57-58 (2012), and a period of retroactivity of 2 to 3 years is not modest, *see Rivers v. State*, 490 S.E.2d 261, 278-79 (S.C. 1997).

4. Title 34 O.S. Supp. 2015 § 10 provides:

> A. Any person who is dissatisfied with the wording of a ballot title may, within ten (10) business days after the same is published by the Secretary of State as provided for in subsection I of Section 8 of this title, appeal to the Supreme Court by petition in which shall be offered a substitute ballot title for the one from which the appeal is taken. Upon the hearing of such appeal, the court may correct or amend the ballot title before the court, or accept the substitute suggested, or may draft a new one which will conform to the provisions of Section 9 of this title.
>
> B. No such appeal shall be allowed as to the ballot title of constitutional and legislative enactments proposed by the Legislature.

5. Title 34 O.S. Supp. 2015 § 8(E) provides:

> E. Signature – gathering Deadline for Initiative Petitions. When an initiative petition has been filed in the office of the Secretary of State and all appeals, protests and rehearings have been resolved or the period for such has expired, the Secretary of State shall set the date for circulation of signatures for the petition to begin but in no event shall the date be less than fifteen (15) days nor more than thirty (30) days from the date when all appeals, protests and rehearings have been resolved or have expired. Notification shall be sent to the proponents specifying the date on which circulation of the petition shall begin and that the signatures are due within ninety (90) days of the date set. Each elector shall sign his or her legally registered name, address or post office box, and the name of the county of residence. Any petition not filed in accordance with this provision shall not be considered. The proponents of an initiative petition, any time before the final submission of signatures, may withdraw the initiative petition upon written notification to the Secretary of State.

6. Okla. Const. art. 24, § 1 provides:

> Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of all the members elected to each of the two (2) houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, at the next regular general election, except when the Legislature, by a two-thirds (2/3) vote of each house, shall order a special election for that purpose. If a majority of all the electors voting on any proposed amendment at such election shall vote in favor thereof, it shall thereby become a part of this Constitution.
>
> No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition.

7. Petitioners in another cause challenging the constitutionality of IP 416 assert this Court should abandon the germaneness test we most recently applied in *In re Initiative Petition No. 403*. For reasons set out in *Oklahoma Oil & Gas Association v. Michael O. Thompson*, 2018 OK 26, – - P.3d – –, we decline to do so.

Wyrick, J., concurring specially:

1. Okla. Const. art. II, § 1.

2. John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. Rev. 227, 231 (1998) (citing Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 Temp L. Rev. 1203, 1207 & n.23 (1996)).

3. Okla. Const. art. II, § 1.

4. *Id.* The only caveat given was one required by the federal Constitution's Guarantee Clause, which guarantees that all states will maintain a republican form of government (i.e., government that is democratically accountable to the citizenry), a rejection of the monarchical rule of our country's colonial past. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every state in this union a republican form of government . . . ."); *see also* Oklahoma Enabling Act, Pub. L. No. 59-234, ch. 3335, § 3, 34 Stat. 267, 269 (1906) (requiring that Oklahoma's "constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."). Oklahoma's Constitution accordingly requires that alterations to our form of state government "be not repugnant to the Constitution of the United States." Okla. Const. art. II, § 1.

5. Okla. Const. art. V, § 1 (emphasis added).

6. *Id.* § 2 (emphasis added).

7. *Id.* art. II, § 1 (discussing the People's "right to alter or reform the [government] whenever the public good may require it"); *id.* § 9A (stating that state statutes relating to the death penalty "are in full force and effect, subject to legislative amendment or repeal by . . . initiative," among other things); *id.* § 18 (providing that a grand jury can be convened upon filing with a district judge "of a petition therefor signed by qualified electors of the county equal to the number of signatures required to propose legislation by a county by initiative petition as provided in Section 5 of Article V of the Oklahoma Constitution"); *id.* § 34 (acknowledging that "the People by initiative . . . ha[ve] the authority to enact substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section"); *id.* art. V, § 1 (discussing the People's reservation of "the power to propose laws and amendments to the Constitution"); *id.* § 2 ("The first power reserved by the People is the initiative . . . ."); *id.* § 3 (describing where initiative petitions get filed, when they are voted upon, and, if approved by the People, when they take effect); *id.* § 5 (reserving "[t]he powers of the initiative . . . to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government"); *id.* § 5a (establishing an initiative petition process for abolishing township government and for restoring it thereafter); *id.* § 6 (requiring a higher signature threshold for an initiative petition proposing a measure identical to one already rejected by the People during the three preceding years); *id.* § 7 (stating that the reservation of the initiative power "shall not deprive the Legislature of the right to repeal any law, propose or pass any measure"); *id.* § 8 (requiring the passage of laws "to prevent corruption in making, procuring, and submitting initiative . . . petitions"); *id.* § 58 (imposing an effective date upon enactments, except for those "carrying into effect provisions relating to the initiative"); *id.* art. X, § 6C(A) (giving the Legislature authority to enact laws granting incorporated towns power to provide tax relief for historic preservation, reinvestment, or enterprise areas, but requiring such laws to "provide for the local initiative power . . . of the People"); *id.* § 9A (discussing an additional levy of an ad valorem tax for the purpose of maintaining a county department of health "when such levy is approved . . . by initiative petition by voters of a county," to last until such level gets repealed, which may be done "by initiative petition by voters of a county"); *id.* § 10A (discussing the levying of a special recurring ad valorem tax for the purpose of establishing and maintaining public libraries "upon petition initiated by not less than ten percent (10%) of the qualified electors of the county"); *id.* art. XVIII, § 4(a) ("The powers of the initiative . . . are hereby reserved to the People of every municipal corporation . . . with reference to all legislative authority which it may exercise, and amendments to charters for its own government . . . ."); *id.* § 4(b) (describing how many signatures are required for municipal initiatives and with whom such initiatives are filed); *id.* § 4(c) (discussing an initiative petition that "demands the enactment of an ordinance"); *id.* § 4(e) (discussing an initiative petition that "demands an amendment to a charter" of a municipal corporation); *id.* art. XXIV, § 3 (stating that Article XXIV, Sections 1 and 2 "shall not impair the right of the People to amend this Constitution by a vote upon an initiative petition therefor"); *id.* art. XXV, § 1 (authorizing "the People by initiative petition . . . to provide by appropriate legislation for the relief and care of needy aged persons . . . and other needy persons who, on account of immature age, physical infirmity, disability, or other cause, are unable to provide or care for themselves"); *id.* art. XXIX, § 3 (requiring the Ethics Commission to "promulgate rules of ethical conduct . . . for campaigns for initiatives").

8. *See, e.g., OCPA Impact, Inc. v. Sheehan*, 2016 OK 84, 377 P.3d 138; *In re Initiative Petition No. 409*, 2016 OK 51, 376 P.3d 250; *In re Initiative Petition No. 384*, 2007 OK 48, 164 P.3d 125.

9. *See, e.g., In re Initiative Petition No. 349*, 1992 OK 122, 838 P.2d 1; *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 1975 OK 36, 534 P.2d 3.

10. Okla. Const. art. V, § 2.

11. 34 O.S.2011 § 3.

12. Webster's New International Dictionary 1060 (2d ed. 1959).

13. *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 3, 376 P.3d at 252 (quoting *In re Initiative Petition No. 384*, 2007 OK 48, ¶ 9, 164 P.3d at 129).

14. *Id.* (quoting *In re Initiative Petition No. 384*, 2007 OK 48, ¶¶ 7-8, 164 P.3d at 129).

15. *Id.* (emphasis added) (quoting *In re Initiative Petition No. 384*, 2007 OK 48, ¶¶ 8-9, 164 P.3d at 129).

16. *In re Initiative Petition No. 384*, 2007 OK 48, ¶ 8, 164 P.3d at 129.

17. *Id.* ¶ 12, 164 P.3d at 130.

18. *In re Initiative Petition No. 409*, 2016 OK 51, ¶¶ 6-7, 376 P.3d at 253-54.

19. 34 O.S.2011 § 3 ("Each initiative petition . . . shall be duplicated for the securing of signatures, and each sheet for signatures shall be attached to a copy of the petition. . . . A simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet.").

20. Okla. Const. art. VII, § 1.

21. *Cress v. Estes*, 1914 OK 361, 142 P. 411, 412.

22. *See In re Cty. Comm'rs of Ctys. Comprising Seventh Judicial Dist.*, 1908 OK 207, ¶ 12, 98 P. 557, 560 ("The distinction . . . between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other provides what the law shall be in future cases arising under it." (quoting *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 761 (1878) (Field, J., dissenting))).

23. Okla. Const. art. VII, § 4 ("The appellate jurisdiction of the Supreme Court shall be co-extensive with the State and shall extend to all cases at law and in equity . . . .").

24. *Cress*, 1914 OK 361, 142 P. at 412.

25. *E.g., Threadgill v. Cross*, 1910 OK 165, ¶ 22, 109 P. 558, 563 ("If … [the People] determine [the proposed amendment] to be a valid measure and adopt it, then, and not until then, will the judicial and executive departments have the power and duty devolving upon them to determine its validity and enforce its provisions."); *In re Initiative Petition No. 10 of Okla. City*, 1940 OK 43, ¶ 4, 98 P.2d 896, 897; *In re Initiative Petition No. 259*, 1957 OK 167, ¶¶ 34-35, 316 P.2d 139, 146; *Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton*, 1972 OK 133, ¶ 28, 501 P.2d 1089, 1095; *see also In re Initiative Petition No. 349*, 1992 OK 122, ¶ 32, 838 P.2d 1, 11 (noting the 1975 shift).

26. *See United States v. Windsor*, 570 U.S. 744, 789 (Scalia, J., dissenting) (describing Alexis de Tocqueville's praise for our judicial system "as one which 'intimately bind[s] the case made for the law with the case made for one man" and in which "'[t]he political question that [the judge] must resolve is linked to the interest' of private litigants" (alterations in original) (quoting Alexis de Tocqueville, Democracy in America 97 (H. Mansfield & D. Winthrop eds. 2000))).

27. A major feature of this practice is our pre-enactment review to determine compliance with Article XXIV, Section 1's "one general subject" rule. First, there is no reasoned basis upon which to distinguish this review from the "single subject" rule review of legislation that we conduct pursuant to Article V, Section 57, review which occurs only *post*-enactment. Second, the text of the Constitution belies this Court's view that the "one general subject" rule applies to initiative petitions. Article XXIV, Section 1, titled "Amendments proposed by Legislature – Submission to vote," states that "[n]o proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject." While "[n]o proposal for the amendment or alteration of this Constitution" sounds quite broad when lifted out of context, Section 3 of the same Article clarifies that the one-general-subject requirement indeed only applies to legislative referendums: "This article shall not impair the right of the people to amend this Constitution by a vote upon an initiative petition therefor." In its decision first applying the "one general subject" rule to initiative petitions, this Court failed to account for Section 3, not even mentioning it despite the objections of both dissenters. I*n re Initiative Petition No. 314*, 1980 OK 174, 625 P.2d 595; see *id.* ¶¶ 7-8, 625 P.2d at 614-15 (Lavender, C.J., concurring in part, dissenting in part) ("The restriction of article 24, section 1 as to the one general subject limitation, assuming it is applicable to the exercise of the people's right of the initiative (which may be contra to article 24, section 3) should never be strictly construed so as to inhibit the people in their right to initiate constitutional amendments. The constitutional article involved, particularly section 3 thereof, casts some doubt as to whether the one general subject limitation of the second paragraph of article 24, section 1 is even applicable to measures to amend the Oklahoma Constitution when they are being offered by the people as separate from legislatively referred measures."); *id.* ¶ 3, 625 P.2d at 618 (Doolin, J., dissenting) ("Section 3, Art. 24 prohibits the impairment called for by the majority opinion and was not amended or changed directly or by implication with the amendment of § 1. . . . Section 1, Art. 24 should be construed as a limitation on the legislative referendum process of amending the constitution, and not a limitation on the initiative process of the people."). If we are going to nullify a provision of the Constitution, one designed to protect the People's most fundamental right, we should at least give the provision a proper burial with an opinion that addresses Section 3 head-on.

28. *See House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, ¶ 12, 109 P.3d 314, 318 ("The term 'justiciable' refers to a lively case or controversy between antagonistic demands." (citing *Lawrence v. Cleveland Cty. Home Loan Auth.*, 1981 OK 28, ¶ 7, 626 P.2d 314, 315)); *In re Application of State ex rel. Dep't of Transp.*, 1982 OK 36, ¶ 6, 646 P.2d 605, 608-09 ("To be a proper subject for adjudication, a controversy must be 'justiciable' . . . ."); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

29. *See In re Application of State ex rel. Dep't of Transp.*, 1982 OK 36, ¶ 6, 646 P.2d at 609 (discussing standing as an aspect of justiciability); *Hendrick v. Walters*, 1993 OK 162, ¶ 5, 865 P.2d 1232, 1236-37 (listing one of the elements of standing as "an actual or threatened injury (sometimes called injury-in-fact)"); *see also Cuno*, 547 U.S. at 342 ("The core component of the requirement that a litigant have standing to invoke the authority of a federal court is an essential and unchanging part of the case-or-controversy requirement of Article III. The requisite elements of this core component derived directly from the Constitution are familiar: A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (internal marks and citations omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." (internal marks and citations omitted)).

30. *Smith v. Westinghouse Elec. Corp.*, 1987 OK 3, ¶ 2 n.3, 732 P.2d 466, 467 n.3; *Dablemont v. State, Dep't of Pub. Safety*, 1975 OK 162, ¶ 9, 543 .2d 563, 564.

31. Okla. Const. art. VI, § 8.

32. I have no doubt that if someone filed an original action asking the Court to declare unconstitutional a bill being considered by the Legislature, we would pour them out of court, opining that there was not yet a case or controversy and that the case was not yet ripe. We would be correct to do so. But there, just as here, one could argue that the Court, if it intends to strike the measure, ought to do so pre-enactment to save the taxpayers the expense associated with a legislative session. Perhaps the difference is that this Court recognizes that the separation of powers prevents it from so interfering with the legislative process. But if the Legislature deserves that respect, so do the People.

33. *Am. Commc'n Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 442 (1950).

34. *In re Initiative Petition No. 349*, 1992 OK 122, ¶ 32, 838 P.2d 1, 11.

35. *See, e.g., New York v. United States*, 505 U.S. 144, 188 (1992) (invalidating a federal regime requiring states to implement certain regulations in furtherance of federal policy and emphasizing that "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal [policy]. The Constitution permits *both* the Federal Government and the States to enact legislation . . . [and merely] enables the Federal Government to preempt state regulation contrary to federal interests. . . ." (emphasis added) (citation omitted)).

36. *See, e.g., Graham v. Florida*, 560 U.S. 48, 62 (2010) (relying on a 50-state survey of state law as an "objective indicia of national consensus" on the legality of certain life-without-parole sentences under the Eighth Amendment); *see also Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (describing state law as the "clearest and most reliable objective evidence of contemporary values").

37. *New York*, 505 U.S. at 181.

2018 OK 25

MIKE McDONALD, VALERIE MITCHELL, and OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, Petitioners,

v. MICHAEL O. THOMPSON, RAY H. POTTS, and MARY LYNN PEACHER, Respondents.

No. 116,680. March 19, 2018

ORIGINAL PROCEEDING TO DETERMINE THE SUFFICIENCY OF THE GIST OF INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795

¶0 This is an original proceeding to determine the legal sufficiency of the gist of Initiative Petition No. 416, State Question No. 795. The petition seeks to amend the Oklahoma Constitution by adopting Article XIII-C, a new Article. The proposed Article XIII-C would primarily serve to increase funding for public education through an increase in the gross production tax. The opponent petitioners allege the gist of the petition is insufficient and misleading. Upon review, we hold that the gist of the petition is legally sufficient.

THE GIST OF INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT

Robert G. McCampbell, Adam C. Doverspike, and Jake M. Krattiger, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

Anthony J. Ferate, Edmond, Oklahoma, for Petitioner Oklahoma Independent Petroleum Association.

Joel L. Wohlgemuth, Ryan A. Ray, Alix R. Newman, Norman Wohlgemuth Chandler Jeter Barnett & Ray, P.C., Tulsa, Oklahoma, for Respondents.

COMBS, C.J.

¶1 On December 20, 2017, Respondents Michael O. Thompson, Ray H. Potts, and Mary Lynn Peacher (collectively, Proponents) filed Initiative Petition No. 416, State Question No. 795 (IP 416) with the Oklahoma Secretary of State. IP 416 would create a new Article XIII-C in the Oklahoma Constitution. IP 416 contains 8 sections, which Proponents assert will levy a new 5% gross production tax on oil and gas production from certain wells, and provide for the deposit of the proceeds primarily in a new fund entitled the "Oklahoma Quality Instruction Fund" (the Fund). Monies from the Fund will be distributed: 1) 90% to common school districts of the State of Oklahoma to increase compensation and benefits for certified personnel, and the hiring, recruitment and retention thereof; and 2) 10% to the State Department of Education to promote school readiness, and to support compensation for instructors and other instructional expenses in "high-quality early learning centers" for at-risk children prior to entry into the common education system.

¶2 Section 1 of IP 416 creates the Fund. Section 2 creates the Oklahoma Quality Instruction Reserve Fund to ensure the Fund always has sufficient resources, and provides mechanisms for the transfer of monies. Section 3 levies the 5% gross production tax. Section 4 provides for a $4,000 increase in compensation for certified personnel, including teachers, but excluding superintendents and assistant superintendents. Section 5 provides for the distribution of funds according to the percentage scheme noted in the previous paragraph above. Section 6 attempts to ensure that the new funds will be used to supplement existing funding rather than supplant it, and grants the Board of Equalization the power to specify the amount that was supplanted or replaced, preventing the Legislature from making appropriations until it makes an appropriation to replace the supplanted amount. Sections 7 and 8 provide an effective date and severability provision, respectively.

¶3 On January 10, 2018, Petitioners Mike McDonald, Valerie Mitchell, and Oklahoma Independent Petroleum Association (collectively, Protestants), timely filed an Application to Assume Original Jurisdiction in this Court protesting the sufficiency of the gist of IP 416.

