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2018 OK 35

SAVANNAH NICOLE LIND, Administrator of the Estate of James David Lind, Sr. Plaintiff/Appellant, v. BARNES TAG AGENCY, INC., an Oklahoma corporation; JAMES BARNES a/k/a JIM T. ROY BARNES; JOHN DOES 1 THROUGH 5; and JOHN DOE COMPANIES 1 THROUGH 5, Defendants/Appellees.

No. 115,130. May 1, 2018

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Plaintiff/Appellant, the administrator of the estate of a decedent killed by injuries suffered while performing work on real property, filed suit against the decedent's employer as well as the sole stockholder of the employer (who is also the property owner), alleging negligence. The defendants moved for summary judgment arguing they possessed immunity from suit pursuant to the provisions of the Oklahoma Workers' Compensation Act, 85 O.S. §§ 1-413. The trial court granted summary judgment in favor of the defendants. The administrator appealed, arguing the trial court erred by determining that Jim T. Roy Barnes, as the individual owner of the property, was immune from suit. The Court of Civil Appeals, Division IV, affirmed and this Court granted certiorari.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE TRIAL COURT AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION

Brandon A. Johnson, Grove, Oklahoma, for Plaintiff/Appellant.

Dan S. Folluo and Lauren M. Marciano, Rhodes, Hieronymus, Jones, Tucker, & Gable, P.L.L.C., Tulsa, Oklahoma, for Defendants/Appellees Barnes Tag Agency, Inc. and James Barnes a/k/a Jim T. Roy Barnes.

COMBS, C.J.:

¶1 The question presented in this cause is whether the sole shareholder of a corporation, who individually owns a property where an employee of the corporation sustained fatal injuries, is immune from suit for common-law negligence in district court under the provisions of the Oklahoma Workers' Compensation Act. We hold in the negative.

I.
FACTS AND PROCEDURAL HISTORY

¶2 James David Lind, Sr. (Decedent) was an employee of Defendant/Appellee Barnes Tag Agency Inc. (BTA). Decedent was hired on January 14, 2010, to perform maintenance work on property owned individually by Defendant Jim T. Roy Barnes (Barnes), the sole stockholder of BTA. On February 21, 2010, there was an explosion on the property while Decedent was present, resulting in a fire. Descendent sustained severe injuries that led to his death on February 26, 2010.

¶3 On February 21, 2012, Decedent's children filed a form 3A in the Workers' Compensation Court, seeking compensation under the Oklahoma Workers' Compensation Act (OWCA), 85 O.S. §§ 1-413 (repealed by Laws 2013, SB 1062, c. 208, § 171). The Workers' Compensation Court of Existing Claims entered orders in 2015 determining Decedent's injury arose out of the course and scope of his employment with BTA, and that Decedent's surviving minor children were entitled to death benefits. The Workers' Compensation Court of Existing Claims also determined, on November 17, 2015, that the Decedent was not an employee of Jim Barnes, and dismissed the workers' compensation claim against Jim Barnes individually with prejudice. No appeal was made from that order.

¶4 Plaintiff/Appellant Savannah Nicole Lind (Lind) is Decedent's adult daughter and the administrator of Decedent's estate. On February 21, 2012, Lind filed a wrongful death action in district court alleging Defendants breached a duty of care to assure that the premises were in a suitably safe condition. Defendants BTA and Barnes moved for summary judgment in

the district court action, asserting Lind's district court action was barred by the exclusive remedy provision of the OWCA and her exclusive remedy lay in the Workers' Compensation Court of Existing Claims. On June 8, 2016, the trial court granted Defendants' motion for summary judgment, holding: 1) BTA was the employer of Decedent and benefits were sought and received under the OWCA; and 2) immunity from suit under the law extended to Defendants BTA and Barnes.

¶5 Lind appealed, filing a Petition in Error with this Court on July 1, 2016. Lind asserted the trial court erred by: 1) determining Lind could not pursue a third-party tort claim against Barnes individually for wrongful death; 2) determining the employer BTA's immunity from suit extended to Barnes, a third-party tortfeasor; 3) determining Barnes was the co-employee of Decedent within the context of the 85 O.S Supp. 2006 § 3; and 4) adopting an incorrect interpretation of 85 O.S. Supp. 2005 § 3. The matter was assigned to Court of Civil Appeals.

¶6 The Court of Civil Appeals, Division IV, issued an opinion on September 12, 2017, in which it determined the issue on appeal was whether Barnes was entitled to immunity from Lind's claim that Barnes was liable as a third-party tortfeasor pursuant to 85 O.S. Supp. 2006 § 44, which address claims against third persons. The Court of Civil Appeals concluded: 1) Barnes was not Decedent's co-employee within the meaning of 85 O.S. Supp. 2006 § 3; and 2) Barnes was protected from suit by his status as a corporate shareholder combined with the Workers' Compensation Court of Existing Claims' factual findings and award of benefits.

¶7 Lind filed a Petition for Writ of Certiorari with this Court on October 3, 2017. We granted certiorari on January 16, 2018, and the matter was assigned to this office on January 17, 2018.

II.
STANDARD OF REVIEW

¶8 The appellate standard of review of summary judgment is *de novo*.[1] *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶7, 408 P.3d 183; *Tiger v. Verdigris Valley Electric Corp.*, 2016 OK 74, ¶13, 410 P.3d 1007; *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶11, 160 P.3d 959. On appeal, this Court assumes plenary and non-deferential authority to reexamine a trial court's legal rulings. *John v. St. Francis Hospital, Inc.*, 2017 OK 81, ¶8, 405 P.3d 681; *Stevens v. Fox*, 2016 OK 106, ¶13, 383 P.3d 269; *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶14, 859 P.2d 1081.

¶9 Summary judgment will be affirmed only if the Court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Lowery,* 2007 OK 38 at ¶11; *Wathor v. Mut. Assur. Adm'rs, Inc.*, 2004 OK 2, ¶4, 87 P.3d 559; *Oliver v. Farmers Ins. Croup of Cos.*, 1997 OK 71, ¶6, 941 PP.2d 985. All inferences and conclusions to be drawn from the materials must be viewed in a light most favorable to the non-moving party. *Tiger,* 206 OK 74 at ¶13; *Wathor,* 2004 OK 2 at ¶4; *Oliver,* 1997 OK 71 at ¶6.

III.
ANALYSIS

¶10 This cause concerns the interpretation and application of several provisions of the OWCA that were in effect at the time of Decedent's injuries. Of primary importance is the OWCA's exclusive remedy provision, 85 O.S. Supp. 2006 § 12, which provides in pertinent part:

> The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person.

At the outset, this Court notes it is undisputed on appeal in this matter that Decedent was found to be an employee of BTA by the Court of Existing Claims, and that BTA was ordered to pay death benefits to Decedent's surviving minor children. The trial court's grant of summary judgment in favor of BTA, as Decedent's employer, was proper pursuant to the exclusive remedy provisions of 85 O.S. Supp. 2006 § 12, and Lind does not argue otherwise.