I.
STANDARD OF REVIEW

¶4 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400.

See In re Initiative Petition No. 349, State Question No. 642, 1992 OK 122, ¶35, 838 P.2d 1.

¶5 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48 at ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726,* 2006 OK 89, ¶16, 155 P.3d 32).

¶6 The gist of an initiative petition is required by 34 O.S. 2011 § 3, which provides in pertinent part: "A simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet." This Court described the importance of the gist and ballot title, as well as the requirements, in *In re Initiative Petition No. 344, State Question No. 630*, where we explained:

> [T]he statement on the petition [the gist] and the ballot title must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition. The limitations ... are necessary to prevent deception in the initiative process.... The voters, after reading the statement on the petition and the ballot title, should be able to cast an informed vote.

1990 OK 75, ¶14, 797 P.2d 326.

This Court further explained in detail how the gist of an initiative petition should be evaluated in *In re Initiative Petition No. 409,* where we stated:

> This Court has long held that the purpose of the gist, along with the ballot title, is to "prevent *fraud, deceit, or corruption* in the initiative process." The gist "'should be sufficient that the signatories are at least put on notice of the changes being made,'" and the gist must explain the proposal's effect. The explanation of the effect on existing law "does not extend to describing policy arguments for or against the proposal." The gist "need only convey the practical, not the theoretical, effect of the proposed legislation," and it is "'not required to contain every regulatory detail so long as its outline is not incorrect.'" "We will approve the text of a challenged gist if it is 'free from the taint of misleading terms or deceitful language.'"

2016 OK 51 at ¶3 (footnotes omitted) (quoting primarily *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, 164 P.3d 125).

II.
ANALYSIS

¶7 The gist of IP 416 as submitted is as follows:

> This measure adds a new Article to the Oklahoma Constitution. The new Article creates two limited purpose funds to support quality instruction. It increases compensation for all certified personnel, including teachers, and supports early learning. It levies a five percent tax on gross production of oil and gas wells during the first thirty-six months of production to provide revenue for the Oklahoma Quality Instruction Fund (the "Fund"), and to provide revenue for a Reserve Fund ensuring the Fund can fulfill its obligations. The tax does not supplant or replace existing gross production taxes on such wells during such periods. The Article mandates a $4,000 increase in salaries for all common education certified personel, including teachers and others. It allocates 90% of the available proceeds in the Fund for that purpose. It also allocates 10% of the available proceeds to support compensation for instructors and other instructional expenses in high-quality early learning centers for at-risk children prior to entry into the common education system. It requires annual audits of the use of monies from the Funds, which shall be made publicly available. It prohibits the use of such funds for superintendent or assistant superintendent salaries. It requires that monies from the Funds not supplant or replace other educational funding, and requires the State Board of Equalization to prohibit further appropriations by the Legislature if such supplanting or replacement has occurred, until remedied.

Petitioners' Appendix to Application to Assume Original Jurisdiction and Petition to Review the Gist of Initiative Petition 416, Ex. B.

Protestants challenge the legal sufficiency of the gist, and assert that the insufficiency of the gist is fatal to IP 416.

¶8 Protestants make several arguments that the gist of IP 416 is insufficient, including that the gist: 1) is misleading because it mentions only teachers as the recipients of the salary increase; 2) engages in advocacy by using terms such as "to support quality instruction" and "in high quality early learning centers;" 3) fails to mention the State Department of Education will receive 10% of the proceeds; 4) fails to mention that the new tax will be applied to wells drilled after July 1, 2015; 5) fails to mention the salary increase for certified personnel will be set within the Constitution itself; 6) fails to mention the pay raise will be given without regard to merit; and 7) fails to mention the tax will be imposed by the Constitution. This Court finds Protestants' arguments to be unpersuasive.

¶9 Protestants first assert that the gist of IP 416 is misleading because it mentions only teachers specifically as recipients of the salary increase that would be put in place by the new article. However, neither the gist, nor the petition itself mentions only teachers. In fact the gist properly mirrors the petition by stating that the new article "increases compensation for all certified personnel, including teachers." The gist further notes, in keeping with the petition, that superintendents and assisstant superintendents are excluded. This language is not decieving or misleading, but informative of the purpose behind IP 416 itself and properly describes the effect the new article will have. This situation, where the gist highlights one part of a larger category in the same manner the petition itself does, is factually distinguishable from *In re Initiative Petition No. 344*, where this court determined a gist to be insufficient because it did not address all the major changes proposed by the petition. *See* 1990 OK 75 at ¶¶12-15. Protestants' reliance on that case is misplaced.

¶10 Protestants also assert the gist sets forth policy arguments in favor of the proposal by using loaded terms that are subject to political debate, such as "to support quality instruction" and "in high quality learning centers." Protestants cite to *OCPA Impact v. Sheehan*, where this Court redrafted a ballot title to alter language such as "improve public education" to "increase funding for public education." *See* 2016 OK 84, ¶¶9-11, 377 P.3d 138. Petitioners assert this Court should treat the gist the same as a ballot title for purposes of language that indicates partiality, and determine the gist is insufficient for this reason. However, ballot titles are subject to statutory requirements the gist is not.[1] These more stringent requirements are fitting given that the ballot title is all a voter has access to within the voting booth. Though the gist is now the only shorthand explanation of the proposal's effect a potential signatory sees as part of the pamphlet, *In re Initiative Petition No. 409*, 2016 OK 51 at ¶4, nothing stops a potential signatory from looking up the text of an initiative petition or asking to see it. Proponents terms, which again mirror the petition itself, are not deceitful or misleading and do not prevent potential voters from making an informed decision.

¶11 Protestants also challenge the legal sufficiency of the gist for failing to specify that 10% of new proceeds will go to the Department of Education. However, though it does not specify what entity will handle the funds in question, the gist does specify the allocation of funds as well as the use to which they will be put.[2] Specifically, the gist states that the new article: "also allocates 10% of the available proceeds to support compensation for instructors and other instructional expenses in high-quality early learning centers for at-risk children prior to entry into the common education system." Again, the language of the gist is not deceitful or misleading, and does not prevent voters from making an informed decision. As this Court has previously noted, the gist is "not required to contain every regulatory detail so long as its outline is not incorrect." *In re Initiative Petition No. 409*, 2016 OK 51 at ¶3.

¶12 Protestants also allege the gist is legally insufficient because it fails to mention the new tax will be applied in a retroactive manner to wells drilled after July 1 of 2015. At the outset, it is true that the gist does not specify the July 1, 2015, date or explain the interaction between that date, the first 36 months of production, and the effective date of the new article. However, the question whether the tax imposed by IP 416 applies retroactively is answered in the negative by this Court's opinion in *Okla. Indep. Petroleum Assoc. v. Ray H. Potts*, 2018 OK 24, --- P.3d ----. Further, by its very nature, the gist is a simple statement that summarizes the petition. We do not believe the omission of this one substantive detail is fatal to the legal sufficiency of the gist, and the omission is not deceitful or misleading, especially given that the gist

does state the tax will apply to "wells during the first thirty-six months of production."

¶14 Finally, Protestants assert the gist is legally insufficient because it fails to mention both the salary increase and the tax will be set by the Oklahoma Constitution, and that the salary increase will be without regard to merit. Protestants argue these changes upset the balance of power and usurp a role traditionally held by the Legislature. Protestants cite to *In re Initiative Petition No. 384, State Question No. 731,* where this Court held a gist to be insufficient because it failed to alert potential signatories to the effect the proposal would have on the balance of power between local school boards and the state. 2007 OK 48, ¶11, 164 P.3d 125.

¶15 The gist of IP 416, however, is creating a new article in the Oklahoma Constitution to 1) impose the new gross production tax; and 2) provide a pay increase for common education certified personnel:

> This measure adds a new **Article** to the Oklahoma Constitution. **The new Article creates** two limited purpose funds to support quality instruction. It increases compensation for all certified personnel, including teachers, and supports early learning. It levies a five percent tax on gross production of oil and gas wells during the first thirty-six months of production to provide revenue for the Oklahoma Quality Instruction Fund (the "Fund"), and to provide revenue for a Reserve Fund ensuring the Fund can fulfill its obligations. The tax does not supplant or replace existing gross production taxes on such wells during such periods. **The Article** mandates a $4,000 increase in salaries for **all** common education certified personnel, including teachers and others. (Emphasis added).

Further, the use of the term "all" as emphasized above necessarily implies the pay increase will be given across the board without regard to merit. Protestants' arguments in this instance are in reality little more than policy arguments against the proposal, and would be more appropriately made to the public. The gist's explanation of the effect on existing law should not extend to describing policy arguments for or against the proposal, and the gist need only convey the practical, not the theoretical, effect of the proposal. *In re Initiative Petition No. 409,* 2016 OK 51 at ¶3; *In re Initiative Petition No. 384,* 2007 OK 48 at ¶8. A gist is sufficient if it apprises the voters of what the proposed measure is intended to do. *In re Initiative Petition No. 384,* 2007 OK 48 at ¶8.

III.
CONCLUSION

¶16 The gist of IP 416 properly alerts potential signatories to the changes being made by the new article should voters approve it. The gist provides potential signatories with sufficient information to make an informed decision about the true nature of the proposed constitutional change. *In re Initiative Petition No. 344,* 1990 OK 75, ¶14, 797 P.2d 326. The gist is also free from the taint of misleading terms and deceitful language. *In re Initiative Petition No. 409,* 2016 OK 51 at ¶3; *In re Initiative Petition No. 384*, 2007 OK 48 at ¶9. The gist of IP 416 is legally sufficient. Any petition for rehearing in this matter shall be filed no later than five (5) days from the date this opinion is handed down.

THE GIST OF INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER (by separate writing), WINCHESTER, EDMONDSON, and REIF, JJ.

CONCUR SPECIALLY: WYRICK, J. (by separate writing)

RECUSED: COLBERT, J.

KAUGER, J., with whom WINCHESTER, J., joins in concurring:

¶1 I agree with the majority that the gist fails to discuss retroactivity with specificity. It could certainly be written more clearly. Nevertheless, because the requirements for a ballot title are more extensive than the gist of the proposition, any ambiguity can clarified by the ballot title so that the voters will have the opportunity to cast an informed vote. See, OCPA Impact, Inc., v. Sheehan, 2016 OK 84, 377 P.3d 138 (Taylor, J., with whom Kauger and Winchester, JJ., join concurring).

Wyrick, J., concurring specially:

¶1 I concur for the reasons set forth in my separate opinion in Case No. 116,679, *Oklahoma Independent Petroleum Association v. Potts*, 2018 OK 24, --- P.3d ---.

COMBS, C.J.

1. Title 34 O.S. Supp. 2015 § 9(B) provides:

B. The parties submitting the measure shall also submit a suggested ballot title to the Secretary of State which shall be filed on a separate sheet of paper and shall not be part of or printed on the petition. The suggested ballot title:
1. Shall not exceed two hundred (200) words;
2. Shall explain in basic words, which can be easily found in dictionaries of general usage, the effect of the proposition;
3. Shall not contain any words which have a special meaning for a particular profession or trade not commonly known to the citizens of this state;
4. Shall not reflect partiality in its composition or contain any argument for or against the measure;
5. Shall contain language which clearly states that a "yes" vote is a vote in favor of the proposition and a "no" vote is a vote against the proposition; and
6. Shall not contain language whereby a "yes" vote is, in fact, a vote against the proposition and a "no" vote is, in fact, a vote in favor of the proposition.

2. For comparison, in *OCPA Impact, Inc. v. Sheehan,* this Court redrafted a ballot title because it failed to breakdown the actual amounts and allocation of revenue. 2016 OK 84. ¶11, 377 P.3d 138. That is not the case here.

2018 OK 26

OKLAHOMA OIL & GAS ASSOCIATION and DAVID S. SIKES, Petitioners, v. MICHAEL O. THOMPSON, MARY LYNN PEACHER, and RAY H. POTTS, Respondents.

No. 116,682. March 19, 2018

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795

¶0 This is an original proceeding to determine the legal sufficiency of Initiative Petition No. 416, State Question No. 795. The petition seeks to amend the Oklahoma Constitution by adopting Article XIII-C, a new Article. The proposed Article XIII-C would primarily serve to increase funding for public education through an increase in the gross production tax. The opponent petitioners allege the petition is unconstitutional because it violates the one general subject rule of Okla. Const. art. 24, § 1. Upon review, we hold that the petition is legally sufficient.

INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

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

Joel L. Wohlgemuth, Ryan A. Ray, Alix R. Newman, Norman Wohlgemuth Chandler Jeter Barnett & Ray, P.C., Tulsa, Oklahoma, for Respondents.

COMBS, C.J.

¶1 On December 20, 2017, Respondents Michael O. Thompson, Mary Lynn Peacher, and Ray H. Potts (collectively, Proponents) filed Initiative Petition No. 416, State Question No. 795 (IP 416) with the Oklahoma Secretary of State. IP 416 would create a new Article XIII-C in the Oklahoma Constitution. IP 416 contains 8 sections, which Proponents assert will levy a new 5% gross production tax on oil and gas production from certain wells, and provide for the deposit of the proceeds primarily in a new fund entitled the "Oklahoma Quality Instruction Fund" (the Fund). Monies from the Fund will be distributed: 1) 90% to common school districts of the State of Oklahoma to increase compensation and benefits for certified personnel, and the hiring, recruitment and retention thereof; and 2) 10% to the State Department of Education to promote school readiness, and to support compensation for instructors and other instructional expenses in "high-quality early learning centers" for at-risk children prior to entry into the common education system.

¶2 Section 1 of IP 416 creates the Fund. Section 2 creates the Oklahoma Quality Instruction Reserve Fund to ensure the Fund always has sufficient resources, and provides mechanisms for the transfer of monies. Section 3 levies a 5% tax on the gross value of the production of oil, gas, or oil and gas from all oil and gas wells spudded after July 1, 2015, during the first thirty-six months of production, commencing with the month of first production, from and after the effective date of the article. Section 4 provides for a $4,000 increase in compensation for certified personnel, including teachers, but excluding superintendents and assistant superintendents. Section 5 provides for the distribution of funds according to the percentage scheme noted in the previous paragraph above. Section 6 attempts to ensure that the new funds will be used to supplement existing funding rather than supplant it, and grants the Board of Equalization the power to specify the amount that was supplanted or replaced, preventing the Legislature from making appropriations until it makes an appropriation to replace the supplanted amount. Sections 7 and 8 provide an effective date and severability provision, respectively.

¶3 On January 10, 2018, Petitioners Oklahoma Oil & Gas Association and David A. Sikes (collectively, Protestants), timely filed an Application to Assume Original Jurisdiction in

this Court protesting the sufficiency of IP 416 and the basis that it fails to pass constitutional muster.

I.
STANDARD OF REVIEW

¶4 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Const. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1.

¶5 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409,* 2016 OK 51 at ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48 at ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶6 This Court has generally refused to declare a ballot initiative invalid in advance of a vote of the people except where there is a clear or manifest showing of unconstitutionality. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶3; *In re Initiative Petition No. 358, State Question No. 658,* 1994 OK 27, ¶7, 870 P.2d 782. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> "Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts**."

In re Initiative Petition No. 403, 2016 OK 1 at ¶3 (quoting *In re Initiative Petition No. 382*, 2006 OK 45 at ¶3.

Accordingly, Opponents in this matter bear the burden of demonstrating the proposed initiative petition is clearly and manifestly unconstitutional. *In re Initiative Petition No. 403,* 2016 OK 1 at ¶3; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

II.
ANALYSIS

¶7 Opponents in this matter allege IP 416 is insufficient and must not be submitted to the voters as it stands because it is unconstitutional. Opponents challenge the constitutionality of IP 416 on the grounds that it violates the single-subject requirements of Okla. Const. art. 24, § 1. Opponents raise two general arguments concerning the application of Okla. Const. art. 24, § 1 in this cause. First, Opponents argue this Court should overrule *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, 367 P.3d 472, and instead of the "germaneness" standard applied in that cause adopt a "one general subject" standard in keeping with what Opponents argue is the plain language of Okla. Const. art. 24, § 1. Second, Opponents assert IP 416 violates Okla. Const. art. 24, § 1 because it combines multiple distinct subjects, including granting expansive powers to the Board of Equalization in Section 6.

A. *In re Initiative Petition No. 403, State Question No. 779,* 2016 OK 1,367 P.3d 472 remains good law.

¶8 Opponents concede that in the case of *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, 367 P.3d 472, this Court determined an almost identical initiative petition to the one at issue in this cause did not violate the single-subject rule of Okla. Const. art. 24, § 1. In that cause, this Court applied a "germaneness test" to determine if a proposed constitutional amendment by new article violated the single subject-requirements of Okla. Const. art. 24, § 1. *In re Initiative Petition No. 403*, 2016 OK 1 at ¶10. We summed up the test in the following manner:

> "when the proposed *constitutional amendment is by a new article* the test for gauging

> multiplicity of subjects is whether the changes proposed are *all germane* to a singular common subject and purpose or are essentially unrelated to one another."

In re Initiative Petition No. 403, 2016 OK 1 at ¶10 (quoting *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶15, 927 P.2d 558).

¶9 Opponents argue against the continued application of this test, and for this Court to overrule *In re Initiative Petition No. 403*. To do so would be a departure from the rule of *stare decisis*. Simply stated, *stare decisis* means to abide by decided cases. *Fent v. State ex rel. Okla. Capitol Imp. Auth.*, 2009 OK 15, n.12, 214 P.3d 799; *Rodgers v. Higgins*, 1993 OK 45, ¶28, 871 P.2d 398. This doctrine serves to remove any capricious element from the law and grant it stability over time. *Sisk v. J.B. Hunt Transport, Inc.*, 2003 OK 69, n.24, 81 P.3d 55; *Fent,* 2009 OK 15 at n.12; *Rodgers*, 1993 OK 45 at ¶28. Only those precedents that are patently bad should be altered by judicial correction. *Sisk*, 2003 OK 69 at ¶13; *Rodgers,* 1993 OK 45 at ¶28. In *Rodgers*, this Court discussed the factors we should be mindful of when called upon to reassess our commitment to prior holdings as binding precedent:

> (1) whether the rule has proved to be intolerable by defying practical workability, (2) whether the rule is subject to the sort of reliance that would add special hardship to the consequences of overruling and inequity to the cost of repudiation, (3) whether related principles of law have developed so far that the old rule remains no more than a remnant of abandoned doctrine and (4) whether facts have so changed or come to be viewed so differently that the old rule has been robbed of significant application or justification.