¶11 The question before this Court today is whether Barnes, individually, is protected from Lind's suit by the provisions of the OWCA. Title 85 O.S. Supp. 2006 § 44 addresses claims against third persons, and provides in pertinent part:

(a) If a worker entitled to compensation under the Workers' Compensation Act is

> injured or killed by the negligence or wrong of another not in the same employ, such injured worker shall, before any suit or claim under the Workers' Compensation Act, elect whether to take compensation under the Workers' Compensation Act, or to pursue his remedy against such other.

A. Barnes Was not Decedent's Co-employee

¶12 Barnes' first argument on appeal is that he was a co-employee of Decedent and thus 85 O.S. Supp. 2006 § 44 does not authorize Lind's suit against him personally. The COCA determined Barnes was not a co-employee of Decedent and we agree.

¶13 The definition of employee under the OWCA is provided by 85 O.S. Supp. 2006 § 3, which provides in pertinent part:

> [A]ny stockholder-employees of a corporation who own ten percent (10%) or more stock in the corporation are specifically excluded from the foregoing definition of "employee", and shall not be deemed to be employees as respects the benefits of the Workers' Compensation Act.... Sole proprietors, members of a partnership, members of a limited liability company who own at least ten percent (10%) of the capital of the limited liability company or any stockholder-employees of a corporation who own ten percent (10%) or more stock in the corporation may elect to include the sole proprietors, any or all of the partnership members, any or all of the limited liability company members or any or all stockholder-employees as employees, if otherwise qualified, by endorsement to the policy specifically including them under any policy of insurance covering benefits under the Workers' Compensation Act. When so included, the sole proprietors, members of a partnership, members of a limited liability company or any or all stockholder-employees shall be deemed to be employees as respects the benefits of the Workers' Compensation Act.

It is uncontroverted in the record before this Court that BTA's workers' compensation insurance policy did not contain an endorsement listing Barnes as an employee and that Barnes had also expressly rejected such coverage. *See* Record on Accelerated Appeal, Objection to Motion for Summary Judgment, Exhibit B, at p. 18. Barnes effectively acknowledged this to be the case in his Reply in Support of Motion for Summary Judgment:

> 1. Defendant Barnes was not an employee of Defendant Agency within the Context of the Oklahoma Workers' Compensation Act.
>
>   Reply: Defendant Jim T. Roy Barnes ("Barnes") is still afforded immunity from suit by the Oklahoma Workers' Compensation Act by virtue of his status as an officer and shareholder of the Barnes Tag Agency, Inc. ("Barnes Tag").

Barnes Defendants' Reply in Support of Motion for Summary Judgment, at p.1.

The Court of Civil Appeals correctly determined Barnes was not a co-employee of Decedent.

B. Barnes Is not Immune from Suit Individually for Breach of Duties Stemming from his Ownership of the Property Where Decedent was Injured.

¶14 Barnes' primary argument on appeal is that he is protected from suit under 85 O.S. Supp. 2006 § 12 and 85 O.S. Supp. 2006 § 44 due to his status as owner and sole shareholder of BTA. Before the trial court, Barnes cited the recent overhaul of Oklahoma workers' compensation law embodied in the new Administrative Workers' Compensation Act (AWCA). Barnes asserted that the new exclusive remedy provision, 85A O.S. Supp. 2013 § 5,[2] merely codifies an established tenet that shareholders and corporate officers are afforded immunity to the same extent as an employer under workers' compensation law.

¶15 This Court recently examined the effect of 85A O.S. Supp. 2013 § 5(A) in *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, __ P.3d ___. In that cause, this Court determined that 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. *Odom*, 2018 OK 23 at ¶44. In reaching that conclusion, we noted:

> [A]n 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).

Odom, 2018 OK 23 at ¶37.

Odom, however, concerned the new exclusive remedy provision and not the interplay between 85 O.S. Supp. 2006 § 12 and 85 O.S. Supp. 2006 § 44.

¶16 This Court appears to have never decisively answered the question of whether those provisions shield a stockholder of an employer from suits related to the stockholder's **independent** tortious conduct as a third party, though we have considered the reverse situation where an injured employee sought to pierce the corporate veil and hold stockholders liable for the actions of the employer corporation. For example, in *Kenkel v Parker*, 2015 OK 81, 362 P.3d 1145, this Court determined that principles of corporate law barred a suit against an employer's stockholders individually for the corporation's failure to secure workers' compensation coverage. That cause, however, concerned an attempt to hold shareholders liable for the employer corporation's actions. Here, Lind's suit is rooted in Barnes' alleged negligence as the holder of the property in question, which is individually titled to him and not BTA. Lind is not attempting to hold Barnes personally liable for alleged negligence on the part of BTA. This distinction matters.

¶17 The Court of Civil Appeals relied upon a provision of Larson's Workers' Compensation Law § 113.02 (Matthew Bender 2017) to reach the conclusion that Lind's suit against Barnes is barred:

> It is held with virtual unanimity that an employer cannot be sued as the owner or occupier of land, whether the cause of action is based on common-law obligations of landowners or on statutes such as safe place statutes or structural work acts.
>
> Apart from the basic argument that mere ownership of land does not endow a person with a second legal persona or entity, there is an obvious practical reason requiring this result....
>
> Moreover, if the circumstances are such that a president and sole stockholder of a corporation would be immune to suit by an employee, he or she does not lose that immunity by also being the owner of the land.

At the outset, it must be noted that the first two paragraphs of this section of the treatise concern application of the dual-capacity doctrine, applicable under the old OWCA when an employee sought to sue an **employer** in tort based on some other role, capacity, or persona than its capacity as an employer. *See Odom*, 2018 OK 23 at ¶11-12; *Weber v. Armco, Inc.*, 1983 OK 52, ¶¶6-7, 663 P.2d 1221. *See also Evans v. Thompson*, 879 P.2d 938, 942 (Wash. 1994) ("Larson's text makes this generalized statement: 'It is held with virtual unanimity that an employer cannot be sued as the owner or occupier of land [.]' 2A Arthur Larson, *Workmen's Compensation* § 72.82 (1988). However, this general statement refers to the situation where the entity which is the employer is also the same entity which owns the land."). The dual-capacity doctrine is not directly implicated in this cause, because Lind is no longer pursuing any cause of action in tort against the employer, BTA, based on some other persona it possessed. Rather, Lind is suing Barnes personally as a third party and separate legal person based on his own personal ownership of the premises and the duties attached to that ownership.

¶18 It is the final paragraph of the Larson treatise that is relevant here, and the stated principle is not held with the same "virtual unanimity." Several jurisdictions recognize that a shareholder's status as a distinct legal entity from the employer corporation eliminates their immunity under workers' compensation law for torts based upon the shareholders' status as landholders. For example, in *Couillard v. Van Ess*, 447 N.W.2d 391, 393, (Wis. Ct. App. 1989), the Wisconsin Court of Appeals noted:

> The court need not have searched for an exception to the employer's immunity because it is beyond dispute that a corporation is a separate entity from those who own it. *Jonas v. State*, 19 Wis.2d 638, 644, 121 N.W.2d 235, 238 (1963). Thus, the legal distinction between the corporation/employer and the Van Ess partnership that leased the factory to the corporation eliminates the Van Esses' immunity as individuals.

The court in that cause recognized that a sole-shareholder partnership leasing land to the employer corporations was not immune from suit under workers' compensation law due to its status as a legal third party.

¶19 Similarly, in *LaBelle v. Crepeau*, 593 A.2d 653, 655 (Maine 1991), the Supreme Judicial

Court of Maine determined that a shareholder of an employer could be sued as a third party for claims based on ownership of the premises he leased to the employer. The court determined:

> Here, the employer who secured payment of benefits for plaintiff, Crepeau Motors, Inc., is immune from any civil action. Plaintiff's exclusive remedy against Crepeau Motors, Inc. is worker's compensation. Likewise, plaintiff cannot sue defendant in any capacity that was related to defendant's employment or association with Crepeau Motors, Inc as employee or officer. Defendant, however, was not sued in his capacity as employee or corporate officer. Rather, he was sued individually as the owner of premises he leased to a separate corporate entity, solely for failure to conform to an alleged legal duty on the part of a landlord to assure the safety of the premises.

LaBelle, 593 A.2d at 655 (Maine 1991).

¶20 The Supreme Court of New Jersey reached the same conclusion in *Lyon v. Barrett*, 89 N.J. 294, 304-305, 445 A.2d 1153, 1158 (NJ 1982). In that cause, the court determined the sole owner of a professional corporation was still potentially liable in tort as a landlord. The court explained:

> A professional corporation and its sole owner are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation. Absent fraud or the like, corporate independence should not insulate a principal from liability to an injured corporate employee where the principal would otherwise be liable for the injuries. Piercing the corporate veil, a doctrine created to defeat fraud and injustice, should not be misapplied to defeat the benevolence of the workers' compensation laws. In general, the veil that protects a corporate principal from liability for business debts of the corporation, including the obligation to provide workers' compensation benefits, also precludes that principal from claiming the immunity of the corporation from liability in negligence to an injured employee. Incorporation carries benefits as well as burdens; one cannot claim the benefits without the burdens.

Lyon, 89 N.J. at 304, 445 A.2d at 1158 (NJ 1982).

¶21 Not all jurisdictions, however, are in agreement. For example, in *Jackson v. Gibson*, 409 N.E.2d 1236, 1238-39 (Ind. App. 1980), the Court of Appeals of Indiana held that an individual, who was president of corporate employer and was supervising or directing the work of corporation's employee, was liable to employee for his injuries only as set out in the Workmen's Compensation Act and could not be held liable, as a separate entity, as owner of the land on which employee was injured. That holding, however, was based on specific language in the state's workers compensation statutes. *Jackson*, 409 N.E.2d at 1238-39. New York has a similar precedent, but it treats the corporate officer/landowner as a co-employee, which as discussed above is not the case here because of the language of the OWCA. *See Ozarowski v. Yaloz Realty Corp.*, 181 A.D.2d 763, 764 (N.Y. App. Div. 1992). *See also Henderson v. Meredith Lumber Co.*, 190 W.Va. 292, 298, 438 S.E.2d 324, 330 (W. Va. 1993) ("Applying our traditional method of statutory interpretation we find that when the employer's officer, manager, agent, representative or employee is also the owner of the place of employment, that person under the terms of *W.Va.Code* 23–2–6a [1949] is immune from liability so long as the action is in furtherance of the employer's business and does not deliberately inflict an injury.").

¶22 Based on Oklahoma law and the reasoning of other jurisdictions that have considered similar questions, this Court concludes that the OWCA does not bar Lind's suit against Barnes as a third-party property owner. As the Supreme Court of New Jersey correctly noted, extending employer immunity under the circumstances is conceptually similar to the legal concept of reverse piercing of the corporate veil. *See Lyon*, 89 N.J. at 304, 445 A.2d at 1158. That doctrine applies in situations where a plaintiff seeks to hold a corporation liable for the actions of its shareholders or someone else who controls the entity. *U.S. v. Badger,* 818 F.3d 563, 568. As the United States Court of Appeals for the Tenth Circuit noted in *In re Denton*, 203 F.3d 834 (Table) (10 Cir. 2000), this Court has never adopted the reverse-piercing doctrine. To the contrary, this Court continues to stress the legal distinction between a corporation and its shareholders in the context of the OWCA. *See Kenkel*, 2015 OK 81 at ¶¶10-18.

¶23 It is useful to look once again to this Court's decision in *Odom* to understand why shareholders may be liable as third-parties

under the OWCA by comparing the OWCA's provisions to those that replaced them with the adoption of the AWCA. Title 85A O.S. Supp. 2013 § 5 of the new AWCA specifically added immunity for stockholders to the exclusive remedy protections of Oklahoma workers' compensation law. This language is a new addition to Oklahoma workers' compensation law. Barnes asserts this language was merely added to codify traditional corporate law principles. However, as discussed above, under traditional corporate law principles a corporation would not generally be liable for the independent torts of a stockholder, and most jurisdictions that hold suits like Lind's to be barred are rooted in the landowner's status as a co-employee or other specific statutory provisions. There is no specific language in 85 O.S. Supp. 2006 § 12 and 85 O.S. Supp. 2006 § 44 that would bar Lind's suit in this instance. Though this Court has not considered this specific situation before, the statutes themselves are clear.

¶24 Where the former statute was clear, an amendment may reasonably indicate that the intention of the Legislature was to alter the law. *Dean v. Multiple Injury Trust Fund*, 2006 OK 78, ¶16, 145 P.3d 1097; *Magnolia Pipe Line Co.*, 1946 OK 113, ¶11, 167 P.2d 888. Language in the new exclusive remedy provision of the AWCA, 85A O.S. Supp. 2013 § 5, indicates intent by the Oklahoma Legislature to grant immunity from suit where it did not previously exist: to stockholders of an employer corporation when sued for allegedly independent tortious conduct. As discussed in *Odom,* even that grant of immunity is limited to situations where the stockholder was acting in the role of the employer. 2018 OK 23, ¶¶37-39.

IV.
CONCLUSION

¶25 No express grant of immunity under the circumstances exists pursuant to 85 O.S. Supp. 2006 § 12 and 85 O.S. Supp. 2006 § 44, and this Court is persuaded by the rationale of those jurisdictions that permit suits against shareholders of a corporate entity for their independent tortious conduct as a third-party landowner. A corporation and its sole owner and shareholder are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation as a third-party landowner. *See Lyon*, 89 N.J. at 304, 445 A.2d at 1158 (NJ 1982); *LaBelle*, 593 A.2d at 655 (Maine 1991). The opinion of the Court of Civil Appeals is vacated. The order of the trial court is affirmed in part and reversed in part, and this cause is remanded for proceedings consistent with this opinion.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE TRIAL COURT AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED

FOR PROCEEDINGS CONSISTENT WITH THIS OPINION

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

DISSENT: WINCHESTER (by separate writing) and REIF, JJ.

NOT PARTICIPATING: DARBY, J.

Wyrick, J., concurring:

¶1 The dispositive issue in this case was decided when Barnes failed to appeal the Order of the Workers' Compensation Court of Existing Claims (WCC) declaring that he was not Lind's employer. Under the governing version of workers' compensation law, only "the employer and any of his employees" benefit from the exclusive remedy.[1] Barnes could not qualify as an employee under the statute;[2] thus, the exclusive remedy would not bar this proceeding unless Barnes was Lind's employer. When the WCC's Order on that issue became final, Barnes's ability to invoke the exclusive remedy as a bar was dead.