1993 OK 45 at ¶29 (citing Planned *Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55, 112 S.Ct. 2791, 2808-09, 120 L.Ed.2d 674 (1992)).

¶10 Opponents do not address any of these factors directly, but they do make several arguments addressing why the germaneness test is improper. First, they assert it conflicts with the plain language of Okla. Const. art. 24, § 1, which provides in pertinent part:

> No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition.

Opponents assert the plain language of the provision requires a "one general subject" standard that they equate to the standard used to judge amendments made NOT by entire article, and which should be less liberal.

¶11 Opponents also assert this Court has not consistently applied the germaneness standard to amendments by article. According to Opponents, this Court applied a different test in *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, 797 P.2d 326. The language Opponents cite from that case explaining the rule is actually a direct quote from an older Arizona case this Court was favorably referencing:

> If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition.

Kerby v. Luhrs, 44 Ariz. 208, 221, 36 P.2d 549, 554 (1934).

In reality, this language is not in conflict with the rule this Court articulated in *In re Initiative Petition No. 403*, 2016 OK 1 at ¶10. In fact, *In re Initiative Petition No. 344*, which Opponents argue is inconsistent, did not disavow the liberal approach taken in *Rupe v. Shaw,* 1955 OK 223, ¶6, 286 P.2d 1094, but rather distinguished it:

> In his reply brief, the Attorney General relies on *Rupe v. Shaw,* 286 P.2d 1094 (Okla. 1955), in support of his position that the Petition embraces only one subject. The

> Attorney General argues that this Court in *Rupe* adopted the liberal test rather than the more restrictive test adopted by some other jurisdictions and that under the liberal test the present Petition embraces only one general subject. This Court found that the petition in *Rupe* addressed only one general subject because the details were incidental to accomplishing the general design of the proposal. Many of the changes made by the present Petition are not incidental or necessary to an overall design.

In re Initiative Petition No. 344, 1990 OK 75 at ¶6.

¶12 Regardless, *In re Initiative Petition No. 403* set out in some detail this Court's long history of applying the more liberal germaneness test to amendments by article. 2016 OK 1 at ¶¶5-10. The Court made reference to a wealth of prior precedent in support of such an approach: *Rupe v. Shaw,* 1955 OK 223, ¶6, 286 P.2d 1094 (holding a more liberal construction should be applied to amendments by article); *In re Initiative Petition No. 314, State Question No. 550*, 1980 OK 174, 625 P.2d 595 (explaining that unconstitutional changes proposed by amending an existing article could have been effected through amendment by new article without violating the single-subject requirement); *In re Initiative Petition No. 319, State Question No. 563,* 1984 OK 23, ¶¶8-9, 682 P.2d 222 (recognizing the different test for amendment by article, explaining the germaneness test, and approving the petition as proposed); *In re Initiative Petition No. 363,* 1996 OK 122, ¶15, 927 P.2d 558 (reiterating that the test for amendment by article is whether the changes proposed are *all germane* to a singular common subject and purpose or are essentially unrelated to one another).

¶13 Opponents argue the germaneness test frustrates the policy behind the single-subject rule by allowing almost anything absent totally unrelated provisions to pass constitutional muster, and that the test's flexibility allows individuals to game the system and avoid the single-subject requirement by cloaking multi-subject amendments with vague titles, essentially tricking potential signatories and voters. However, Opponents ignore the actual operation of the germaneness test in question. This Court does not base its analysis merely on the relation of a new article's sections to a single statement of purpose such as a fund name, but on their relationship to each other and their combined, common purpose. *See In re Initiative Petition No. 403*, 2016 OK 1 at ¶12.

¶14 Further, in *Initiative Petition No. 403* we explained the policy behind the one general subject rule:

> The purpose of the one general subject rule, as this Court has repeatedly held, is "'to prevent imposition upon or deceit of the public by the presentation of a proposal which is *misleading or the effect of which is concealed or not readily understandable*,'" and to "'afford the voters freedom of choice and *prevent "logrolling", or the combining of unrelated proposals* in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts." *In re Initiative Petition No. 314,* 1980 OK 174, ¶ 59, 625 P.2d 595, 603 (quoting *Fugina v. Donovan*, 104 N.W.2d 911, 914 (Minn. 1960)) (emphasis added).

2016 OK 1 at ¶13.

The germaneness test does not frustrate this purpose, but rather serves it. The goal is to ensure the proposed amendment by article does not combine **unrelated proposals** which would result in a misleading effect or logrolling. That goal is accomplished by ensuring that all the proposed changes are germane to a singular common subject or purpose, which necessarily excludes the possibility that they will be unrelated to one another. *See Initiative Petition No. 403*, 2016 OK 1 at ¶10. The Court explained as much succinctly in *In re Initiative Petition No. 363*:

> A single-subject measure, within the meaning of Art. 24 § 1, Okl. Const., is one whose componential ingredients, no matter how numerous, are so interrelated as to all form parts of an integrated whole. The purpose of the one-general-subject criterion is to guard against deceit or against the presentation of a misleading proposal as well as to prevent log rolling – the combining of unrelated proposals. *In re Initiative Petition No. 319* teaches that when the proposed *constitutional amendment is by a new article* the test for gauging multiplicity of subjects is whether the changes proposed are *all germane* to a singular common subject and purpose or are essentially unrelated one to another.

1996 OK 122 at ¶15 (footnotes omitted).

¶15 The rule this Court applied in *In re Initiative Petition No. 403* is not unworkable. It has been applied successfully by this Court several times over the past few decades, as noted above. The rule has not been robbed of its significance, nor is it an abandoned doctrine due to the evolution of underlying legal principles. Further, IP 416 was very obviously drafted in reliance on this Court's decision in I*n re Initiative Petition No. 403,* and to overrule it at this stage would result in exactly the sort of capricious instability the doctrine of *stare decisis* is intended to counter. Opponents have failed to meet the burden required to show why this Court should depart from long-settled precedent in this instance. *See Sisk*, 2003 OK 69 at ¶13; *Rodgers*, 1993 OK 45 at ¶¶28-29.

B. The new article proposed by IP 416 does not violate the single-subject requirements of Okla. Const. art. 24, § 1.

¶16 Opponents also assert IP 416 violates the single-subject rule of Okla. Const. art. 24, § 1 because it contains multiple distinct subjects by lumping a $4,000 pay increase for certified common education personnel with the new gross production tax, as well as with expanding the reach of the Board of Equalization, an executive branch entity, into the legislative realm. As discussed in the previous section of this opinion, *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, 367 P.3d 472 remains good law. That case, combined with this Court's decision in *Okla. Indep. Petroleum Assoc. v. Ray H. Potts*, 2018 OK 24, --- P.3d ----, are controlling and dispositive of Opponents' arguments concerning application of Okla. Const. art. 24, § 1 to IP 416. IP 416 does not violate the single-subject requirement of Okla. Const. art. 24, § 1.

III. CONCLUSION

¶25 After fully considering Opponents' arguments concerning the continued applicability of the germaneness test and their constitutional challenge, this Court concludes that *In re Initiative Petition No. 403, State Question No. 779,* 2016 OK 1, 367 P.3d 472 remains good law and the new article proposed by IP 416 does not violate the single-subject requirements of Okla. Const. art. 24, § 1. It is the determination of this Court that IP 416 is legally sufficient for submission to the people of Oklahoma. Any petition for rehearing in this matter shall be filed no later than five (5) days from the date this opinion is handed down.

INITIATIVE PETITION NO. 416, STATE QUESTION NO. 795 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER (by separate writing), WINCHESTER, EDMONDSON, and REIF, JJ.

CONCUR SPECIALLY: WYRICK, J. (by separate writing)

RECUSED: COLBERT, J.

KAUGER, J., with whom WINCHESTER, J., joins concurring:

¶1 I concur by reason of stare decisis based on this Court's decision in In Re Initiative Petition No. 403 State Question No., 779, 2016 OK 1, 367 P.3d 472.

Wyrick, J., concurring specially:

¶1 I concur for the reasons set forth in my separate opinion in Case No. 116,679, *Oklahoma Independent Petroleum Association v. Potts*, 2018 OK 24, --- P.3d ---.

March

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

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

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

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

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

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

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

2018 OK CIV APP 15

MATTHEW RICHARD PARKER, Petitioner/Appellee, vs. STATE OF OKLAHOMA, Respondent/Appellant.

Case No. 115,092. February 9, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE WILLIAM J. MUSSEMAN, TRIAL JUDGE

AFFIRMED

Fred Randolph Lynn, Tulsa, Oklahoma, for Petitioner/Appellee

Steve Kunzweiler, TULSA COUNTY DISTRICT ATTORNEY, Stephanie A. Collingwood, Douglas A. Wilson, ASSISTANT DISTRICT ATTORNEYS, Tulsa, Oklahoma, for Respondent/Appellant

JANE P. WISEMAN, PRESIDING JUDGE:

¶1 The State of Oklahoma appeals a trial court order finding that Matthew Richard Parker "made a *prima facie* showing of actual innocence for the purpose of initiating a claim pursuant to the Oklahoma Governmental Tort Claims Act." After review, we affirm the order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Parker was found guilty by a jury of "sexually abusing a minor child/felony" and was sentenced on April 25, 1997, to life in prison. Parker appealed citing numerous propositions of error including ineffective assistance of counsel. In a summary opinion filed October 19, 1998, the Court of Criminal Appeals affirmed the judgment and sentence of the trial court.

¶3 As reported in *Parker v. Scott*, 394 F.3d 1305 (10th Cir. 2005), Parker sought federal habeas relief. The United States District Court for the Northern District of Oklahoma denied Parker's petition for a writ of habeas corpus, and the United States Court of Appeals for the Tenth Circuit affirmed that decision.

¶4 On July 1, 2011, Parker filed an "Application for Post-Conviction Relief" in his Tulsa County District Court case on the ground of "actual innocence." Stating that he passed a polygraph test while he was incarcerated, he further asserted, "The investigation by which I came to be accused and the prosecution resulting therefrom were so suggestive and results-oriented as to dictate a guilty verdict. My trial lawyer, who has been disbarred, did not spot this set of problems." In his brief supporting his application, he asserted the existence of four items of previously unavailable evidence which we will discuss in detail below.

¶5 The trial court denied Parker's Application for Post-Conviction Relief in September 2011. The Court of Criminal Appeals then reversed the trial court's decision and remanded the case for an evidentiary hearing on Parker's post-conviction application.

¶6 After an evidentiary hearing held on August 30 and 31, and September 27, 2012, the trial court made findings about the four items of evidence Parker claimed were unavailable to him at the time of trial. Parker claimed that Dr. Waterman would testify "'that developments in the area of investigative techniques used in child sex abuse cases since 1996 all but conclusively demonstrate Matthew Parker's innocence'" and "'that the investigation conducted in 1996 was badly flawed, particularly in its use of outdated, discredited, condemned interviewing techniques.'" The trial court found that "the proposed testimony of Dr. Waterman would not have been material to this case" and Parker "did not exercise due diligence to discover Dr. Waterman prior to trial, as Dr. Waterman was available to testify at the time of [Parker's] trial."

¶7 The second item Parker claimed was excluded and not available at trial was "the alleged absence of a mole on [Parker's] penis." The court found that, while Parker argued his trial counsel's ineffectiveness prevented him "from demonstrating evidence of the lack of a mole on his penis" and also that his "trial counsel lied to him about the effectiveness and permissibility of this evidence," it was unclear from Parker's testimony at the evidentiary hearing "exactly what evidence his trial counsel lied to him about." Both Parker and his mother testified that he did not have a mole on his penis. The court found additional evidence

on this issue "would have been merely cumulative" and the issue concerning the lack of a mole could have been raised in the direct appeal of the conviction or in the habeas corpus proceeding.

¶8 The third item Parker alleged was not available at trial was "the prior, unsubstantiated, allegation of sexual abuse made by the complaining witness." Parker claimed the complaining witness had previously alleged sexual abuse by "a previous babysitter's husband." Parker alleged this information

> was known at the time of the trial, but was not brought to the jury's attention through the ineffectiveness of [his] trial counsel (again, through a lie about the State's willingness to employ such a procedure) and through a legal error by the trial court (failure to hold a required taint hearing under OKLA.STAT.tit. 12 § 2803.1).

The trial court found that this evidence was known at the time of trial and the issue could have been raised in the direct appeal or in the habeas corpus proceeding.

¶9 The fourth item Parker claimed was unavailable was his passing a polygraph examination in 2007. Parker claimed Susan Loving, a member of the Pardon and Parole Board, requested that he take the exam, his application for release received a unanimous 5-0 vote in favor of his release, but Governor Brad Henry denied the application. He also claimed that before trial, the prosecution offered the following "deal" – if he passed a polygraph examination, they would drop the charges, but if he failed the examination, "he would plead guilty and be sentenced to ten years imprisonment." Parker claimed he agreed, but the prosecution withdrew the deal. The trial court found Parker was not precluded from taking the examination before trial and the "evidence of the polygraph examination [is] immaterial as such evidence would not have been admissible in evidence at [Parker's] trial."

¶10 Parker appealed the trial court's decision to the Court of Criminal Appeals, and the Court granted Parker's application for post-conviction relief and remanded the case for a new trial. The Court stated:

> In *May v. State*, 1976 OK CR 328, ¶10, 75 P.3d 891, we held that when there exists evidence of material facts not previously presented and heard, vacation of the conviction or sentence may be required in the interest of justice. In the present case we find evidence of material facts, favorable to [Parker], not previously presented and heard from the testimony of Rhae Smith at the evidentiary hearing. The record reflects that testimony concerning the child's advanced sexual knowledge and prior allegations of sexual abuse were not heard by the jury because of trial counsel's ineffective representation of the defendant.

The Court found, "In the present case the evidence and testimony presented at the evidentiary hearing shows the trial counsel's performance was constitutionally deficient and that the deficient performance prejudiced the defense." The Court further found, "Based on the evidence adduced at the evidentiary hearing this Court finds that the ineffectiveness of trial counsel was inadequately raised in the direct appeal to this Court."

¶11 On March 26, 2015, State filed a motion to dismiss "for the reason that after the passage of 21 years, the evidence in the case has become stale." At the hearing on the motion held that same day, State asked that the case be dismissed with prejudice, and the trial court granted the motion.

¶12 On February 16, 2016, Parker filed an "Application for a Finding of Actual Innocence" in which he argued that based on the procedural history of the case, the Court of Criminal Appeals' reversal of the conviction, and State's dismissal, "there easily exists sufficient evidence in the record for a finding that a *prima facie* case of actual innocence is present."

¶13 In response, State argued that the Court of Criminal Appeals granted Parker's application for post-conviction relief based only on the ineffective assistance of his counsel in failing to present Rhae Smith's testimony "regarding the 'child's advanced sexual knowledge'" and previous allegation of sexual abuse. State asserted Parker "has not made a *prima facie* case of actual innocence."

¶14 In its order filed on May 19, 2016, the trial court determined:

> 1. Based on . . . the evidence in the record before this Court, viewed in a light most favorable to Petitioner/Applicant, he has made a *prima facie* showing of actual innocence for the purpose of initiating a claim pursuant to the Oklahoma Governmental

Tort Claims Act, OKLA.STAT.tit. 51, § 151 *et. seq*.

State now seeks this Court's review of the trial court's decision.

STANDARD OF REVIEW

¶15 We address the question of whether Parker stated a *prima facie* case as we would the question of whether a petition is legally sufficient – as a question of law, which we review *de novo. See Jordan v. Western Farmers Elec. Co-op*., 2012 OK 94, ¶ 5, 290 P.3d 9.

ANALYSIS

¶16 State argued in its brief in chief that the trial court erred by (1) making "a threshold determination of actual innocence entitling [Parker] to bring suit under the [GTCA] in the absence of any wrongdoing by the State" and by (2) "basing its threshold determination of actual innocence on impeachment evidence not presented at trial."

¶17 In the order on appeal, the trial court determined Parker made a *prima facie* showing of actual innocence such that he could pursue his claim pursuant to the GTCA. The GTCA, at 51 O.S.2011 § 154(B), provides:

> 1. Beginning on the effective date of this act, claims shall be allowed for wrongful criminal felony conviction resulting in imprisonment if the claimant has received a full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced or has been granted judicial relief absolving the claimant of guilt on the basis of actual innocence of the crime for which the claimant was sentenced. The Governor or the court shall specifically state, in the pardon or order, the evidence or basis on which the finding of actual innocence is based.
>
> 2. As used in paragraph 1 of this subsection, for a claimant to recover based on "actual innocence", the individual must meet the following criteria:
>
> a. the individual was charged, by indictment or information, with the commission of a public offense classified as a felony,
>
> b. the individual did not plead guilty to the offense charged, or to any lesser included offense, but was convicted of the offense,
>
> c. the individual was sentenced to incarceration for a term of imprisonment as a result of the conviction,
>
> d. the individual was imprisoned solely on the basis of the conviction for the offense, and
>
> e. (1) in the case of a pardon, a determination was made by either the Pardon and Parole Board or the Governor that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser offenses, was not committed by the individual, or
>
> *(2) in the case of judicial relief, a court of competent jurisdiction found by clear and convincing evidence that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser included offenses, was not committed by the individual and issued an order vacating, dismissing or reversing the conviction and sentence and providing that no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.*

(Emphasis added and footnote omitted.)