¶2 I write separately to dispel the notion that the result in this case would be any different if brought under the Administrative Workers' Compensation Act (AWCA), 85A O.S.Supp. 2017 §§ 1-125. The Court explains that new language in the AWCA's exclusive remedy provision, *see id*. § 5, purports to "grant immunity from suit where it did not previously exist," in situations like this one where "stockholders of an employer corporation [are] sued for allegedly independent tortious conduct."[3] The Court notes, however, that our interpretation of that provision in *Odom v. Penske Truck Leasing Co.,* 2018 OK 23, --- P.3d ---, limits that immunity to only situations in which the stockholder was "acting in the role of the employer."[4] Accordingly, Barnes's status as stockholder – by itself – is insufficient regardless of which law applies. Under either law, Barnes

must first qualify as Lind's employer before he can enjoy the benefits of the exclusive remedy.

¶3 The difference between the old law and the AWCA only becomes relevant *after* a stockholder like Barnes demonstrates that he or she was acting in the capacity of employer. Under the old law, the stockholder/employer might still be subject to suit pursuant to the dual-capacity doctrine.[5] In a case like this one, for example, it would be up to the court to determine whether Barnes's duty as an employer to provide a safe work environment could be logically separated from his duty as a landowner to remove or warn about hidden dangers.[6] If the two duties are logically separable, the suit may proceed; if, however, the duties are "so inextricably wound" that they cannot be separated, the suit may not.[7] Under the AWCA, on the other hand, if a stockholder demonstrates that he or she qualifies as an employer, the inquiry is over. The AWCA abrogates the dual-capacity doctrine such that no suit may proceed against a person deemed to be an employer "regardless of the multiple roles, capacities, or personas the employer may be deemed to have."[8] It is this language that extends immunity where it had not previously existed, not the fact that 85A O.S.Supp.2017 § 5 now includes the word "stockholder."

¶4 Make no mistake; a stockholder can qualify as an employer under the prior law and thus can benefit from the exclusive remedy. Barnes cannot here, however, because he has already lost on the issue.

WINCHESTER, J., with whom Reif, J., joins, dissenting:

¶1 I respectfully dissent. I would have followed the holding and rationale found in the opinion of the Court of Civil Appeals, which affirmed the decision of the district court.

¶2 Mr. Barnes is the sole shareholder of Barnes Tag Agency and he individually owns rental property. He purchased workers' compensation insurance through Barnes Tag Agency to cover his employees. He hired the decedent through Barnes Tag Agency as an employee to perform maintenance work both at the office of the tag agency and on the rental properties owned by Barnes. Therefore, all of the maintenance work in any of those locations was in the course and scope of his employment. While carrying out the work as a part of his employment he was fatally injured.

¶3 As expected, the decedent's family received death benefits pursuant to the workers' compensation insurance paid by Mr. Barnes and Barnes Tag Agency. The estate of the employee now also seeks to recover from Barnes individually.

¶4 The district court, the Court of Civil Appeals and the majority's opinion all agree that the workers' compensation award was proper. The employee was in the course and scope of his employment. Nevertheless, the majority appears to conclude that because the employee was not on the Barnes Tag Agency property, the estate of the employee may properly sue Barnes individually since the employee was on a different property. What if the employee had been fatally injured on the tag agency property? Would this Court still allow the plaintiff to bring a negligence action against the sole stockholder of the corporation? If not, this distinction between "on the Barnes Tag Agency property" and "off the Barnes Tag Agency property" is not "clear" even though the majority concludes the owner of the corporation may be liable because he and the corporation are separate persons. A new ambiguity is created.

¶5 "[If] the circumstances are such that a president and sole stockholder of a corporation would be immune to suit by an employee, he or she does not lose that immunity by also being the owner of the land." This quotation from Larson's Workers' Compensation Law § 113.02 reflects a logical rationale for finding that the plaintiff/appellant cannot collect death benefits from Workers' Compensation and separately sue the sole stockholder of Barnes Tag Agency.

¶6 The sole stockholder of a corporation, which is an entity used to protect the personal property of the stockholders, can now be sued because he has a corporation. If he did not have a corporation, then workers' compensation would fully cover him. The employee was hired to do maintenance work in both locations. Under this Court's majority opinion, Mr. Barnes has no personal protection from either his corporation, or from his workers' compensation insurance.

COMBS, C.J.:

1. The parties and the trial court correctly treated Defendants' motion as one for summary judgment, despite Defendants' assertion that the trial court lacked subject matter jurisdiction because Lind's tort claim was barred by the exclusive remedy provision of the OWCA. When a motion going to the court's jurisdictional power to hear a matter is intertwined with the merits of the controversy, a motion challeng-

ing the court's jurisdictional power should be treated as one for summary judgment. *State ex rel. Bd. of Regents of Univ. of Okla. v. Lucas*, 2013 OK 14, ¶10, 297 P.3d 378. *See Powers v. Dist. Ct. of Tulsa County*, 2009 OK 91, ¶6, 227 P.3d 1060.

2. Title 85A O.S. Supp. 2013 § 5 provides in pertinent part:

> A. 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.

Wyrick, J., concurring:

1. 85 O.S.Supp.2009 § 12.
2. *Id*. § 3(9); Majority Op. ¶ 13.
3. Majority Op. ¶ 24.
4. *Id*. (citing *Odom*, 2018 OK 23, ¶¶ 37-39, --- P.3d at ---).
5. *See generally Weber v. Armco, Inc*., 1983 OK 53, ¶ 5, 663 P.2d 1221, 1225 ("According to the dual-capacity doctrine, an employer who is generally immune from tort liability may become liable to his employee as a third-party tortfeasor; if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on his as an employer."), *superseded by statute*, 85A O.S.Supp.2013 § 5(A), *as recognized in Odom*, 2018 OK 23, ¶ 38, --- P.3d at ---.
6. *See id*. ¶ 7, 663 P.2d at 1226 (defining in general terms the employer's duty); *Scott v. Archon Grp., L.P.*, 2008 OK 45, ¶ 19, 191 P.3d 1207, 1211-12 (defining the landowner's duty to an invitee).
7. *Weber*, 1983 OK 53, ¶ 7, 663 P.2d at 1226.
8. 85A O.S.Supp.2017 § 5; *see also Odom*, 2018 OK 23, ¶¶13-15, 38-39, --- P.3d at --- (recognizing that the AWCA abrogates the dual-capacity doctrine).

2018 OK 36

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Steven Paul Minks, Respondent.

SCBD 6644; Rule 6.2A. May 7, 2018

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 On March 29, 2018, the complainant, Oklahoma Bar Association (OBA), filed a verified complaint against the respondent, Steven Paul Minks, pursuant to Rules 6 and 7 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A. The OBA, with the concurrence of the Professional Responsibility Commission, requests an emergency interim suspension pursuant to Rule 6.2A of the RGDP.