¶18 In *Courtney v. State*, 2013 OK 64, ¶ 0, 307 P.3d 337, the Supreme Court addressed the issue of appellate jurisdiction in a case involving a request to determine actual innocence. The Court noted that "the threshold determination of actual innocence (made in conjunction with an order vacating, dismissing or reversing a conviction) is not a requirement founded upon the criminal law" but a "threshold determination is a requirement created by the [GTCA] as a predicate to a tort claim against the State for wrongful conviction." *Id.* ¶ 4. The Court stated:

> Significantly, the concept of actual innocence is not a common law legal standard in the same sense as guilt beyond a reasonable doubt. The term actual innocence is a general expression of Legislative intent to limit tort claim relief to cases in which the defendant was exonerated, as opposed to cases in which a conviction is set aside from the suppression of a confession or the exclusion of other evidence. Even though the determination of actual innocence is to be made in conjunction with a post-conviction relief proceeding, actual innocence is

not an issue that must be determined for the court to grant post-conviction relief.

Id. The Court continued:

> Actual innocence is an ancillary issue to be determined in a supplemental proceeding. In the supplemental proceeding, the court makes use of the evidence adduced at the post-conviction relief proceeding as well as other evidence. By directing the post-conviction relief court to make the additional determination of actual innocence, the Legislature was not making actual innocence a matter of criminal jurisprudence; the Legislature was simply seeking to achieve judicial economy. In the final analysis, *a determination of actual innocence does not entitle the successful petitioner to further relief under the criminal law, it simply paves the way for the petitioner to pursue civil liability on the part of the State.*

Id. ¶ 5 (emphasis added). The determination made by the trial court "is just the first step in the tort claim process that may ultimately require a jury to finally determine a claimant's actual innocence." *Id.* ¶ 6.

¶19 As to the inclusion of the "clear and convincing evidence" language in § 154(B), the Court stated:

> While the Legislature does require clear and convincing evidence of actual innocence to pursue a claim, we do not believe that the Legislature intended the court to make a final adjudication of actual innocence at this stage. When viewed in the context of the larger tort claims process, it appears the Legislature intended the court to act as gatekeeper.

Id. ¶ 7. The Court added, "The gatekeeper role of the court is to determine whether the petitioner had made a *prima facie* case of innocence." *Id.* ¶ 8. In *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶ 14, 981 P.2d 301, the Supreme Court instructed: "A *prima facie* case is made out by that quantum of proof which, if unexplained or uncontradicted, is sufficient to establish a given fact and to uphold a judgment in favor of the issue which it supports, but which may be refuted by other evidence." The evidence in support of the claim "may be direct or it may be such as supports an inference in favor of the fact in question." *Id.*

¶20 The *Courtney* Court pointed out, "The requirement of 'clear and convincing evidence' at this stage is not a burden of proof, but is the measure of the *prima facie* case." *Courtney*, 2013 OK 64, ¶ 8. It described "[c]lear and convincing evidence" as "sufficient evidence, both in its quality and quantity, so as to produce a firm conviction of the truth of the allegation." *Id.* The Court explained, "In the related gatekeeper role for the tort of outrage, the trial court must allow the case to go forward if reasonable persons could differ on the ultimate issue." *Id.*

¶21 The Court cautioned that when the trial court assesses whether a *prima facie* showing has been made, it "must view the evidence in a light most favorable to the petitioner, particularly any exonerating evidence." *Id.* ¶ 9. This Court "must likewise view the evidence in a light most favorable to the petitioner when conducting de novo review of the actual innocence finding by the post-conviction relief court." *Id.* This consideration is required for these reasons:

> First, upon vacation of the conviction, the presumption of innocence is restored to the petitioner. Second, in vacating the conviction, the court must have found the exonerating evidence to have sufficient probative force to overcome the jury's determination of guilt beyond a reasonable doubt. Third, this view of the evidence in determining a *prima facie* case better serves the "remedial nature" of a claim for compensation for wrongful conviction. [*Wilhoit v. State*, 2009 OK 83, ¶ 13, 226 P.3d 682]. It also liberally construes §§ 154(B) and 156(H) "so as to afford all the relief within the power of the court which the language of the act indicates the Legislature intended to grant." *Id.*

The Court explained:

> In *Wilhoit,* a case where a conviction was set aside prior to the effective date of §§ 154(B) and 156(H), this Court took a similar view of a *prima facie* case of innocence; we recognized that vacation of a conviction based on exonerating evidence is a sufficient showing of actual innocence to initiate the Risk Management claims process. *Wilhoit,* 2009 OK 83, ¶ 11, 226 P.3d at 685. One rationale for this approach was that the State is afforded an opportunity to present evidence in the claims process to rebut the petitioner's claim of innocence. *Id.* In the course of the Risk Management

> claims process for such claims, if actual innocence remains in doubt, the State's Risk Management representative may deny the claim and have a jury ultimately determine actual innocence as an element of a wrongful conviction claim. No good reason exists to subject post-effective date claims to a different and more difficult process.

Id. ¶ 10. In summary, the Court held:

> The determination of actual innocence is ancillary to a proceeding seeking judicial relief from a conviction and is to be made utilizing the evidence offered in support of such relief and other evidence. A court should view the evidence in a light most favorable to the petitioner, bearing in mind that actual innocence will be again examined in the claims process and may ultimately be determined by a jury.

Id. ¶ 13.

¶22 The trial court held that Parker stated a *prima facie* case. In its appellate brief, State asserted that it was trial court error to make "a threshold determination of actual innocence entitling [Parker] to bring suit under the [GTCA] in the absence of any wrongdoing by the State." State argued Parker's claims arose from a potential "'self-inflicted injury' because of attorney malpractice, instead of one arising from any negligence or wrongdoing by the State or one of its political subdivisions." State asserted it "did nothing to subject itself to liability under the GTCA."

¶23 Although Parker consistently argued the issue of ineffective assistance of counsel, he also repeatedly took issue with State's use of inappropriate investigative techniques, which is an allegation of wrongdoing by State. Viewing the evidence in a light most favorable to Parker, he presented argument and evidence of wrongdoing by State in the evidentiary hearing. The question for the trial court was not whether State had committed any wrongdoing, but whether Parker presented a *prima facie* case of actual innocence. Just as the Court in *Courtney* concluded that "actual innocence will be again examined in the claims process and may ultimately be determined by a jury," *id.* ¶ 13, we conclude that at the threshold stage for determining if Parker had established a *prima facie* case, the trial court was not deciding whether Parker was actually innocent or whether State committed any wrongdoing. Based on the reasoning in *Courtney*, we conclude that if Parker files a GTCA claim based on actual innocence, State will then have the opportunity to present its arguments that it did nothing wrong. The trial court was not deciding the issue of State's liability under the GTCA, but only whether Parker had shown a *prima facie* case. We conclude, as the trial court did, that he has.

¶24 State next argued trial court error when it based "its threshold determination of actual innocence on impeachment evidence not presented at trial." It maintained that in considering Parker's application, the trial court "seemingly ignored the basis for the reversal of the conviction and for the State's dismissal." State claimed Parker's charges were not dismissed because of exonerating evidence and further that the trial court "committed reversible error in holding that such impeachment evidence that could have been presented at trial is exonerating in nature, rather than evidence that trial counsel rendered ineffective assistance of counsel."

¶25 We reject this proposition of error, again based on the holding in *Courtney.* We reiterate from *Courtney*: "Actual innocence is an ancillary issue to be determined in a supplemental proceeding. In the supplemental proceeding, the court makes use of the evidence adduced at the post-conviction relief proceeding as well as other evidence." *Id.* ¶ 5. Clearly, the trial court was free to use the evidence adduced at the post-conviction relief proceeding and was not limited to the evidence presented at trial. The Court of Criminal Appeals reversed the conviction and ordered a new trial. State then decided to dismiss the case with prejudice. Parker was unable to present any further evidence of actual innocence and obtain a complete exoneration without a new trial.

¶26 Pursuant to 51 O.S.2011 § 154(B)(2), Parker showed he was charged with and convicted of a felony and that he was incarcerated solely as a result of his conviction for the offense. During the post-conviction relief proceedings, Parker presented evidence in support of his claim of actual innocence. The Court of Criminal Appeals reversed the conviction and remanded the case for a new trial. In response, State ultimately dismissed its case against Parker with prejudice. We conclude that, in viewing the evidence in the light most favorable to Parker, he presented sufficient evidence to establish a *prima facie* case of actual innocence pursuant to § 154(B).

The trial court's order, and our affirmance of that decision, do not establish Parker's actual innocence or any wrongdoing by State. In any subsequent GTCA lawsuit by Parker against State, it will have a full opportunity to defend against his claims in that case.

CONCLUSION

¶27 Finding no error, we affirm the trial court's decision.

¶28 **AFFIRMED**.

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

2018 OK CIV APP 16

GERALD DAVID CHICOINE, SHELLY ANNETTE CHICOINE, individually and as next friend of CAYMAN DAVID CHICOINE, Plaintiffs/Appellants, vs. SAINT FRANCIS HOSPITAL, INC., SAINT FRANCIS HEALTH SYSTEM, INC., and KELLY J. JONES, R.N. Defendants/ Appellees.

Case No. 115,255. December 22, 2017

APPEAL FROM THE DISTRICT COURT OF WAGONER COUNTY, OKLAHOMA

HONORABLE DAVID SHOOK, JUDGE

AFFIRMED

Jon L. (Lin) McGraw, McKinney, Texas, and Matthew J. Kita, Dallas, Texas, and Charles L. Boudreaux, Paul T. Boudreaux, Raymond S. Allred, Richardson Richardson Boudreaux, Tulsa, Oklahoma, for Plaintiffs/Appellants,

Mike Barkley, Brad Smith, F. Will DeMier, Jeff L. Wilson, Rachel D. Parrilli, The Barkley Law Firm, Tulsa, Oklahoma, for Defendants/ Appellees.

Bay Mitchell, Presiding Judge:

¶1 Plaintiffs/Appellants Gerald David Chicoine and Shelly Annette Chicoine, individually and as next friend of Cayman David Chicoine (collectively "Plaintiffs") appeal the trial court's denial of their Motion for New Trial following the jury's return of a verdict in favor of Defendants/Appellees Saint Francis Hospital, Inc., Saint Francis Health System, Inc., and Kelly J. Jones, R.N. (collectively "Defendants"). Following our review of the record on appeal and the applicable law, the decision of the trial court is AFFIRMED.

I. Factual and Procedural Background

¶2 On July 23, 2009, Cayman Chicoine, a minor child, was admitted to Defendant Saint Francis Hospital ("SFH") for herpes encephalitis, a severe viral infection of the brain. On July 25, 2009, Cayman's treating physician, Dr. Barton, ordered that Cayman, who was then in a medically induced coma, receive 150 milligrams (mg) of pentobarbital to treat the brain seizures caused by the viral infection. Defendant Kelly J. Jones, R.N., unintentionally administered 2,000 to 2,500 mg of the medication to Cayman. At that time, the overdose was unknown to SFH staff. Cayman went into cardiac arrest (referred to in the record as a "code"). Nurses in the room then started CPR, and Cayman's condition stabilized after a few minutes. After the code but before he knew of the overdose, Dr. Barton also ordered the placement of a "bolt" to monitor Cayman's intracranial pressure ("ICP").[1] Plaintiffs presented evidence showing the bolt would not have been needed at that exact moment but for the overdose. Defendants also presented evidence showing the bolt would likely have been required at some point during Cayman's illness and that the bolt was used throughout his treatment to monitor ICP. Cayman survived his bout with herpes encephalitis but left SFH with severe brain injuries.

¶3 Plaintiffs brought suit against Defendants alleging the overdose of pentobarbital and Defendants' failure to properly intervene after the overdose resulted in brain damage to Cayman that was materially worse than brain damage that would have been caused by the herpes encephalitis alone. Defendants admitted Cayman received an excess dose of pentobarbital but denied that the excess dose caused any damage to him. Defendants further denied they were negligent in intervening or treating the overdose. Following a three week jury trial, which began February 22, 2016, the jury returned a defense verdict. A poll of the jury showed nine jurors sided with the Defendants with three deciding in favor of Plaintiffs. Following the entry of the Journal Entry of Judgment in Defendants' favor, Plaintiffs filed a Motion for New Trial arguing the jury's verdict was "contrary to law" because the jury ignored the trial court's instructions and alleged the jury was exposed to extraneous prejudicial information in the jury room in the form of one juror's opinion regarding the characteristics of pentobarbital and the effect malpractice claims might have on nurses' insurance premiums.

The trial court denied Plaintiffs' Motion for New Trial and, relying on 12 O.S. §2606(B) and *Warger v. Shauers,* 574 U.S. ___, 135 S.Ct. 521 (2014), declined to admit the affidavits submitted to support Plaintiffs' allegations the jury was influenced by extraneous prejudicial information. Plaintiffs appeal from this denial of their Motion for New Trial.

II. Plaintiffs did not properly preserve an evidentiary challenge to the jury's verdict.

¶4 Generally, appellate courts review the denial of a motion for new trial for error of a pure question of law or for an abuse of discretion. *Robinson v. Okla. Nephrology Associates, Inc.*, 2007 OK 2, ¶6, 154 P.3d 1250, 1253. Here, Plaintiffs argue that because the jury's verdict was "contrary to law," we must apply a *de novo* standard of review to this contention of error. Specifically, Plaintiffs argue the verdict was "inconsistent with the undisputed evidence, the instructions [the jury] received, and the law of this State." Plaintiffs claim the undisputed evidence showed: (1) Defendants caused Cayman to receive an overdose of pentobarbital, (2) the overdose required Cayman to undergo CPR and to have the bolt implanted to monitor ICP, and (3) the act of CPR and bolt placement caused damage to Cayman. Given this undisputed evidence and having received standard jury instructions on negligence,[2] direct cause,[3] and damages,[4] Plaintiffs argue the jury had no option but to return a verdict in their favor and set the amount of damages to be awarded.

¶5 Plaintiffs insist they are not arguing the evidence was insufficient to support the jury's verdict, but we see no other way to view Plaintiffs' position. *See Reedy v. Weathers*, 1970 OK 130, 472 P.2d 914.[5] Put another way, Plaintiffs argue that, as a matter of law, they were entitled, at the close of all the evidence, to a directed verdict on the issue of liability and that they were entitled to be awarded some, or at least nominal, damages.[6] "Whether or not there is sufficient evidence to go to the jury in a law case is a question of law . . . that must be presented to the trial court by a demurrer to the evidence or motion to direct a verdict. . . ." *Id.* at ¶15. The trial court must be given the opportunity to make a ruling and the aggrieved party must note their exception to such ruling. *Id.* Only "then [will an appellate court] review the alleged error of law committed by the trial court in sustaining or overruling such demurrer or motion to direct a verdict." *Id.* "In order to preserve a challenge to the sufficiency of the evidence, a party must move for directed verdict at the close of all the evidence and before the issues are submitted to the jury." *Hebble v. Shell Western E & P, Inc.*, 2010 OK CIV APP 61, ¶15, 238 P.3d 939, 945 (citing *Drouillard v. Jensen Const. Co. of Okla., Inc.*, 1979 OK 126, ¶5, 601 P.2d 92, 94). Plaintiffs in this case never moved the trial court for a directed verdict. Accordingly, we agree with Defendants that Plaintiffs waived this issue for purposes of their Motion for New Trial and our appellate review. The trial court did not abuse its discretion in denying Plaintiffs' Motion for New Trial on these grounds.

III. The affidavits supporting Plaintiffs' Motion for New Trial were properly excluded by the trial court.

¶6 Plaintiffs also argued in their Motion for New Trial that they should be granted a new trial because extraneous prejudicial information had been introduced into the jury deliberations. The Motion was supported by affidavits of Jurors J.T. and V.B. who claimed that (1) Juror A.S. told the other jurors during deliberations that he learned pentobarbital was not a vasodilating drug while he helped his wife study for her nursing license exam, and (2) when Juror J.T. told the jury members he thought SFH's nurses were lying about their conduct during Cayman's code to keep their liability insurance premiums from increasing, Juror A.S. opined that his wife's liability insurance did not increase when claims were made. According to Plaintiffs, the determination of whether pentobarbital was a vasodilating drug was material to whether SFH met the standard of care in treating Cayman and would explain why Cayman needed CPR after the overdose. Plaintiffs argued Juror A.S.'s statements qualified as extraneous prejudicial information because it was an assertion of fact related to the issue the jurors were to decide. Further, Plaintiffs argued the statements regarding nurses' malpractice insurance bore upon the jurors' determination of witness credibility. Defendants responded with their own juror affidavits generally denying these statements although Juror A.S. did agree that he stated his wife's insurance premiums would not increase significantly with a claim. Additionally, Defendants argued Juror A.S.'s alleged statements were not extraneous prejudicial information because they merely reflected his life experiences. At the hearing on the matter, no witnesses were called, and Plaintiffs relied on the affidavits attached to their

Motion. The trial court refused to admit the affidavits under 12 O.S. §2606(B) and *Warger v. Shauers,* 574 U.S. __, 135 S.Ct. 521 (2014) and denied Plaintiffs' Motion.

¶7 "We review a trial court's order denying a motion for new trial for error of a pure question of law or for an abuse of discretion which is arbitrary, clearly against the evidence, and manifestly unreasonable." *Robinson*, 2007 OK 2, ¶6. Here, the trial court's decision to deny a new trial also rested on its decision to deny admission of the juror affidavits which purported to show that extraneous prejudicial information was improperly brought to the jury's attention. This decision is also reviewed for manifest error or an abuse of discretion. *See Ledbetter v. Howard*, 2012 OK 39, ¶22, 276 P.3d 1031, 1038; *Crane v. Nuttle*, 2005 OK CIV APP 73, ¶11, 121 P.3d 1124, 1127.

¶8 Title 12 O.S. §2606 codified the long-standing common law rule, often referred to as the "no impeachment" rule, prohibiting jurors from testifying to impeach the verdict of a jury on which they served. "The rule that jurors may not impeach their verdict was designed to encourage free and frank discussion among jurors, promote verdict finality, protect jurors from harassment by losing parties, and preserve the viability of the jury system." *Ledbetter*, 2012 OK 39, ¶2 (Winchester, J., dissenting). *See also Short v. Jones,* 1980 OK 87, 613 P.2d 452 (applying the common law predecessor to §2606).[7] Subsection (B) "created a single exception to this common law rule" which allows a juror to testify on the issue of whether "extraneous prejudicial information or outside influence was improperly brought to bear" during jury deliberations. *Walker v. Ison Transportation Services, Inc*., 2007 OK CIV APP 14, ¶7, 152 P.3d 894, 895 (quoting 12 O.S. §2606(B)) (internal quotations omitted). Subsection (B) provides in full:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes.

12 O.S. 2011 §2606(B).

¶9 Neither the statute itself nor Oklahoma case law has defined the terms "extraneous prejudicial information" or "outside influence."[8] Oklahoma's appellate courts have found juror testimony or affidavits admissible under §2606(B) when information from outside the testimony and exhibits admitted at trial was inserted into the jury's deliberations.[9] When applying the same evidentiary statute, the Oklahoma Court of Criminal Appeals described the exception as allowing juror testimony on "information injected into the deliberation process from the outside [which does not include] information coming from the juror's own subjective experiences and background. . . ." *Hawkins v. State*, 2002 OK CR 12, ¶45, 46 P.3d 139, 148 (finding that jurors could not testify regarding their alleged misunderstanding of what the term "life without parole" meant). In federal jurisprudence, "information is deemed 'extraneous' if it derives from a source 'external' to the jury."[10] *Warger,* 135 S.Ct. at 529 (citing *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739 (1987)).[11] "'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Id.* While our appellate courts have not explicitly adopted this understanding of external versus internal matters, the majority of our reported decisions are consistent with this approach. *See* note 9, *supra*. However, our Supreme Court's most recent decision on the issue, *Ledbetter v. Howard*, 2012 OK 39, 276 P.3d 1031, does not conform to this approach. This is the case Plaintiffs urge us to apply to the case at bar.

¶10 In *Ledbetter,* the Supreme Court upheld the grant of a new trial in a medical negligence case where the plaintiff suffered from diabetes. *Id.* at ¶20. The juror affidavits alleged the jury foreperson, who was a nurse, shared her experiences in the treatment of diabetic patients in an "attempt[] to influence her fellow jurors based on her professional knowledge and experiences, all while acting in the leadership position of foreperson on the jury."[12] *Id.* at ¶18.

When finding the juror affidavits admissible under §2606(B), the Supreme Court stated the jury foreperson's statements were "made as statements of fact by the foreperson; involved purportedly extraneous information arising solely from the foreperson's professional experience; and were intended to sway the jury toward a defendant's verdict." *Id.* at §16. The Supreme Court specifically noted that during *voir dire* the foreperson "assured the [trial court] that nothing about her experiences would cause her to be biased and that she would not substitute her experience for the testimony of the witnesses in the trial." *Id.* at ¶14.

¶11 We find the rationale employed in *Ledbetter* inapplicable to this case. First, Juror A.S. in this case is not a professional like the nurse foreperson in *Ledbetter.* He is married to a nurse. He is not, himself, a nurse. Second, Juror A.S. did not mislead counsel in *voir dire* and was not asked to, nor did he, make any specific guaranty regarding any knowledge he may have gained because of his wife's profession.[13] These facts were central to the Supreme Court's determination that the foreperson's statements were admissible under §2606(B). *Id.* at §§14, 16. *See also id.* at ¶20 ("Counsel were entitled to rely on the foreperson's guaranty to the trial court that she would not allow her professional expertise to override the testimony presented."). Further, the Supreme Court made clear the decision was limited and based upon the particular facts of the case. *See id.* at ¶18.[14] We must also note the different procedural stance. In *Ledbetter,* the Supreme Court was upholding the grant of a new trial and showed proper deference to the trial court's decision. *Id.* at ¶22.[15] Here, just the opposite has occurred. The trial court in this case, after overseeing *voir dire* and observing the entire trial, determined that Juror A.S.'s purported statements during jury deliberations did not qualify as "extraneous prejudicial information" or "outside influence" to qualify for the exception to the no impeachment rule set forth in §2606(B). We agree.

¶12 We view the case at bar to be strikingly similar to *Caldararo v. Vanderbilt University,* 794 S.W.2d 738 (Tenn. Ct. App. 1990). In that case plaintiff was the wife of a diabetic patient who alleged his brain damage was caused by nurses failing to properly intervene after he went into cardiac arrest. *Id.* at 740. The Court of Appeals of Tennessee found that juror affidavits did not contain extraneous information under that state's application of FRE 606(b) when such affidavits alleged the jury foreperson "repeated references to the fact that his wife was a nurse … [and] argued … the Vanderbilt nurses would have determined whether [plaintiff] was breathing even if they thought his difficulties were diabetes-related." *Id.* at 741. "A juror's personal experiences unrelated to the litigation are not external information," but "[a] juror's personal experiences directly relating to the parties or events directly involved in the litigation may be." *Id.* at 744 (citations omitted). The Tennessee court found that the juror's affidavits were not admissible because they did not show that the foreperson had "prior or extraneous knowledge of the parties or the events that gave rise to this suit" and "[a]t most, [the foreperson] claimed to have some specialized knowledge about diabetics and proper resuscitation procedures, presumably because he was married to a nurse." *Id.* at 745. "This is not the type of extraneous information that requires us to overturn a verdict." *Id.* We agree with the reasoning of the Tennessee court.

¶13 Juror A.S. did not have knowledge specifically relating to the facts and circumstances giving rise to Plaintiffs' suit. The affidavit claimed Juror A.S. purported to have some knowledge of the drugs used to treat Cayman and of the general nature of nurse's liability insurance.[16] "[I]t would be unreasonable, and perhaps unwise, to expect juries to be completely sterilized and free of any external influences. The jurors' various attitudes, philosophies, experiences and backgrounds are the 'very human elements that constitute one of the strengths of the jury system'." *Id.* (quoting *United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). Our jury system relies upon jurors bringing their "thoughts and backgrounds to the deliberations." *Nalley v. Kellywood Co.,* 1993 OK CIV APP 80, ¶9, 867 P.2d 1336, 1338. *See also* OUJI 1.8A.[17] A "juror's own subjective experiences and background" are not extraneous as that term is used in §2606(B). *See Hawkins,* 2002 OK CR 12, ¶45. *See also Ledbetter,* 2012 OK 39, ¶6 (Gurich, J., concurring).[18] "Moreover, in difficult line-drawing cases, the line should be drawn in favor of juror privacy, and the testimony should be disallowed." *Hawkins,* 2002 OK CR 12, ¶45.

¶14 Considering the record before us and the procedural posture of the case, we cannot say that the trial court abused its discretion or manifestly erred in refusing to admit the juror

affidavits in support of Plaintiffs' Motion for New Trial and in denying the same.

¶15 The decision of the trial court is AFFIRMED.

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

Bay Mitchell, Presiding Judge:

1. A "bolt" is a small sensor surgically implanted in the skull which rests on the surface of the brain and is used to monitor ICP.

2. OUJI 9.1; OUJI 9.2.

3. OUJI 9.6.

4. OUJI 4.2; OUJI 4.3.

5. In *Reedy*, ¶¶12-13, the plaintiff in a car accident case alleged for the first time on appeal that the verdict and judgment for defendant "were not sustained by sufficient evidence and were contrary to law" because, given the undisputed evidence presented at trial, the only conclusion the jury could have reached was to find the defendant liable. In that case, as here, the plaintiff never "called the trial court's attention to the alleged insufficiency of the evidence, under the law" by moving for a directed verdict, so the Supreme Court declined to review this contention of error on appeal. *Id.* ¶¶14-16.

6. In our review of the record on appeal, and specifically the jury instructions, we note the jury was not instructed on nominal damages. As presented to the jury, it was clear that Plaintiffs were seeking damages for the exacerbation of Cayman's brain damage allegedly caused by the pentobarbital overdose and Defendants' intervention afterwards, not for any alleged damage he suffered for the physical act of CPR and the insertion of the bolt. "It is the function of the jury to properly evaluate the various elements of alleged damages." *Park v. Security Bank & Trust Co.*, 1973 OK 72, ¶15, 512 P.2d 113, 117. Here, the jury did so and found that Plaintiffs suffered no damage as a result of Defendants' actions.

7. In *Short*, 1980 OK 87, ¶11, the Supreme Court revisited an earlier adoption of the common law version of the no impeachment rule and explained the reasoning behind the exclusion of juror testimony to impeach a verdict:

> The admissibility of such material would be a threat to the jurors' very security in that it would encourage perjury, through bribery and other less subtle methods of persuasion, after the jury had returned to their private abodes, and the slight burden of jury duty falling on the citizen would not cease upon rendition of a verdict and discharge of the jury, but continue on indefinitely. The exclusion of such matters is necessary to preserve the security of the jurors, the secrecy of their deliberations, and the finality of the judgment thereby rendered.

8. Similar to federal jurisprudence interpreting Federal Rule of Evidence ("FRE") 606(b), Oklahoma's appellate decisions do not appear to differentiate between the two terms. *See* 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence 2d § 6075 (2d ed.) ("The [federal] courts have not fully clarified the meaning of these two terms, often treating them as interchangeable or even abandoning the language of the rule entirely in favor of the hybrid 'extraneous influence'.").

9. *Willoughby v. City of Oklahoma City*, 1985 OK 64, 706 P.2d 883 (juror conducted independent investigation relating to cause of death); *Graybeal v. Martin Sand & Gravel*, 2008 OK CIV APP 28, 179 P.3d 1278 (jurors' affidavits admissible where jury foreperson made statement of fact indicating that personal representative had received large insurance settlement); *Thompson v. Krantz*, 2006 OK CIV APP 60, 137 P.3d 693 (a juror in a medical malpractice case conducted an internet search and obtained evidence regarding medical procedures and the results of other, similar lawsuits); *Crane v. Nuttle*, 2005 OK CIV APP 73, 121 P.3d 1124 (three jurors viewed the accident scene to "see how the accident could have happened" without court permission); *Bledsoe By & Through Bledsoe v. Truster*, 1992 OK CIV APP 25, 839 P.2d 673 (jury misconduct in speculating that excluded deposition contained material weighing on decision).

10. Oklahoma's statute is modeled upon FRE 606. Thus, federal cases are helpful when interpreting §2606(B). *See Willoughby*, 1985 OK 64, ¶12.

11. *Warger*, 135 S.Ct. at 524, involved a negligence suit arising from a motorcycle crash. During *voir dire*, a potential jury member said she could decide the case fairly. *Id.* This person eventually became the jury foreperson and revealed during deliberations that her daughter had been involved in a deadly car crash and opined that a lawsuit would have ruined her life. *Id.* at 524-25. The jury returned a defense verdict, and another juror came forward with the foreperson's statements after the verdict was returned. *Id.* The U.S. Supreme Court rejected the plaintiff's argument the no impeachment rule did not apply to alleged misrepresentations during *voir dire* and held that affidavits from other jurors setting forth the foreperson's statements during jury deliberations were inadmissible under FRE 606(b) because the affidavits did not concern "extraneous prejudicial information." *Id.* The Court held that the foreperson's experience with her daughter's car crash and her opinions thereon fell within the "internal" side of the divide. *Id.* Arguably, our Supreme Court's decision in *Ledbetter,* which deemed admissible juror affidavits concerning misleading statements during *voir dire*, conflicts with the U.S. Supreme Court's reasoning in *Warger,* which was decided two years after *Ledbetter. See* paragraph 10, *infra*. However, we need not reconcile the two cases to decide the case before us today as it does not involve any allegations that Juror A.S. misled counsel during *voir dire*. We look to *Warger* only for guidance on how federal courts define "external" and "internal" influences on jury deliberations.

12. The malpractice alleged in *Ledbetter* involved the misdiagnosis of Charcot foot, a disease of the nerves affecting diabetic patients. *Ledbetter,* 2012 OK 39, ¶¶7-8, n. 3. The majority opinion detailed the jury foreperson's statements as contained in the affidavits offered in support of the plaintiff's motion for new trial. *Id.* at ¶15. The affidavits stated the nurse foreperson: (1) eagerly shared her experiences and knowledge of the proper care and treatment of diabetic patients; (2) said she had been in "similar situations;" (3) said it was common for doctors to say a patient's condition was normal when it was not; (4) said "all diabetics have podiatrists" and questioned by plaintiff did not have one; (5) said, based on her experience, plaintiff had prior foot problems and was not following his doctor's instructions; (6) said that the four insulin shots per day taken by plaintiff showed he was not following instructions; and (7) said, based on her experience, if plaintiff had Charcot foot, an earlier diagnosis would not have helped his condition. *Id.*

13. Counsel knew Juror A.S.'s wife was a nurse at a different hospital. During *voir dire*, Juror A.S. stated he "develop[ed] his own opinions" regarding malpractice issues and that he generally sided with the patient while his wife sided with "the hospital. . . ."

14. "This is not a case in which we need make any sweeping statement as to when or how a professional may utilize individual training or expertise in the deliberative process or even may be allowed to communicate the same to fellow fact finders." *Ledbetter,* 2012 OK 39, ¶18.

15. When describing the trial court's actions, the Supreme Court stated:

> The trial judge conducted the initial *voir dire* in which the foreperson assured him that she would not allow her professional background to be substituted for the evidence presented by the witnesses; was present during the trial; observed the witnesses; and heard their testimony. After considering the motion for new trial and the juror's affidavit, the response, and the argument of counsel for all parties, he determined that the statements of the foreperson, taking on the persona of an expert witness during jury deliberations, constituted conduct materially and adversely affecting the Ledbetters' right to a fair trial. On the record presented, there has been no clear showing of manifest error and an abuse of discretion.

Ledbetter, 2012 OK 39, ¶22.

16. We must also note that 12 O.S. §2606(B) prohibits juror testimony on the actual effects the alleged extraneous information had on the verdict. *Id.* ("[A] juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations."). *See also Ledbetter*, 2012 OK 39, ¶7 (Gurich, J., concurring). Accordingly, the portion of the affidavits describing the effect Juror A.S.'s statements purportedly had on the jury were inadmissible regardless of whether the rest of the affidavit fell within the exception to the no impeachment rule set forth in §2606(B). 12 O.S. §2606(B); *see Ledbetter*, 2012 OK 39, ¶7 (Gurich, J., concurring). *See also U.S. v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975) ("the district court must disregard those portions of the affidavit purporting to reveal the influence the alleged prejudicial extrinsic matter had upon the jurors").

17. Oklahoma Uniform Jury Instruction 1.8A, which was provided to the jury in this case, provides in part: "From all the testimony and evidence seen by you during the trial, and using the reasoning which you each have, you will make your decision."

18. In an attempt to clarify the process for deciding when a juror with relevant professional experience has introduced "extraneous prejudicial information" as that term is used in §2606(B), Justice Gurich explained:

> When determining whether a juror with expertise improperly introduced extraneous information to the jury, the trial court must first decide whether the experience used by the juror in deliberations was part of the juror's background, gained before the juror was selected to participate in the case or was the result of independent investigation into a matter relevant to the case.

Ledbetter, 2012 OK 39, ¶6 (Gurich, J., concurring).

2018 OK CIV APP 17

IN THE MATTER OF THE MARRIAGE OF DIAZ: ANGELA DIAZ, Petitioner/Appellee, vs. ANTHONY DIAZ, Respondent/Appellant.

Case No. 115,780. January 19, 2018

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

HONORABLE BARRY V. DENNEY, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Winston H. Connor, II, Joshua W. Brewer, STOCKWELL & CONNOR, P.L.L.C., Jay, Oklahoma, for Petitioner/Appellee,

Nancy K. Anderson, Oklahoma City, Oklahoma, for Respondent/Appellant.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

¶1 Husband appeals that portion of the decree of dissolution wherein the trial court found his personal injury settlement to be marital property, and awarded Wife one-half of his settlement. He also appeals that portion of the decree wherein the trial court found Husband gifted Wife the Bristow home and awarded it to her as her separate property.

¶2 Petitioner, Angela Diaz, (Wife) and Respondent, Anthony Diaz, (Husband), were married February 14, 2004. In 2012, Husband participated in a 13-week clinical trial study of a pharmaceutical drug manufactured by Bristol-Myers Squibb to treat hepatitis C. He was 50 years old at the time.

¶3 Thereafter, Husband and Wife filed separate tort claims against Bristol-Myers Squibb that were resolved in a class action lawsuit. In April 2013, the parties received separate settlements of their claims against Bristol-Myers Squibb. The settlement documents did not explain how much of each party's award was allotted for which types of damages.

¶4 Wife's net recovery was $1,106,064.46 which was deposited in a joint bank account with Husband. Husband's net recovery was $1,937,209.21. Of that, Husband deposited $437,209.21 in the same joint account with Wife's award. The remainder of Husband's settlement went into an annuity in his name. The annuity included 180 monthly payments of $5,725.00 followed by a lump sum of $1,000,000.00 to be paid June 1, 2028. Husband's monthly annuity payments began in June 2013. The first annuity payment and those for July, August, and September went into the parties' joint account as Husband had instructed. The parties separated in mid-September, and thereafter, the payments went into Husband's separate account.

¶5 At trial, Husband testified that the Bristol-Myers Squibb drug treatment was extremely painful, and that as a result of the treatment, he no longer has hepatitis C. However, he stated, that "[d]oesn't mean it's – I'm not going to have problems down the road." He also testified that it was his understanding that the medication he received in the clinical trial "affected my heart and can affect it later on." He added that something might also happen with his kidneys.

¶6 In its August 12, 2016 Order, the trial court found, among other things, that Husband had gifted the residence in Bristow to Wife and awarded it to her as her separate property. It also applied the analytical approach in determining what portion of the tort settlement award was separate or marital property. That approach provides that the injured party who claims that some or all of the award is his separate property has the burden of showing what part of the award represents compensation for pain and suffering, personal disfigurement, post separation loss of earning capacity, medical expense or loss of consortium. The trial court found there was evidence that Husband endured more than 3 months of pain due to the use of the drug, but there was no evidence that any portion of the settlement was given for pain and suffering nor was there evidence that any part of it was given for diminished future earning capacity or for disfigurement. Thus, no part of the award was Husband's separate property. As a result, the trial court found it was marital property. It likewise found that although Wife's award was solely for her loss of consortium, she placed that money in a joint account, making it marital property. It found a 50/50 split of the annuity to be an equitable division of that marital property.