¶2 In support, the OBA presented notices of criminal convictions for direct contempt of court for Minks' failure to appear on behalf of his clients at two felony jury trial sounding dockets and two disposition dockets, all in LeFlore County, Oklahoma. Minks was sentenced as follows:

a. In Case No. CF-2017-78, Minks was found guilty of Direct Contempt of Court on March 8, 2018, and sentenced to a term of imprisonment of 1 day;

b. In Case No. CF-2016-611A, Minks was found guilty of Direct Contempt of Court on March 8, 2018, and sentenced to a term of imprisonment of 1 day, to run concurrently with No. CF-2017-78;

c. In Case No. 2016-393, Minks was found guilty of Direct Contempt of Court on March 22, 2018, and sentenced to a term of imprisonment of 3 days;

d. In Case No. 2017-78 (2nd offense), Minks was found guilty of Direct Contempt of Court on March 22, 2018, and sentenced to a term of imprisonment of 3 days.

¶3 In addition to the 4 criminal convictions, the OBA listed 12 other incidents where Mink failed to appear at court hearings on behalf of his clients during the 3 months preceding the filing of the Notice in this Court. The OBA also alleged Mink failed to appear at a hearing for a client, failed to refund any portion of her fee after she terminated his employment, and refused to communicate with her regarding the unearned fee. The OBA further alleged Respondent acted in violation of statutes by damaging property, violating a protective order, and unlawfully operating a vehicle while under the influence of drugs.

¶4 On March 30, this Court ordered Respondent to show cause no later than April 13, 2018, why an order of immediate interim suspension should not be entered. Respondent did not respond.

¶5 Upon consideration of the OBA' s Rule 6.2 verified complaint and application for an order of emergency interim suspension, and the evidence presented, the Court finds that Respondent has committed conduct in violation of the Oklahoma Rules of Professional Conduct and such conduct poses an immediate threat of substantial and irreparable public harm.

¶6 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Steven Paul Minks is

immediately suspended from the practice of law, pursuant to Rule 6.2A of the RGDP.

¶7 Inasmuch as Respondent did not file an objection under Rule 6.2A(2)(a) and (b), Steven Paul Minks is ordered to give written notices by certified mail, within 20 days from the date of this order, to all of his clients having legal business then pending of his inability to represent them and the necessity for promptly retaining new counsel. If Steven Paul Minks is a member of, or associated with, a law firm or professional corporation, such notice shall be given to all clients of the firm or professional corporation, which have legal business then pending with respect to which the Respondent had substantial responsibility. Steven Paul Minks shall also file a formal withdrawal as counsel in all cases pending in any tribunal. Steven Paul Minks must file, within 20 days from the date of this Order, an affidavit with the Commission and with the Clerk of the Supreme Court stating that he has complied with this Order, together with a list of the clients so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. Proof of substantial compliance by Steven Paul Minks with this Order shall be a condition precedent to any petition for reinstatement.

¶8 DONE BY ORDER OF THE SUPREME COURT in conference on May 7, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 37

RE: Revocation of Certificates of Certified Shorthand Reporters

SCAD-2018-28. May 7, 2018

ORDER

On February 15, 2018, this Court suspended the certificates of several certified shorthand reporters for failure to comply with the continuing education requirements for calendar year 2017 and/or with the annual certificate renewal requirements for 2018. *See* 2018 OK 20 (SCAD 2018-17).

The Oklahoma Board of Examiners of Certified Shorthand Reporters has advised that the court reporters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court of the State of Oklahoma the revocation of the certificate of each of these reporters, effective April 15, 2018, pursuant to 20 O.S., Chapter 20, App. 1, Rules 20 and 23.

IT IS THEREFORE ORDERED that the certificate of each of the certified shorthand reporters named below is hereby revoked effective April 15, 2018.

Lori Byrd	CSR #1981
Tara Dale	CSR #1409
Kristina Greene	CSR #1377
Holly Hurley	CSR #1765

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7TH day of MAY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 38

RE: Revocation of Credentials of Registered Courtroom Interpreters

SCAD-2018-29. May 7, 2018

ORDER

On February 15, 2018, this Court suspended the certificates of several Registered Courtroom Interpreters for failure to comply with the continuing education requirements for calendar year 2017 and/or with the annual certificate renewal requirements for 2018. *See* 2018 OK 29 (SCAD 2018-21).

The Oklahoma Board of Examiners of Certified Courtroom Interpreters has advised that the interpreters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court of the State of Oklahoma the revocation of the credential of each of these interpreters, effective April 15, 2018, pursuant to 20 O.S., Chapter 23, App. II, Rules 18 and 20.

IT IS THEREFORE ORDERED that the credential of each of the Registered Courtroom Interpreters named below is hereby revoked effective April 15, 2018.

Maria Ferri-Haro
Maria LaMar
Mary McCormick
Sergio Torres

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7th day of MAY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 39

DELILAH CHRISTINE GENTGES, an individual Appellant, v. OKLAHOMA STATE ELECTION BOARD, Appellee.

No. 115,440. May 8, 2018

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS

¶0 Appellant brought an action against the State Election Board challenging the constitutionality of the Oklahoma "Voter ID Act." The district court found that the Voter ID Act and the state venue statute, requiring the action to be brought in Oklahoma County, are constitutional. Appellant appealed and this Court retained the appeal.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

James C. Thomas and William D. Thomas, Thomas Law Firm, PLLC, Tulsa, Oklahoma, for Appellant,

M. Daniel Weitman, Assistant Attorney General, Oklahoma Attorney General's Office, Oklahoma City, Oklahoma, for Appellee.

Per Curiam.

¶1 The issue in this matter is whether the Oklahoma "Voter ID Act,"[1] Okla. Stat. tit. 26, § 7-114 (2010), and the Oklahoma venue statute, Okla. Stat. tit. 12, § 133 (2011), are constitutional. We find both statutes constitutional and affirm the District Court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

¶2 Prior to the Oklahoma Voter ID Act, Title 26, Section 7-114 simply required that "[e]ach person presenting himself to vote shall announce his name to the judge of the precinct, whereupon the judge shall determine whether said person's name is in the precinct registry." Okla. Stat. tit. 26, § 7-114 (2001). In April 2009, the Oklahoma Legislature passed S.B. 692, and referred it for a vote of the people as State Question 746, Legislative Referendum 347. 2009 Okla. Sess. Laws 126-31, 2612. The Voter ID Act was approved by a vote of the people on November 2, 2010 and was codified at Title 26, §§ 7-114,[2] 7-116.1, 14-115.4, 14-121, 16-120 (2010).

¶3 The Voter ID Act amended Section 7-114 to require that voters provide proof of identity in the form of a document issued by the United States, the State of Oklahoma, or the government of a federally recognized Indian tribe or nation that shows: 1) the name of the person to whom it was issued (substantially conforming to the name in the precinct registry); 2) a photograph of the person to whom it was issued; and 3) an expiration date after the present election (unless the identification belongs to someone over the age of 65 and is valid indefinitely). Okla. Stat. tit. 26, § 7-114 (2010).[3] The Voter ID Act provides, in the alternative, that the person may present the voter identification card issued by the appropriate county election board. Id. The Voter ID Act provides that if a person is unable or unwilling to produce proof of identity, the person may sign a statement under oath swearing that they are the person identified on the precinct registry and then the person will be allowed to cast a provisional ballot. Id.[4]

¶4 Appellant brought an action in Tulsa County District Court against the State Election Board contending that the Voter ID Act is unconstitutional as an interference with the free right to suffrage and equivalent to a poll tax.[5] In October 2015, following transfer of the case to the Oklahoma County District Court, Appellant filed a motion for summary judgment and Appellee filed a combined response and counter-motion for summary judgment. The Oklahoma County District Court held a hearing on the competing motions and determined that venue was proper in Oklahoma County, that there was no evidence of any voter fraud in Oklahoma, and that there was a question of fact regarding the impact of the Voter ID Act on the right to suffrage which would be determined in an evidentiary hearing.

¶5 In August 2016, the district court held an evidentiary hearing on the effect of the Voter ID Act in Oklahoma. Evidence was presented that a quarter of the population of the State of Oklahoma lacks a driver's license or DPS issued identification. However, that percentage did not subtract the portion of the population under the age of 18, making it an inaccurate rendition of how many citizens of voting age have DPS identifications and did not account

for other forms of acceptable identification. The free voter identification card, that is accepted in lieu of photo identification, is credit card sized, made of cardstock, and is not periodically replaced. The card is only replaced if a voter fills out a new voter registration application or calls the state or county election board and submits a request. Voters can also appear in person at any county election board office and receive a temporary voter identification card on the spot that is good for 30 days. Subsequent to the request for a temporary card, the election board will mail the voter a new permanent voter identification card.

¶6 Senator Judy McIntyre testified that Oklahoma ranks 44th in the Nation in terms of poverty. According to Senator McIntyre, many people view the Voter ID Act as an extra burden to obtain an ID in order to exercise the right to vote. She pointed to transportation as an issue, noting the cost to pay someone to take a prospective voter to obtain a Driver's license or State ID in person and the inability to do so without money. Although Senator McIntyre acknowledges that voters can obtain a voter ID card in advance without physically going to obtain one, the use of the phrase "photo ID" is misleading. She reasons that after explaining to voters that a voter ID card may be used in lieu of photo ID, some voters remain confused as to what constitutes an acceptable form of identification. That confusion leads to voter suppression and is another way of "keeping out the black vote." Transcript of Procs. 69:3-9, Gentges v. Okla. State Election Bd., CV-2012-284, Aug. 15, 2016.

¶7 The evidence further showed that at the polling precinct, voters are asked to show their identification. The precinct official then matches the voter's identification with the name in the Voter Registration log. If their name does not appear or does not match the name on the identification provided, the voter is offered a provisional ballot. For voters using the provisional ballot due to lack of identification, they fill out an affidavit to verify their identity. After being cast, the provisional ballots are kept separate from the regular ballots. At the end of the day, the polling precinct posts a tape on the precinct door with the unofficial vote count of the regular ballots; the bag with provisional ballots is sealed and brought to the election board office. The day after the election, the Secretary for the county election board begins researching each ballot and determining if the ballot should be counted. While keeping the ballot sealed, the Secretary removes the information from the outer envelope and tracks down information to confirm that the voter is in fact registered to vote and to confirm the person's identity. The election results are certified at five o'clock on the Friday evening after the election, at which time the provisional ballots which were counted are included.

¶8 In the last gubernatorial election prior to implementation of the Voter ID Act, in November 2010, there were 700 provisional ballots cast statewide. Of those 700, only 117, or 16.71%, were counted.[6] In the November 2012 Presidential election, 1,334,872 people cast a vote in Oklahoma. Of those, 5,172 provisional ballots were cast. Of the 5,172 provisional ballots cast, 1,297 were cast as such due to lack of voter identification. Of the provisional ballots cast due to lack of identification, 211 went uncounted. However, **126 of those ballots were uncounted because of insufficient identification**. Also, 53 of the uncounted ballots were due to the voter not being registered and 32 voters presented themselves at the wrong precinct. Finally, in the November 2014 gubernatorial election, 1,607 provisional ballots were cast statewide. Of the provisional ballots cast, 668 were cast provisionally because no identification was provided, and 34 of those were not counted.

¶9 At the evidentiary hearing, Appellant argued that the Voter ID Act is a condition on the right to vote and is no less than a poll tax on the people's right to vote. In a journal entry filed October 10, 2016, the Oklahoma County District Court found that Appellant had not met her burden of proof and that based on the evidence presented, the Voter ID Act does not violate the Oklahoma Constitution. The district court further found the Oklahoma venue statute is constitutional. The court therefore entered judgment for the State Election Board on all claims in the case. On October 17, 2016, Appellant filed a petition in error in this matter.

II. STANDARD OF REVIEW

¶10 At issue is the constitutionality of Title 26, Section 7-114, the Voter ID Act, and Title 12, Section 133, the venue statute. This Court reviews a statute's constitutional validity de novo. John v. St. Francis Hosp., Inc., 2017 OK 81, ¶ 8, 405 P.3d 681, 685. This Court assumes "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." Id.

III. ANALYSIS

A. Constitutionality of the Oklahoma Venue Statute

¶11 Title 12, Section 133 states:

> Actions for the following causes must be brought in the county where the cause, or some part thereof arose:
>
> First. An action for the recovery of a fine, forfeiture or penalty imposed by statute …
>
> Second. An action against a public officer for an act done by him in virtue, or under color, of his office, or for neglect of his official duties.
>
> Third. An action on the official bond or undertaking of a public officer.

Okla. Stat. tit. 12, § 133 (2011). Venue for actions against public officers is proper, and is considered to arise, where their office is located. State v. Dist. Ct. of Bryan Cty., 1955 OK 346, ¶ 8, 290 P.2d 413, 418. However, Appellant contends that this cause arose in Tulsa County, where she is a registered voter and should have her cause heard by a district court judge that she had the ability to vote to approve or disapprove, rather than Oklahoma County where the State Election Board offices are located.

¶12 Appellant challenges this Court's interpretation of Section 133 as an unconstitutional special law under Article 5, Section 46 of the Oklahoma Constitution. Section 46 prohibits the passage of local or special laws "[p]roviding for change of venue in civil and criminal cases." Okla. Const., art. 5, § 46. A plain reading of Section 133 shows that Section 133 provides **where venue originally lies, not for a change of venue**. Section 133 is constitutional under Article 5, Section 46 of the Oklahoma Constitution. Venue for this action is proper in Oklahoma County.

B. Constitutionality of the Oklahoma Voter ID Act

¶13 The Oklahoma Constitution provides that elections should be free and equal and that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right." Okla. Const. art. 2, § 4, art. 3, § 5. The Constitution also grants the Legislature power to "prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections." Okla. Const. art. 3, § 4. Laws governing the right to vote must be reasonable and not destructive to a constitutional right. Swindall v. State Election Bd., 1934 OK 259, ¶ 0, 32 P.2d 691.

¶14 From Statehood, this Court has acknowledged that:

> [t]he object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult.