¶7 In its Order Regarding Petitioner's Motion to Clarify/Reconsider, among other things, the trial court awarded Husband 56% of the marital estate and awarded Wife 44% of the marital estate. It stated that ". . . although [Husband] did not prove that any of the settlement received in the Bristol-Meyers [sic] lawsuit was his separate property, his pain and suffering and his risk of future health issues was essentially what brought that very large asset into the marital estate. In reconsideration of this matter, the Court therefore finds the marital property split in favor of Husband is fair and equitable."

¶8 In the January 31, 2017, Decree of Divorce and Dissolution of Marriage, the trial court attached the Order as Exhibit E to the decree. In the decree, the trial court ordered that the entire annuity shall be split 50/50 between the parties, including the monthly payments and lump sum due and ordered Husband to reimburse Wife for her half of all payments made into his sole account since the parties separated in September 2013. It determined the amount owed to Wife through August 2016 is $100,187.50. It directed Husband to change the annuity so that the payment is equally divided between him and Wife from September 2016 on. Husband appeals.

¶9 Husband complains that the trial court abused its discretion in finding that his annuity, part of his personal injury settlement, is marital property subject to division and in ordering that the annuity be split 50/50 between the parties. The appellate court will not disturb the trial court's decision regarding property division unless the trial court abused its discretion or the decision is clearly against the weight of the evidence. *Gray v. Gray*, 1996 OK 84, ¶15, 992 P.2d 615. Although property acquired during marriage is presumed to have been jointly acquired, Husband contends that the annuity is his separate property. *Standefer v. Standefer*, 2001 OK 37, ¶15, 26 P.3d 104. In Oklahoma, the analytical approach is applied to determine whether a spouse's tort settlement is separate or joint property. The analytical approach attempts to determine the underlying nature of the recovery before characterizing it as either separate or joint property. The purpose for which the award or settlement is received controls its designation, so that to the extent the recovery is compensation for losses to the marital estate, it is marital property, and to the extent it is compensation for a personal loss to a spouse's separate estate, it is separate property. *Id.* at ¶13.

¶10 In *Taylor v. Taylor,* 1992 OK CIV APP 22, 827 P.2d 911, in which the Court of Civil Appeals held that the analytical approach applied, it cited *Bandow v. Bandow*, 794 P.2d 1346 (Alaska 1990), wherein the Supreme Court of Alaska stated:

> Lost earnings could represent marital or separate property, depending upon whether it replaces pre-divorce lost earnings, (marital property) or post-divorce lost earnings (separate property). As to the medical expenses component, it must be determined whether it compensates for pre-divorce or post-divorce expenses. More difficult questions are the components intended to compensate for non-economic losses such as pain and suffering of the injured spouse and the loss of consortium of the noninjured spouse. . . . Damages for pain and suffering, mental anguish, and the like compensate for a loss which is so personal to the claimant spouse that classifying them as marital property would be inequitable.

¶11 The trial court found that Husband's "pain and suffering and his risk of future health issues was essentially what brought that very large asset into the marital estate." Nevertheless, the trial court found the settlement documents did not apportion his award into categories of damages.

¶12 Husband urges that the trial court's decision that his annuity, comprised of approximately 3/4 of his individual settlement award, is divisible marital property is against the clear weight of the evidence. Husband admits there is no direct evidence to support a pain and suffering damage allocation in the settlement. Direct evidence is that which will persuade the fact finder of the existence of a fact without the necessity of drawing any inferences from the evidence. Indirect, or circumstantial evidence, is that evidence from which inferences must be drawn in determining the existence of the disputed fact. *Estrada v. Port City Properties, Inc.,* 2011 OK 30, fn 34, 258 P.3d 495. An inference must be based upon something other than mere conjecture or speculation. The inference must be a more probable and more reasonable inference to be drawn from the evidence. *Gypsy Oil Co. v. Ginn*, 1931 OK 496, ¶7, 152 Okla. 30, 3 P.2d 714. When reviewing the proof's suffi-

ciency, the evidence may be either direct or it may be indirect. *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶14, 981 P.2d 301.

¶13 Husband testified that he was in extreme pain during the Bristol-Myers Squibb hepatitis C drug trial and that the medication affected his heart and could affect it and his kidneys in the future. Wife does not dispute this. Although he received a settlement from Bristol-Myers Squibb which does not document how much of his award was apportioned into categories of damages, the trial court found Husband's pain and suffering and his risk of future health issues was essentially what brought the award into the marital estate. Thus, the probable and reasonable inference is that a substantial portion of Husband's award was allocated for pain and suffering and the risk of future health issues. *Gypsy Oil Co. v. Ginn*, 1931 OK 496, ¶7. Pain and suffering is personal to Husband, and his risk of future health issues are damages which are his separate property under the analytical approach. *Taylor v. Taylor,* 1992 OK CIV APP 22.

¶14 Just because a settlement is not allocated among the various types of damages awards does not result in its transformation from separate to marital property. The trial court should be able to make a reasonable apportionment of the settlement, even if not mathematically exact. *Taylor v. Taylor,* 1992 OK CIV APP 22, ¶15. The trial court's decision finding that Husband's annuity was marital property subject to division is an abuse of discretion and against the clear weight of the evidence. *Gray v. Gray,* 1966 OK 84, ¶15.

¶15 Husband argues the trial court abused its discretion in finding Husband gifted to Wife the Bristow home and in awarding it to her as her separate property. He argues the home was part of the marital estate, and should have been included in the valuation of it. The payoff was about $149,000.00. Husband and Wife paid off the home after the settlement money arrived. At the time of trial, the value was $70,000.00. Wife testified that prior to trial, Husband ". . . kept trying to tell me [the Bristow home] was mine and I told him not until the Judge decides." Husband testified he did not want the Bristow home.

¶16 A gift inter vivos requires proof of three essential elements: intention to give; complete delivery of the thing given; and acceptance by the donee. *McSpadden v. Mahoney,* 1967 OK 118, 432 P.2d 432. Here, even if Husband intended to give the Bristow home to Wife, there was no delivery of the deed to her, and she did not accept it. The home is part of the marital estate. Thus, the trial court abused its discretion in awarding Wife the Bristow home as her separate property.

¶17 REVERSED AND REMANDED with instructions to the trial court to reasonably apportion the annuity in a manner consistent with this opinion. It is further instructed to divide equitably the value of the Bristow home between Husband and Wife.[1]

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

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

1. At the time of trial, the value of the Bristow home was $70,000.00.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, March 1, 2018

C-2017-371 — Matthew Clayton Arrington, Petitioner, pled guilty to the crime of first degree rape, after former conviction of two or more felonies, in Case No. CF-2015-507 in the District Court of Stephens County. The Honorable Ken Graham, District Judge, found Petitioner guilty and sentenced him to life imprisonment without the possibility of parole. Petitioner filed a timely motion to withdraw the plea, which the trial court denied after a hearing. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The Judgment and Sentence of the district court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-1053 — Devonte Latroy Henry, Appellant, was tried by jury for the crimes of robbery with a dangerous weapon (Count 2), attempted robbery with a dangerous weapon (Count 3), and assault with a dangerous weapon (Count 4), in Case No. CF-2015-3479 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at ten years imprisonment and a $4,000.00 fine in Count 2, and eight years imprisonment and a $4,000.00 fine in each of Counts 3 and 4. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Devonte Latroy Henry has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2016-1096 — Appellant, Merle Travis Johnson, entered a plea of *nolo contendere* in the District Court of Choctaw County, Case No. CF-2002-30, on October 17, 2001, to three counts of Rape, First Degree, and one count of Sexual Battery. Appellant was sentenced to five years imprisonment for Sexual Battery. For three counts of Rape, First Degree, he was sentenced to twenty-eight years with all except the first thirteen years suspended, with rules and conditions of probation. The sentences were ordered to run concurrently. The State filed a motion to revoke Appellant's suspended sentences on November 12, 2015, and amended on May 9, 2016. Following a revocation hearing on August 24, 2016, the Honorable Bill J. Baze, Associate District Judge, found Appellant violated the rules and conditions of his probation. At sentencing on October 4, 2016, Judge Baze ordered ninety months of Appellant's remaining sentences revoked with the balance (sixty-six months) suspended under the original terms and conditions of probation, with credit for time served. The sentences were ordered to run concurrently. Appellant did not timely appeal the revocation of his suspended sentences but was granted a revocation appeal out of time by this Court on November 23, 2016, Case No. PC 2016-1002. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

C-2017-783 — Petitioner Raymond Charles Kionute entered a pleas of guilty in the District Court of Custer County, Case No. CF-2015-464, to three counts of Sexual Abuse of a Person Entrusted to One's Care. The Honorable Jill C. Weedon, Associate District Judge, accepted Petitioner's pleas and sentenced him to fifteen (15) years imprisonment in each count, to be served concurrently, with credit for time served and with the final five (5) years suspended. Petitioner was also ordered to pay court costs and fees. Petitioner timely filed a Motion to Withdraw Plea. At a hearing where Petitioner was represented by conflict counsel, the motion was denied. From that denial Raymond Charles Kionute has perfected his appeal. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

C-2017-242 — Angelo Raul Solis, Petitioner, pled no contest to the crimes of operating a vehicle under the influence of an intoxicating substance, a misdemeanor (Count 1), and driving under suspension, a misdemeanor (Count 2), in the District Court of Oklahoma County, Case No. CF-2016-9101. The Honorable Kevin

C. McCray, Special Judge, found Petitioner guilty and sentenced him in each count to one (1) year in jail, suspended, to be served concurrently. Petitioner filed a timely application to withdraw his pleas, which the court denied after evidentiary hearing. Petitioner now seeks a writ of certiorari. The Petition for the Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2017-83 — Joey Edward Pope, Appellant, was tried by jury for the crime of Indecent Exposure, After Former Conviction of Five Felonies in Case No. CF-2016-109 in the District Court of Ottawa County. The jury returned a verdict of guilty and set punishment at ten years imprisonment and one year of post-imprisonment supervision. The trial court sentenced accordingly. From this judgment and sentence Joey Edward Pope 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-2017-0385 — Appellant, Chase Douglas Cavaness, was charged on July 11, 2014, with Unlawful Possession of Controlled Dangerous Substance, a felony, after three prior felony convictions, in Canadian County District Court Case No. CF-2014-417. Appellant entered a plea of guilty on February 25, 2015, and was admitted into the Canadian County Drug Court Program. The State filed an application to terminate Appellant from the Canadian County Drug Court Program on March 15, 2017. Following a hearing on the State's application on April 10, 2017, the Honorable Gary D. McCurdy, Special Judge, sustained the State's application and terminated Appellant from the Canadian County Drug Court Program. Appellant was sentenced to fifteen years imprisonment. Appellant appeals from his termination from Drug Court. Appellant's termination from the Canadian County Drug Court Program is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

F-2017-0053 — Appellant, Kimberly Jean Stealer, entered a plea of guilty on February 29, 2016, to Possession of a Controlled Dangerous Substance (Methamphetamine) in Oklahoma County District Court Case No. CF-2015-4734. Appellant entered Drug Court agreeing that if successful, the case would be dismissed, and if unsuccessful, she would be sentenced to five years imprisonment, with credit for time served. The State filed an Application to Revoke from Drug/DUI Court Program on October 3, 2016. Following a Drug Court termination hearing on January 10, 2017, the Honorable Geary Walke, Special Judge, sentenced Appellant to five years imprisonment, with credit for time served. Appellant appeals from termination from the Drug Court program. Appellant's termination from the Drug Court program is AFFIRMED. Opinion by: Kuehn, J. Lumpkin, P.J.: concur; Lewis, V.P.J.: concur; Hudson, J.: concur; Rowland, J.: concur.

C-2017-879 — Roger Wayne Behrens, Petitioner, entered negotiated *nolo contendere* pleas to the crimes of Possession of Marijuana and Resisting an Officer in Case No. CM-2016-769 in the District Court of Bryan County. The trial court accepted the plea agreement and sentenced Petitioner to two terms of 90 days in the county jail, to be served concurrently and on weekends. Petitioner moved to withdraw his pleas, and at an August 15, 2017 hearing, the district court denied his request. From this denial of his Motion to Withdraw Pleas, Roger Wayne Behrens has perfected his certiorari appeal. Petition for Writ of Certiorari DENIED; District Court's denial of Petitioner's Motion to Withdraw Plea AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, March 8, 2018

F-2017-225 — Travis Murphy Lozada, Appellant, was tried by jury for the crimes of First Degree Felony Murder and Conspiracy to Commit a Felony in Case No. CF-2014-2691 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without parole for First Degree Murder and 10 years imprisonment and a $5,000 fine for Conspiracy. The trial court sentenced accordingly. From this judgment and sentence Travis Murphy Lozada has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2016-658 — Appellant Kurk DeLawrence Johnson was tried by jury and convicted of Sexual Abuse of a Child Under 12 years, After Former Conviction of a Felony, Case No. CF-2013-770 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. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Specially Concurs; Kuehn, J., Concur in Results; Rowland, J., Concur in Results.

F-2016-769 — Appellant, Carlos James Miera, Jr., was tried by jury and convicted of Burglary in the First Degree (Count 1); Conspiracy to Commit a Felony (Count 2); Assault with a Dangerous Weapon (Count 3); and Attempted Extortion Induced by Threats (Count 4) After Former Conviction of a Felony in District Court of Kay County Case Number CF-2015-702. The jury recommended as punishment imprisonment for ten (10) years each in Counts 1 and 3 and two (2) years each in Counts 2 and 4. The trial court sentenced accordingly, ordered Counts 1 and 3 to run concurrently and granted Appellant credit for time served. The trial court further ordered Counts 2 and 4 to run concurrently but ordered those sentences to run consecutively to Counts 1 and 3. From this judgment and sentence Carlos James Miera Jr. has perfected his appeal. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

C-2017-396 — Petitioner, Frederick Maurice Westbrook, was charged by Information in the District Court of McCurtain County, Case No. CF-2016-56 with First Degree Rape (Count 1) Sodomy (Count 2), and Burglary in the First Degree (Count 3). On January 13, 2017, Petitioner entered a negotiated blind plea to the charges with the assistance and advice of appointed counsel. The Honorable Walter Hamilton, Special Judge, accepted Petitioner's pleas and set the matter for sentencing pending receipt of the pre-sentence investigation report. On January 25, 2017, Petitioner filed a *pro se* request seeking to withdraw his blind pleas of guilty. The District Court appointed conflict counsel to assist Petitioner and held a hearing on the matter on February 10, 2017. After receiving the advice of conflict counsel, Petitioner withdrew his request to withdraw his plea. On March 8, 2017, the Honorable Walter Hamilton, Special Judge, sentenced Petitioner to imprisonment for sixty (60) years with all but the first thirty (30) years suspended in Count 1, and imprisonment for twenty (20) years each in Counts 2 and 3.[1] The District Court ordered the sentences to run concurrently and granted Petitioner credit for time served. On March 17, 2017, Petitioner filed his *pro se* motion to withdraw plea. On April 5, 2017, the District Court held an evidentiary hearing on Petitioner's request and denied the motion. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his motion to withdraw plea. The trial court's order denying Petitioner's Motion to Withdraw Plea is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

1. Petitioner is required to serve 85% of his sentences for First Degree Rape and Sodomy prior to becoming eligible for consideration for parole.21 O.S.Supp.2015, § 13.1.

RE-2017-90 — On November 10, 2009, Appellant Timothy Lee Logman entered a plea of guilty to Unlawful Distribution of a Controlled Drug in Craig County District Court Case No. CF-2008-17. He was convicted and sentenced to ten years imprisonment, with all but the first five years suspended. On March 12, 2014, the State filed a Motion to Revoke Appellant's suspended sentence in Case No. CF-2008-17. Following a hearing on the application, the Honorable H.M. Wyatt, III, Associate District Judge, found Appellant had violated his rules and conditions of probation and revoked Appellant's remaining suspended sentence in full. Appellant appeals. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Lumpkin, V.P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

F-2016-196 — Levi McCray Luginbyhl, Appellant, was tried by jury for the crime of Robbery with a Firearm, After Former Conviction of Two or More Felonies, in Case No. CF-2014-6496, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 40 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Levi McCray Luginbyhl has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Specially Concurs; Rowland, J., Concurs.

F-2016-1118 — Appellant, Jordan Taylor Cloud, entered a plea of *nolo contendere* in the District Court of Pontotoc County, Case No. CF-2013-253, on August 7, 2013, to Falsely Personate Another to Create Liability. Sentencing

was delayed while Appellant entered the Drug Court Program. The plea agreement provided that the charge would be dismissed and expunged upon successful completion of the Drug Court program. If Appellant failed to successfully complete the Drug Court program, he would be sentenced to ten years imprisonment. The State filed an application to terminate Appellant from the Drug Court program on July 15, 2016. Following a Drug Court termination hearing on November 29, 2016, the Honorable Gregory D. Pollard, Special Judge, terminated Appellant from the Drug Court program. Appellant was sentenced to ten years imprisonment, with credit for time served. Appellant appeals from his termination from Drug Court. Appellant's termination from Drug Court is AFFIRMED. Opinion by: Hudson, J., Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Specially Concurs.