State v. Millar, 1908 OK 124, ¶ 9, 96 P.747, 749 (quoting Hirsh v. Wood, 148 N.Y. 143, 42 N.E. 537). In determining if a law relating to voting was constitutional, we have considered whether the law was designed to protect the purity of the ballot, not as a tool or instrument to impair constitutional rights. Sparks v. State Election Bd., 1964 OK 114, ¶ 13, 392 P.2d 711, 714. We have also looked at whether a measure reflects a conscious legislative intent for electors to be deprived of their right to vote. Id. ¶ 11, 392 P.2d at 714.

¶15 The Voter ID Act, as passed by the People, states:

> A. Each person appearing to vote shall announce that person's name to the judge of the precinct and shall provide proof of identity, whereupon the judge shall determine whether the person's name is in the precinct registry. As used in this section, "proof of identity" shall mean a document that satisfies all of the following:
>
> 1. The document shows the name of the person to whom the document was issued, and the name substantially conforms to the name in the precinct registry;
>
> 2. The document shows a photograph of the person to whom the document was issued;
>
> 3. The document includes an expiration date, which is after the date of the election in which the person is appearing to vote. The provisions of this paragraph shall not apply to an identification card issued to a person sixty-five (65) years of age or older which is valid indefinitely, as provided in Section 6-105.3 of Title 47 of the Oklahoma Statutes; and

4. The document was issued by the United States, the State of Oklahoma or the government of a federally recognized Indian tribe or nation.

Provided, if the person presents a voter identification card issued by the appropriate county election board, such card may serve as proof of identity without meeting the requirements of paragraphs 2 and 3 of this subsection.

B. 1. If a person declines to or is unable to produce proof of identity, the person may sign a statement under oath, in a form approved by the Secretary of the State Election Board, swearing or affirming that the person is the person identified on the precinct registry, and shall be allowed to cast a provisional ballot as provided in Section 7-116.1 of this title.

2. False swearing or affirming under oath shall be punishable as a felony as provided in Section 16-103 of this title, and the penalty shall be distinctly set forth on the face of the statement.

Okla. Stat. tit. 26, § 7-114 (2010).

¶16 Where a statute is susceptible of more than one construction, one of which would render it unconstitutional and the other valid and enforceable, the statute should be held constitutional. Swindall, 1934 OK 259, ¶ 22, 32 P.2d at 695. In cases with various possible interpretations, the object sought to be accomplished thereby is an important factor to be considered in determining the construction to adopt. Id. "The understanding of the Legislature as the framers and of the electorate as the adopters of the constitutional amendment is the best guide for determining an amendment's meaning and scope, and such understanding is reflected in the language used in the measure and the ballot title." Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization, 2009 OK 72, ¶ 13, 231 P.3d 638, 642.

¶17 The ballot title for State Question 746, the Voter ID Act stated:

> This measure amends statutes relating to voting requirements. It requires that each person appearing to vote present a document proving their identity. The document must meet the following requirements. It must have the name and photograph of the voter. It must have been issued by the federal, state or tribal government. It must have an expiration date that is after the date of the election. No expiration date would be required on certain identity cards issued to person 65 years of age or older.
>
> In lieu of such a document, voters could present voter identification cards issued by the County Election Board.
>
> A person who cannot or does not present the required identification may sign a sworn statement and cast a provisional ballot. Swearing to a false statement would be a felony.
>
> These proof of identity requirements also apply to in-person absentee voting. If adopted by the people, the measure would become effective July 1, 2011.

State Question 746 (as proposed by Sec'y of State, May 14, 2009) available at https://www.sos.ok.gov/documents/questions/746.pdf.

¶18 In application of these rules to the present case, we must consider the situation upon which the act was intended to operate. While there is no evidence of prior in-person voter fraud in Oklahoma, the Voter ID Act was intended as a procedural regulation to prevent future in-person voter fraud by requiring voters to prove they meet the existing qualifications to vote. It was not passed with the intent to impair the right to vote. Neither the Legislature, nor the People of the State of Oklahoma, have to wait for a problem to directly arise before they take action to address it. Munro v. Socialist Workers Party, 479 U.S. 189, 195-96, 107 S.Ct. 533, 537-38 (1986)("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.").

¶19 A State's interest in voting is limited to the power to fix qualifications. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668, 86 S.Ct. 1079, 1082 (1966).

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the indi-

vidual's right to vote and his right to associate with others for political ends." Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569-70, 75 L.Ed.2d 547 (1983).

Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063 (1992). The Harper Court noted that "[v]oter qualifications have no relation to wealth nor to paying or not paying [a] tax." Harper, 383 U.S. at 666. Appellant argues that the Voter ID Act makes the affluence of voters an electoral standard by requiring identification and payment of the associated costs found in obtaining identification.

¶20 In Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 128 S.Ct. 1610 (2008), the U.S. Supreme Court upheld the constitutionality of a similar Voter ID Law from Indiana. The Indiana Voter ID Law requires voters to present government issued photo identification when voting in-person on election day or in-person in advance of the election day. Id. at 185. Indiana offers free photo identification to qualified voters to establish residence and identity. Id. at 186. In addition, Indiana allows provisional ballots to be cast by indigent voters who have not obtained the free photo identification. Id. In order to vote provisionally, the voter signs an affidavit at the ballot location and then executes another affidavit before the circuit court clerk within ten (10) days of the election. Id. The Indiana district court found that the State had not introduced evidence of a single individual voter who would be unable to vote because of the Voter ID Act. Id. at 187. The U.S. Supreme Court balanced the state's interests with the burdens caused by the Voter ID Act. Id. at 191-203.

¶21 Indiana claimed interests in deterring and detecting voter fraud, election modernization, and safeguarding voter confidence. The Court noted that requiring voters to show proof of identity serves to protect the integrity and reliability of the electoral process – pointing to a federal statute requiring individuals to show identification[7] in order to vote, if they had submitted their application to register to vote for the first time via mail, as an indication that Congress believes that photo identification is an effective method of establishing a voter's qualification to vote. Id. at 192-93, citing Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, 42 U.S.C. § 15483(b) (now 52 U.S.C. § 21083). The Court also noted that while there is no evidence of any in-person voter fraud occurring in Indiana at any time in its history, that there are flagrant examples of such fraud in other parts of the country that have been documented throughout this Nation's history and that those and recent examples of absentee ballot fraud show that voter fraud is real and can affect the outcome of a close election. Id. at 194-95.

¶22 The Court stated that the burdens that are relevant are those imposed on people who are eligible to vote but do not possess a current photo identification that complies with the Voter ID Act; determining that a provisional ballot is the remedy for problems caused by "life's vagaries," such as losing identification, not looking like the photo on the identification, or name changes. Crawford, 553 U.S. at 198 ("The fact that most voters already possess . . . some other form of acceptable identification, would not save the statute under our reasoning in Harper, if the State required voters to pay a tax or a fee to obtain a new photo identification."). The Court described the burden to obtain a free photo identification card – including the inconvenience of making a trip to get the ID, gathering required documents, and posing for a photo – which they deemed was not a significant increase from the usual burden to vote.

¶23 The Court noted that a somewhat heavier burden is placed on people who, because of economic or personal reasons, may find it difficult to secure a copy of their birth certificate or other required documents to obtain the "free" identification card. Id. at 198-99. However, the Court found the severity of the burden to be mitigated by the ability to vote a provisional ballot regardless of the fact that it required a second trip within ten days. Id. at 199. The Court noted that based on the record in the case, which did not show the number of registered voters without photo identification or the difficulties faced by indigent voters, they could not conclude the Voter ID Act imposed excessively burdensome requirements on any class of voters. Id. at 200-02.