RE-2016-873 — On January 4, 2011, Appellant Wayne William White, represented by counsel, entered a plea of no contest to violating a protective order in Tulsa County Case Nos. CF-2009-1638 and CF-2009-2041. White was sentenced to ten (10) years, suspended in both cases, subject to terms and conditions of probation. The sentences were ordered to be served concurrently with each other. On February 26, 2014, the State filed an Application to Revoke White's suspended sentence in Case No. CF-2009-2041. On July 29, 2014, the State filed an Application to Revoke White's suspended sentence in Case No. CF-2009-1638. On September 8, 2016, the District Court of Tulsa County, the Honorable William D. LaFortune, District Judge, revoked White's suspended sentences in full. The revocation of White's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2016-1056 — In the District Court of Grady County, Appellant, Matthew Dan Lane, while represented by counsel and on pleas of no contest, received a ten (10) year sentence of imprisonment in each one of the following case numbers: CF-2008-314 for Robbery in the First Degree, After Former Conviction of a Felony; in CF-2013-246 for Possession of a Controlled Dangerous Substance (Methamphetamine), After Former Conviction of a Felony; and in CF-2014-49 for Possession of a Controlled Dangerous Substance (Marijuana), a Second or Subsequent Offense. In each case number, and in accordance with plea agreements, the Honorable Richard G. Van Dyck, District Judge, imposed these sentences and ordered them to be served concurrently, but he conditionally suspended the execution of a portion of each sentence under written rules of probation. On August 4, 2016, Judge Van Dyck found that Appellant violated his probation. On November 8, 2016, pursuant to that finding, the Honorable Michael C. Flanagan, Associate District Judge, revoked in full the orders of suspension. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

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

116,128 — In The Matter of the Estate of Carol Annebelle Vogt, Deceased, Christopher Eugene Vogt, Petitioner/Appellant, vs. Billy Eugene Derr, Respondent/Appellee. Appeal from the District Court of Payne County, Oklahoma. In this interlocutory appeal from a judgment entered in a probate proceeding, Petitioner/Appellant, Christopher Eugene Vogt, the legally adopted son of Carol Annebelle Vogt, deceased (decedent), appeals the trial court's determination that decedent intended to disinherit Petitioner and therefore, Petitioner is not a pretermitted heir. We find the clear weight of the evidence supports the probate court's determination that Petitioner is not a pretermitted heir of decedent and affirm the judgment. AFFIRMED. Opinion by Bell, P.J., Joplin, J., and Buettner, J., concur.

Thursday, March 8, 2018

115,399 — Wells Fargo Bank, N.A., Plaintiff/Appellee, vs. Sheila F. Finn, Defendant/Appellant, and Spouse of Sheila F. Finn, if married, Elbert Kirby, Jr., John Doe, and Jane Doe, Defendants. Appeal from the District Court of Delaware County, Oklahoma. Honorable Robert G. Haney, Judge. Defendant/Appellant Sheila Finn appeals summary judgment foreclosing on a note and mortgage Finn gave to Plaintiff/Appellee Wells Fargo Bank, N.A. (Bank). The record shows no dispute of material fact and Bank was entitled to judgment as a matter of law. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

115,777 — Richard Thayne Cochrane, Petitioner/Appellee, vs. Lori Ann Pirraglia, Respon-

dent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. In this post-paternity proceeding to modify the decree of paternity's custody and time share provisions, Respondent/Appellant, Lori Ann Pirraglia (Mother), appeals from the trial court's order denying her motion to assess attorney fees and costs against Petitioner/Appellee, Richard Thane Cochrane (Father). The evidence shows Father ignored the paternity decree's order to mediate and settle custody and time-share disputes. Instead, Father filed the modification motion less than a month after the entry of the paternity decree. Also, Father unilaterally enrolled the child in a ½ day pre-kindergarten (pre-k) program knowing Mother preferred to enroll the child in a full day pre-k. Father also refused to allow the child's 20-year old half-sister (Mother's designee) to pick up the child for Mother's time share. Father also monitored the child's telephone communications with Mother by placing the calls on speaker phone. The evidence also shows that as a result of Father's behavior, Mother had to incur additional attorney fees in defense of Father's claims which she otherwise would not have incurred. After weighing the evidence, we hold the trial court abused its discretion when it refused to award Mother a reasonable amount of attorney fees and costs related to Father's actions. The trial court's order is therefore reversed and this matter is remanded to the trial court to award Mother her attorney fees and costs in an amount not less than 50% of the reasonable fees incurred by Mother in this modification proceeding. RE-VERSED AND REMANDED. Opinion by Bell, P.J.; Buettner, J., concurs, and Joplin, J., dissents.

115,879 — (Comp. w/Case Nos. 115,878, 115,880, 115,881 and 115,882) Conn Appliances, Inc. d/b/a Conn's, Plaintiff/Appellant, vs. Misty D. Jones, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Conn Appliances, Inc., d/b/a Conn's appeals from the trial court's order denying Conn's motion for default judgment against Defendant Misty D. Jones and ordering Conn to submit its claim to binding arbitration. Jones has not filed an appellate brief and this case proceeds on Conn's brief only. The trial court erred in refusing to grant default judgment and in ordering arbitration in the absence of a motion to compel arbitration. We REVERSE and REMAND. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

115,880 — (Comp. w/Case Nos. 115,878, 115,879, 115,881 and 115,882), Conn Appliances, Inc. d/b/a/ Conn's, Plaintiff/Appellant, vs. Lillie M. Webb, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Conn Appliances, Inc., d/b/a Conn's appeals from the trial court's order denying Conn's motion for default judgment against Defendant Lillie M. Webb and ordering Conn to submit its claim to binding arbitration. Webb has not filed an appellate brief and this case proceeds on Conn's brief only. The trial court erred in refusing to grant default judgment and in ordering arbitration in the absence of a motion to compel arbitration. We REVERSE and REMAND. Opinion by Buettner, J.; Bell, P.J., and Jopln, J., concur.

115,881 — (Comp. w/Case Nos. 115,878, 115,879, 115,880 and 115,882), Conn Appliances, Inc. d/b/a Conn's, Plaintiff/Appellant, vs. Scott Kinsley, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Conn Appliances, Inc., d/b/a Conn's appeals from the trial court's order denying Conn's motion for default judgment against Defendant Scott Kinsley and ordering Conn to submit its claim to binding arbitration. Kinsley has not filed an appellate brief and this case proceeds on Conn's brief only. The trial court erred in refusing to grant default judgment and in ordering arbitration in the absence of a motion to compel arbitration. We REVERSE and REMAND. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

115,882 — (Comp. w/Case Nos. 115,878, 115,879, 115,880 and 115,881), Conn Appliances, Inc. d/b/a Conn's, Plaintiff/Appellant, vs. Dennis H. Bannarn, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Conn Appliances, Inc., d/b/a Conn's appeals from the trial court's order denying Conn's motion for default judgment against Defendant Dennis H. Bannarn and ordering Conn to submit its claim to binding arbitration. Bannarn has not filed an appellate brief and this case proceeds on Conn's brief only. The trial court erred in refusing to grant default judgment and in ordering arbitration in the absence of a motion to compel arbitration. We REVERSE and REMAND. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Wednesday, February 28, 2018

116,014 — James C. Daniels, Jr., Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge, affirming a workers' compensation trial court's denial of Multiple Injury Trust Fund benefits to Claimant. Claimant's sole proposition of error is that the workers' compensation court erred because its order reflects that it considered the fact that Claimant's retirement was voluntary in determining that Claimant was not permanently and totally disabled. The relevant version of 85 O.S.2011 § 45(A) prohibits the consideration of benefits, savings, or insurance of the injured employee in determining the compensation to be paid under the Workers' Compensation Act. Section 45 is a codification of the common law's collateral source rule, and was intended to prohibit the workers' compensation court from considering the amount of a worker's collateral benefits, such as retirement benefits, as a reduction or set-off in calculating the amount of workers' compensation benefits to which a claimant is entitled. The statute does not prohibit the court from considering the fact that a claimant retired voluntarily and was still capable of performing his job at the time of his retirement, in determining the nature and extent of a claimant's disability. We find the workers' compensation court did not err in considering the fact that Claimant voluntarily retired from a job he was still capable of performing in making its determination that Claimant was not PTD. The panel's decision is supported by competent evidence and is in accord with the law, and is therefore sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Thursday, March 1, 2018

116,052 — Shalalah Saunders, Plaintiff/Appellant, vs. Marcella Smothers, an individual, Defendant/Appellee, and John Doe, an individual; Jane Doe, an individual; and agents, property owners, managers, and associates, Defendants. Appeal from an Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, denying Plaintiff's motion for reconsideration of the trial court's grant of summary judgment in favor of Defendant. Defendant, Plaintiff's landlord, does not dispute that Plaintiff notified her that Plaintiff had no hot water, and Defendant did not fix the problem for more than four days. On the fourth day, Plaintiff fell and was injured while carrying a pot of scalding hot water from the kitchen stove to the bathroom in order to prepare a warm bath. We find that, under the rationale of *Miller v. David Grace, Inc.*, 2009 OK 49, 212 P.3d 1223, although Defendant had a general duty to maintain Plaintiff's premises in a reasonably safe condition and to make reasonable repairs, that duty does not extend to protect the tenant from dangers that are so open and obvious as to reasonably expect tenants to detect the danger for themselves. Plaintiff admitted she was aware that boiling water can be dangerous, and she knew that there was a risk of burning herself if she spilled the water, but she engaged the risk nonetheless. We find Defendant had no duty to protect Plaintiff from injury under the facts presented here, as a matter of law. The trial court's summary judgment is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., concurs, and Fischer, J., dissents.

Friday, March 9, 2018

116,001 — Mid-Continent Casualty Company, a foreign corporation, Plaintiff/Appellee, vs. Scott Gordon, an individual, Defendant/Appellant, vs. Michael G. McConnell, Third-Party Defendant. Appeal from an order of the District Court of Tulsa County, Hon. Mary F. Fitzgerald, Trial Judge, denying Scott Gordon's motion for new trial and granting the motion for summary judgment filed by Mid-Continent Casualty Company. Our review of the record leads us to conclude that issues of fact regarding the Indemnity Agreement, the subject of this litigation, remain in dispute and should have precluded the entry of summary judgment in favor of Mid-Continent. In the face of disputed material issues of fact, judgment may not be entered as a matter of law. The denial of Gordon's motion for new trial was therefore an abuse of discretion. Accordingly, we reverse the order of the trial court and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Fischer, J., concurs, and Thornbrugh, C.J., concurs in result.

116,118 — In the Matter of the Estate of L.R. Walker, Deceased, Melvin Felton, Henry Felton, Dorothy Raglin, Appellants, v. Zachery

Bruner, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge, admitting will to probate, an interlocutory order appealable by right pursuant to Okla.Sup.Ct.R. 1.60(h), 12 O.S.2011 and Supp.2013, App.1. The will's proponent, Zachery Bruner (Administrator), submitted a photostatic copy of the original lost will, which exhibited the signatures of the testator and three attesting witnesses, which the trial court admitted into evidence. Contestants argue this was error. The sole issue on appeal is whether the trial court properly admitted into probate the photostatic copy of Decedent's will as a substitute for the original, lost will, pursuant to 58 O.S.2011, § 82. Contestants do not raise the issues of Decedent's capacity to execute the will, the circumstances surrounding its execution, or the trial court's interpretation of the will, assuming it was correctly admitted to probate. The trial court found the will existed at the time of Decedent's death, that the will was a self-proving will, and then admitted it into probate. We find no error. The trial court's findings are not against the weight of the evidence and are sustained. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

(Division No. 3)
Friday, March 9, 2018

114,952 — In Re the Marriage of Winston Frost and Tanya Hathaway-Frost: Winston Frost, Petitioner/Appellee, vs. Tanya Hathaway-Frost, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Anthony J. Miller, Trial Judge. In this appeal, Wife seeks to vacate the decree of dissolution because there is no subject matter jurisdiction, the petition is void, there was fraud in an order nunc pro tunc, and she suffered witness abuse by counsel and the trial court. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

115,181 — In Re the Marriage of Danielle Renee Tente (now Brown) and Brian Paul Tente: Danielle Renee Tente (now Brown), Petitioner/Appellant, vs. Brian Paul Tente, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Martha Oakes, Trial Judge. Petitioner/Appellant Danielle Renee Tente (now Brown) (Wife) appeals from a trial court's order modifying child support owed by Respondent/Appellee Brian Paul Tente (Husband), finding that Husband had overpaid child support for the previous three years in an amount totaling $6,755.12, and recalculating Husband's current child support obligation. Wife argues that the court committed reversible error in granting a retroactive modification of child support and improperly calculating the child support owed by Husband. We AFFIRM IN PART, REVERSE IN PART, AND REMAND WITH INSTRUCTIONS. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

115,666 — Cimarron Terrace Water Association and John Mark Munkres, Petitioners/Appellees, vs. Enid Municipal Authority and Oklahoma Water Resources Board, Respondents/Appellants. Appeal from the District Court of Major County, Oklahoma. Honorable Tim Haworth, Trial Judge. Respondents/Appellants, the Oklahoma Water Resources Board (Board) and the Enid Municipal Authority (EMA), seek review of the district court's order reversing and vacating the decision of the Board to grant a groundwater permit to EMA. The district court reasoned that the City of Enid (City), not EMA, held the subject groundwater rights and therefore EMA did not satisfy the statutory requirement that the permit applicant own the surface or a lease to take groundwater. We hold that EMA acted as Trustee for the City with the City's ratification and therefore was entitled to bring the application in its own name. We reverse the district court's order and remand to the district court for further proceedings consistent with this opinion. REVERSED AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

115,852 — The Bank of New York Mellon, Plaintiff/Appellee, vs. John C. McKnight and Tammy L. McKnight, Defendants/Appellants, and John Doe and Jane Doe, Defendants. Appeal from the District Court of Grady County, Oklahoma. Honorable Richard Van Dyck, Trial Judge. Defendants John C. McKnight and Tammy L. McKnight ("the McKnights") appeal a trial court order granting summary judgment and foreclosure in favor of Plaintiff, The Bank of New York Mellon ("Bank") on its petition and on the McKnights' counterclaims. The accelerated record establishes Bank is entitled to enforce the subject Note, but does not establish Bank's legal right to foreclose. Bank specifically admitted the McKnights' counterclaim allegations, including a prior foreclosure action, default judgment against Mr. McKnight, and vacation of that judgment based on the Mc-

Knights' reinstatement of the Note. Bank's motion for summary judgment fails to address this material fact, so summary judgment is not proper. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶ 10, 743 P2d 682, 685 (Approved for publication by the Oklahoma Supreme Court). Because the McKnights' quiet title action depends on whether Bank can prove its standing and its legal right to enforce the Note on remand, the trial court erred in granting summary judgment in favor of Bank on this specific counterclaim. The trial court's summary judgment in favor of Bank on the McKnights' counterclaim for violation of the FDCPA is affirmed. The Court's judgment in favor of Bank on its petition for foreclosure and in favor of Bank on the McKnights' quiet title counterclaim is reversed, and this matter is remanded for further proceedings consistent with this opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

116,289 — Wilkinson Law Firm, Plaintiff/Appellant, vs. Independent School District No. I-006 Sequoyah and Muskogee Counties, State of Oklahoma, Defendant/Appellee. Appeal from the District Court of Sequoyah County, Oklahoma. Honorable Darrell Shepherd, Judge. Plaintiff/Appellant Wilkinson Law Firm (Wilkinson) brought suit against Defendant/Appellee Independent School District No. I-006, Sequoyah and Muskogee Counties, State of Oklahoma (District) to collect on a contingency fee agreement entered into between the parties. On competing motions for summary judgment, the trial court found Wilkinson could not recover under the contingency fee contract but awarded him $4,343.75 for the reasonable value of his legal services. The trial court also awarded him $5,000 in prevailing-party attorney fees under 12 O.S. §936 for the time expended in the prosecution of this case against the District. The record showed Wilkinson was discharged before the contingency set out in the contract occurred. The trial court correctly concluded he could not recover under the contingent fee contract but may recover for the reasonable value of his services. The record showed Wilkinson expended 34.75 hours in his representation of the District and that his normal billing rate at that time was $125 per hour. The award of $4,343.75 to Wilkinson for the reasonable value of his services is AFFIRMED. The record before us is insufficient to support the prevailing party attorney fee awarded to Wilkinson pursuant to 12 O.S. §936. Accordingly, the award is REVERSED and REMANDED for the trial court to hold an adversary proceeding where Wilkinson bears the burden of providing sufficient records for the trial court to make an attorney fee award. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,396 — Randy L. Frantz, Jr., Plaintiff/Appellant, vs. William M. Valuck; Michael E. Hume; Advanced Care Clinic, L.L.C.; Dorothy June Hume; Reliable Discount Pharmacy, Inc.; Twin R. No. 2, Inc., d/b/a Crest RX Pharmacy; HAC, Inc., d/b/a 195 Homeland Pharmacy, Defendants, Crest RX, L.L.C., d/b/a Crest RX; BFLX-15, Inc., d/b/a Buy For Less Pharmacy No. 1006; Winegardner, Inc., d/b/a Eric's Pharmacy; and Shawnee Regional Pharmacy, Inc., d/b/a McLoud Clinic Pharmacy, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard C. Ogden, Judge. Plaintiff/Appellant Randy L. Frantz, Jr. (Plaintiff) appeals the trial court's denial of his Motion to Reconsider and Vacate its earlier dismissals in favor of Defendants/Appellees Crest RX, LLC d/b/a Crest RX ("Crest RX"); BFLX-15, Inc., d/b/a Buy For Less Pharmacy No. 1006; Winegardner, Inc., d/b/a Eric's Pharmacy; and Shawnee Regional Pharmacy, Inc., d/b/a McLoud Clinic Pharmacy (collectively, Pharmacy Defendants). Plaintiff filed his Petition alleging the Pharmacy Defendants breached the applicable standards of care related to the health care services each provided to him. In response, each of the Pharmacy Defendants filed Motions to Dismiss asserting that Plaintiff's claims fell outside of the applicable statute of limitations, failed to state a claim upon which relief could be granted based upon the learned intermediary doctrine, and that a pharmacy could not be sued for failing to access the Oklahoma Bureau of Narcotics' Prescription Monitoring Program ("PMP"). Based upon the learned intermediary doctrine and PMP arguments, the trial court sustained the Motions to Dismiss. The Journal Entries memorializing the trial court's rulings were not entered until September 9, 2016 for all of the Pharmacy Defendants except Eric's Pharmacy. The Journal Entry in favor of Eric's Pharmacy was entered September 13, 2016. Plaintiff filed a Motion to Reconsider, Modify and Vacate Orders Dismissing the Pharmacy Defendants on October 10, 2016. Plaintiff's Motion also sought leave to amend his Petition based upon *v. Valuck*, 2016 OK CIV APP 66, 394 P.3d 253, which opinion was filed September

19, 2016. The basis of Plaintiff's Motion to Reconsider was that the reasoning of the opinion required the trial court to allow Plaintiff to amend his Petition in the present case. Plaintiff contended that the trial court's dismissals, which were based upon its legal conclusion that the Pharmacy Defendants did not owe a duty to Plaintiff, were erroneous applications of the law and an abuse of discretion. Plaintiff argued this ground for new trial could not have been discovered within ten days of the entry of the journal entries dismissing the Pharmacy Defendants, which occurred on September 9, 2016 and September 13, 2016, because the decision was not filed until September 19, 2016. Because Plaintiff filed his Motion to Reconsider within 30 days of the filing of the decision (October 10, 2016), he argued he fell within the timeliness exception set forth in 12 O.S. 2011 §655. Regardless of when Plaintiff discovered the opinion or when he filed his Motion to Reconsider, Plaintiff's reliance on 12 O.S. 2011 §651(6) was flawed because the trial court's purported failure to comply with was not an error of law. Because it was a COCA opinion not or-dered for publication by the Supreme Court, was persuasive only and had no precedential effect. Sup.Ct.R.1.200(d)(2). The decision of the trial court is AFFIRMED. Opinion by Mitchell, Acting P.J.; Goree, V.C.J., and Bell, J. (sitting by designation), concur.

(Division No. 4)
Thursday, March 1, 2018

116,417 — Sarah Peter, Plaintiff/Appellant, v. Jesus Baeza, M.D., Mark Harman, M.D., Carles Cunningham, M.D., and OU Physicians, Defendants/Appellees, and Hillcrest Medical Center and Hillcrest Healthcare System, Defendants. Appeal from the District Court of Tulsa County, Hon. Mary F. Fitzgerald, Trial Judge. Plaintiff appeals from the trial court's order dismissing her petition for failure to comply with 12 O.S. Supp. 2013 § 19.1. In *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, 405 P.3d 681, the Oklahoma Supreme Court concluded that § 19.1 is unconstitutional. In accordance with this controlling decision, we summarily reverse the trial court's order under Oklahoma Supreme Court Rule 1.201, 12 O.S. 2011, ch. 15, app. 1. We remand for further proceedings. SUMMARILY REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, March 2, 2018

115,125 — Armond Davis Ross, Appellant, v. Rogers County District Attorney, Appellee. Appeal from an Order of the District Court of Rogers County, Hon. J. Dwayne Steidley, Trial Judge, denying Armond Davis Ross his petition for writ of replevin. The record on appeal does not contain a copy of the order appealed from. Accordingly, by show cause order, the parties were directed to provide the Court with a copy of the appealed order or the appeal would be dismissed. The parties did not comply with the order. Consequently, there is no order before the Court to review. Ross, as the Appellant, bears total responsibility for including in the appellate record all materials necessary for corrective relief. Legal error will not be presumed from a silent record. The appeal is therefore dismissed. DISMISSED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,093 — In the Matter of E.B. and P.C., Children under 18 Years of Age, Latasha Cullom, Appellant, v. State Of Oklahoma, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Wilma Palmer, Trial Judge, upon jury verdict terminating Mother's parental rights to her minor children, EB and PC. State sought termination pursuant to 10A O.S.2011, §§ 1-4-904(B)(13) and 1-4-904(B)(17), alleging, *inter alia*, that Mother's cognitive disorder rendered her incapable of adequately and appropriately exercising her parental rights. We find State presented clear and convincing evidence to support the jury's verdict that Mother has a diagnosed cognitive disorder or a medical condition including behavioral health which renders her incapable of adequately and appropriately exercising parental rights, duties, and responsibilities within a reasonable time considering the age of the children, and that allowing Mother to have custody would cause the children actual harm or harm in the near future. The evidence clearly and convincingly shows that the best interests of the children are met by terminating Mother's parental rights. Therefore, the order of the trial court upon jury verdict terminating Mother's parental rights to her minor children is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Monday, March 5, 2018

114,611 — US Bank National Association, Plaintiff/Appellee, vs. Joel Kruger and Kathy

Kruger, Defendants/Appellants. Appeal from an Order of the District Court of Tulsa County, Hon. Rebecca Brett Nightingale, Trial Judge, denying Debtor, Joel Kruger's, motion to vacate an order confirming the Sheriff's Sale of Debtor's real property (Kathy Kruger's personal liability on this note was discharged in bankruptcy). Debtor argues that the notice he received of the confirmation hearing was insufficient, and therefore the confirmation order should be reversed. We agree. A cursory review of this record shows the Debtor's whereabouts and that of his counsel of record, are well known. Given the convoluted posture and long, extensive, litigated history of this foreclosure action, the confirmation of the Sheriff's Sale may very well be the final opportunity for Debtor to present his defenses and prevent foreclosure of his house. The lack of a finding of personal service in this matter, given these facts, convinces this Court that an abuse of discretion has occurred. The trial court should have granted Debtor's motion to vacate the Final Order Confirming Sale. The order under review is reversed, and the matter remanded for further proceedings. Upon remand, the trial court shall set a new hearing date to confirm the 2009 Sheriff's Sale, and Debtor shall be entitled to personal notice of that hearing. At that time, both parties shall be permitted to raise any claims or defenses regarding the confirmation of the Sheriff's Sale, including whether the judgment has become unenforceable by operation of 12 O.S.2011, § 735. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, March 6, 2018

116,224 — Multiple Injury Trust Fund, Petitioner, v. Neil Tweedy, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. The Multiple Injury Trust Fund (MITF) appeals a decision of the Three-Judge Panel of the Workers' Compensation Court of Existing Claims (Panel) which affirmed a decision awarding the claimant, Neil Tweedy (Tweedy), permanent total disability (PTD) benefits. In this case, the date of injury was on January 2009 and that date establishes the applicable law. Tweedy was awarded PTD benefits against MITF and the Panel sustained the decision. The basis for the award was the combination of an open and obvious injury and *Crumby* findings made at the time of adjudication of his work-related injury. Neither the open and obvious injury nor the *Crumby* findings were work-related injuries. The independent medical examiner testified that combining the *Crumby* findings was necessary to be able to rate Tweedy as PTD. The finding of an open and obvious injury is supported by competent evidence. However, in *Ball v. MITF,* 2015 OK 64, n.17, 360 P.2d 499, the Court ruled that *Crumby* findings such as here could not be combined. Therefore, the decision of the Three-Judge Panel of the Workers' Compensation Court of Existing Claims affirming the PTD award to the claimant is reversed. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., concurs in result.

115,520 — In Re the Marriage of: Charlotte Thomas, Petitioner/Appellant, v. Kelvin D. Thomas, Respondent/Appellee. The trial court petitioner, Charlotte E. Thomas (Wife), appeals a Decree of Divorce re-entered following entry of an Order vacating the original Decree. The respondent, Kelvin D. Thomas (Husband), petitioned to vacate the original Decree. Wife's petition-in-error is recast as an appeal from a Decree providing *nunc pro tunc* relief to Husband. That action is consistent with the facts and circumstances of the case where the sole issue was whether Wife was entitled to 50% of Husband's entire 401k or just that part accruing during the marriage. The original Decree is ambiguous. The legal effect of trial court's decision is to correct the original Decree to make it speak the truth. As such, the judgment is affirmed. The award of attorney fees is reversed. The statute on which Husband relied, 43 O.S.2011, § 110(E) does not specifically provide for attorney fees in an action to correct a Decree as opposed to actions to enforce or modify the Decree. Statutes permitting attorney fees are strictly construed. Here, the action was not one to enforce or modify the Decree. Therefore, Husband has failed to demonstrate a statutory basis for the fee award and the attorney fee award is reversed. APPEAL ON MERITS RECAST AND TRIAL COURT DECREE MODIFIED AND AFFIRMED AS MODIFIED. JUDGMENT FOR ATTORNEY FEES REVERSED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., concurs, and Barnes, P.J., concurs specially.

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

Arthur D. Linville 405-736-1925

SUPERSEDEAS/APPEAL/COURT BONDS. Quick turn-around – A+ rated companies. Contact: John McClellan – MBA, Rich & Cartmill, Inc. 9401 Cedar Lake Ave. Oklahoma CIty, OK 73114. 405-418-8640; email: jmcclellan@rcins.com.

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

REUNITING BIOLOGICAL FAMILIES At Tracers Investigation Agency, we specialize in locating biological families in adoption cases using DNA analysis. For details, call or visit my website. Marilyn Conner, Member Association of Professional Genealogists, Licensed Private Investigator www.tracersinvestigations.com. Phone 405-441-4708.

OFFICE SPACE

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

OFFICE SPACE

EXECUTIVE OFFICE WITH SECRETARIAL SPACE, USE OF CONFERENCE ROOMS, receptionist, high-speed internet, fax, copy machine and kitchen. Convenient to all courthouses. Located in Midtown. 25 restaurants within ½ mile. Also the option of a private assistant's office. $750 - $1,250/month. Contact Larry Spears or Jo at 405-235-5605.

ONE TO 5 EXECUTIVE OFFICES AVAILABLE FOR LEASE AT THE RESERVE OFFICE PARK, 15310 N. May Ave, 1 1/4 mile north of Memorial. Four are 12'x12' ($580/mo each). One is 18'x14' plus closet ($800/mo). Can lease just one office. All five: $2,650/mo, utilities included. Common areas: large reception foyer, kitchen, 2 conference rooms. jimboaz99@coxinet.net.

POSITIONS AVAILABLE

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.

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.

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@berry firm.com.

POSITIONS AVAILABLE

ONEOK, INC. SEEKS MANAGER OF SERVICE CONTRACT ADMINISTRATION. ONEOK, Inc., a Fortune 500 midstream energy company, seeks a manager of service contract administration for its Tulsa, Oklahoma headquarters. The manager will be responsible for the management of ONEOK, Inc.'s service contract function, which administers service agreements and certain procurement contracts including environmental services, capital construction projects, information technology and services related to the operation and maintenance of company assets. The manager will also assist business sponsors and legal counsel in the preparation, negotiation and finalization of service agreements, work orders, bid documents and other related documents as needed. Bachelor's degree in law, accounting, business administration, engineering, other related field or an equivalent combination of formal education and job-related experience required. Strong preference for Juris Doctor degree or significant experience in a law firm or legal department setting. Applications should be submitted through ONEOK, Inc.'s careers website at http://www.oneok.com/Careers.

GREAT PLAINS IMPROVEMENT FOUNDATION, INC. IS SEEKING APPLICANTS FOR A FULL-TIME ATTORNEY in the Child Support Services Office in Lawton, Oklahoma. The position will require the attorney to prepare and try child support cases in administrative and district court, establish paternity and child/medical support, enforce and modify orders for child/medical support and negotiate with other attorneys and customers. Duties will include policy and procedure review, legal research and the supervision of staff in the preparation of legal documents. Knowledge of family law related to paternity establishment, child support and medical support matters is preferred. Active membership in the Oklahoma Bar Association is required. Salary range is $45,000-$52,000 annual depending upon experience plus benefits. An application and/or job description may be obtained by calling 580-248-7674. Application, resume, letter of interest and writing sample should be submitted no later than April 9, 2018, to Lawton Child Support Services, P.O. Drawer 2337, Lawton, OK 73502.

RAWLS GAHLOT, PLLC, AN OKLAHOMA CONSUMER LAW FIRM, IS SEEKING AN ASSOCIATE ATTORNEY with 2-3 year's litigation experience. Prefer life experienced person and must have consistent work history. Must be willing to work, in part, on performance bonus pay structure. Solo practitioner experience preferred. Position requires marketing, blogging, motion practice, drafting, trials, client intakes and research. Successful candidate must be persistent and enjoy the pursuit of justice. Offering a competitive salary with benefits. Send resume, writing sample, salary requirements and references to minal@rawlsgahlot.com.

POSITIONS AVAILABLE

THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN AND EASTERN DISTRICTS OF OKLAHOMA is accepting applications for the position of assistant federal public defender for the Muskogee office. The federal defender organization operates under authority of the Criminal Justice Act, 18 U.S.C. §3006A, to provide defense services in federal criminal cases and related matters in the federal courts. Requirements and Qualifications: An applicant must have at least five years of experience in the area of criminal law. Computer knowledge and appellate experience desirable. An applicant must be a member in good standing of a state bar in which he or she is currently admitted to practice and must be eligible for immediate admission to the Bar of the United States District Court for the Northern and Eastern Districts of Oklahoma, the United States Court of Appeals for the 10th Circuit, and the United States Supreme Court. Applicants must have court experience, strong writing and advocacy skills, an established capacity or demonstrated aptitude for excellence in criminal defense; a reputation for personal and professional integrity; a commitment to the representation of indigent defendants and an ability to work well in a team environment. The initial period of employment will be probationary, subject to successful completion of a background check. Salary and Benefits: This is a full-time position. Federal salary and benefits apply. Salary is commensurate with experience and education. This position is subject to mandatory electronic transfer (direct deposit) of net pay. How to Apply: To be considered for this position, qualified persons may apply by submitting a letter of interest, resume (with at least three personal and professional references), and a writing sample to Julia L. O'Connell, Federal Public Defender, 1 West 3rd Street, Suite 1225, Tulsa, OK 74103. Application materials may also be submitted by email to OKNresumes@fd.org. Applications will be accepted until position is filled. The Federal Public Defender is an Equal Opportunity Employer.

HARD WORK REWARDED at young, growing, AV-rated downtown OKC firm with 10 attorneys. Pignato, Cooper, Kolker & Roberson, PC is seeking one associate with 1 to 10 years civil litigation experience, preferably insurance/bad faith defense. Strong research and writing skills a must. Best benefits in town. Salary and bonuses commensurate with experience. Send resume and writing sample to Pignato, Cooper, Kolker & Roberson, PC, attention: Managing Partner, 119 N. Robinson Ave., 11th Floor, OKC, OK 73102.

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

POSITIONS AVAILABLE

THE BUREAU OF INDIAN AFFAIRS, EASTERN OKLAHOMA REGION, MIAMI AGENCY, COURT OF INDIAN APPEALS, IS SEEKING JUDGES FOR AN APPELLATE PANEL. An ideal candidate must have knowledge of issues facing Indian Country and be a member in good standing of the Oklahoma Bar Association. Prior experience as a judge is recommended, but not required. Indian preference will be given to qualified candidates. To be considered, please submit a cover letter, current resume with references and BIA Form 4432 (Indian Preference Form) to Miami Agency CFR Court, ATTN: Court Clerk, P.O. Box 970, Miami OK 74355-0970 no later than April 13, 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.

CLASSIFIED INFORMATION

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

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

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DO NOT STAPLE BLIND BOX APPLICATIONS.

HEALTH LAW SECTION: REPRESENTING VULNERABLE POPULATIONS AND THEIR FAMILIES

LIVE WEBCASTS

PLACING OKLAHOMA WITHIN THE NATIONAL LANDSCAPE OF THE OPIOID EPIDEMIC

WEDNESDAY, APRIL 11 NOON - 1 P.M. 1/0

Featured Presenters: **Dewayne Moore, J.D., Inspector General, OK Dept. of Mental Health & Substance Abuse**
Samuel D. Newton, J.D., Phillips Murrah, P.C.
Mary Holloway Richard, J.D., M.P.H., Phillips Murrah, P.C.

This program will provide information about the scope of the opioid problem in Oklahoma and will cover the statutes and regulations and policies being implemented to combat this epidemic by making services more available, detecting abuse and misuse within the healthcare system, and supporting enforcement and remedial processes. The program will also include valuable take-aways from current litigation across the nation.

SURROGATE BIRTH, ADOPTIONS, AND FERTILITY ISSUES IN OKLAHOMA

And What a Hospital Needs to Know to Complete the Birth and Discharge Plans

WEDNESDAY, MAY 9 NOON - 1 P.M. 1/0

Featured Presenters: **Stacy M. Brklacich, J.D., Senior Attorney, St. John Health System, Inc.**
Becki A. Murphy, Partner, Murphy Francy, PLLC.

This program will focus on the laws surrounding surrogacy, adoptions, and fertility issues, the differences between them, what you should present to the court and what the hospital needs to complete the birth plan and to discharge the infant to their family.

Each course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 1 hour each of mandatory CLE Credit, including 0 hours of ethics. Questions? Call (405) 416-7029. TUITION: $50.00 per webcast. No discounts.

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continuing legal education

FOR DETAILS AND TO REGISTER GO TO: WWW.OKBAR.ORG/MEMBERS/CLE

Stay up-to-date and follow us on

UPCOMING LUNCH-HOUR WEBCASTS

DRAFTING JOINT VENTURE DOCUMENTS

WEDNESDAY, MARCH 28 NOON - 1 P.M. 1/0

Program Presenter:
Al Givray, General Counsel, The NORDAM Group, Tulsa & Law Partner, Davis Graham & Stubbs, Denver

This program introduces you to the principle documentation used in business joint ventures. In addition to learning how to ask the right questions so you can focus on solving the right problems when you document the deal, you will learn how to draft for things you will almost assuredly find during due diligence, how to draft for the closing, and how to be a "deal maker" instead of a "deal breaker." Finally, you will learn what to worry less about than you might think at first.

ELIMINATE THE 'HE SAID – SHE SAID'

Improving Communication and Accountability in Parent Agreements

WEDNESDAY, APRIL 4 NOON - 1 P.M. 1/0

Featured Presenters: Dr. James Mason, Professional Liaison OurFamilyWizard

OurFamilyWizard.com and its mobile applications are often made part of the parent agreement in an effort to reduce litigation and improve co-parent communication. Learn how parents and professionals utilize its features to manage and document communication. Learn who may access the family's activity and obtain declarations on authenticated records. Review model language colleagues are using to stipulate to and order communication on the website.

Each course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 1 hour each of mandatory CLE Credit, including 0 hours of ethics. Questions? Call (405) 416-7029. TUITION: $50.00 per webcast. No discounts.

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