¶24 Like the Indiana Voter ID Act in Crawford, the Oklahoma Voter ID Act is based on the State's attempt to prevent voter fraud and the lack of evidence of in-person voter fraud in the state is not a barrier to reasonable preventative legislation. Requiring voters to show proof of identity serves to protect the integrity and reliability of the electoral process and prevent in-person voter fraud. Unlike the act in Crawford, Oklahoma does not provide free photo

identification cards[8] for voters. However, the Oklahoma Voter ID Act does provide that the free paper voter identification card may be used in lieu of an approved photo identification. Further, a voter with no identification can vote by provisional ballot at the polling location with no further trips required. Because the Oklahoma Voter ID Act exists as a procedural regulation to ensure voters meet an existing qualification of voting and there is no direct cost associated with voting, it is constitutional.

IV. CONCLUSION

¶25 The Oklahoma venue statute providing that venue for this case is in Oklahoma County, where the Oklahoma Election Board is located, is not a special law. The Oklahoma Voter ID Act is a reasonable procedural regulation to ensure that voters meet identity and residency qualifications to vote and does not cause an undue burden. Both statutes are therefore constitutional.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

CONCUR: Combs, C.J., Gurich, V.C.J., Kauger, Winchester, Edmondson, Reif and Darby, JJ.

CONCUR IN RESULT: Colbert, J.

RECUSED: Wyrick, J.

Per Curiam.

1. Appellee states that the act should be known as the "Proof of Identity Statute," but for simplicity referred to it as the Voter ID Act throughout their filings. As the act did not contain an official title, we refer to it by its most common name, the "Voter ID Act."

2. Title 26, Section 7-114 states:

A. Each person appearing to vote shall announce that person's name to the judge of the precinct and shall provide proof of identity, whereupon the judge shall determine whether the person's name is in the precinct registry. As used in this section, "proof of identity" shall mean a document that satisfies all of the following

1. The document shows the name of the person to whom the document was issued, and the name substantially conforms to the name in the precinct registry;

2. The document shows a photograph of the person to whom the document was issued;

3. The document includes an expiration date, which is after the date of the election in which the person is appearing to vote. The provisions of this paragraph shall not apply to an identification card issued to a person sixty-five (65) years of age or older which is valid indefinitely, as provided in Section 6-105.3 of Title 47 of the Oklahoma Statutes; and

4. The document was issued by the United States, the State of Oklahoma or the government of a federally recognized Indian tribe or nation.

Provided, if the person presents a voter identification card issued by the appropriate county election board, such card may serve as proof of identity without meeting the requirements of paragraphs 2 and 3 of this subsection.

B. 1. If a person declines to or is unable to produce proof of identity, the person may sign a statement under oath, in a form approved by the Secretary of the State Election Board, swearing or affirming that the person is the person identified on the precinct registry, and shall be allowed to cast a provisional ballot as provided in Section 7-116.1 of this title.

2. False swearing or affirming under oath shall be punishable as a felony as provided in Section 16-103 of this title, and the penalty shall be distinctly set forth on the face of the statement.

Okla. Stat. tit. 26, § 7-114 (2010).

3. Title 26, Section 7-114 has since been amended to also allow identification cards issued by the armed services of the United States to an active or retired member without having an expiration date. Okla. Stat. tit. 26, § 7-114(A)(3) (2014).

4. Title 26, Section 7-114 has also been amended to clarify the requirements of what the provisional ballot must correctly contain and have verified in order to be counted. Okla. Stat. tit. 26, § 7-114(B) (2014).

5. In January 2012, this Court issued a writ prohibiting the Tulsa County District Court from entertaining a constitutional challenge to the Voter ID Law and stating that the action must be brought in the County of the Defendant's official residence. Okla. State Election Bd. v. Hon. Jefferson Sellers, 109,981, CV-2010-648. Appellant moved the case to Oklahoma County. The Oklahoma County District Court granted summary judgment stating that the bill was validly enacted and Appellant lacked standing; Appellant appealed to this Court. In Gentges I, we determined that the bill was validly enacted, that Appellant has standing to challenge the Voter ID Act, and remanded for the district court to determine the constitutionality of the Voter ID Act and of the state venue provision. Gentges v. Okla. State Election Bd. (Gentges I), 2014 OK 8, 319 P.3d 674.

6. Prior to the Oklahoma Voter ID Act, there was an identification component for first-time voters who registered by mail based on the federal Help America Vote Act (HAVA). Help America Vote Act of 2002, 116 Stat. 1666, 42 U.S.C. § 15483(b) (now 52 U.S.C. § 21083(b)(2)(A)). However, under HAVA voters could provide photo identification or present a copy of a current utility bill, bank statement, government check, paycheck, or other government document that showed the name and address of the voter to verify their identity. As such, two of the provisional ballots that were counted in 2010 were cast provisionally due to the lack of identification. Both ballots cast due to lack of identification were counted in that election.

7. HAVA requires voters to present written identification and permits either a valid government issued identification card or other forms of documentation such as a current utility bill, bank statement, paycheck, or other government document that shows the name and address of the voter. Crawford, 553 U.S. at 193, 52 U.S.C. § 21083(b)(2).

8. Oklahoma does provide an exception from payment for identification cards at age 65, Okla. Stat. tit. 47, § 6-101(O) (2017), and for former U.S. armed forces with an honorable discharge with 100% permanent disability though military action or disease contracted during time in the military. Okla. Stat. tit. 47, § 6-101(P) (2017). Under those exceptions, the person is still responsible for the costs associated with the underlying required identification or birth certificates and the cost and inconvenience of making the trip to obtain the free photo identification card, similar to Crawford.

2018 OK 40

OCTAVIO PINA, Petitioner, v. AMERICAN PIPING INSPECTION, INC., BERKSHIRE HATHAWAY HOMESTATE INS. CO., and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 113,899. May 8, 2018

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Petitioner is a pipeline fitter who was injured and sought treatment and compensation from his employer. Employer denied compensability, arguing Petitioner's injuries did not arise in the course and scope of his employment under 85A O.S. Supp. 2013 § 2 (13). The administrative law judge agreed and the Workers' Compensation Commis-

sion affirmed. Petitioner appealed the decision of the Commission and the Court of Civil Appeals sustained the Commission. Petitioner filed a Petition for Certiorari which was granted. We hold Petitioner was in the course and scope of his employment as the term is defined in 85A O.S. Supp. 2013 § 2 (13) because his actions at the time of injury were related to and in furtherance of the business of the employer.

COURT OF CIVIL APPEALS OPINION VACATED; ORDER FROM WORKERS' COMPENSATION COMMISSION VACATED; CAUSE REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

Bob Burke, Oklahoma City, Oklahoma And Kim N. Nguyen, Oklahoma City, Oklahoma, for Petitioner

Jacque Brawner Dean, Edmond, Oklahoma, for Respondents

OPINION

EDMONDSON, J.:

Facts & Procedural History

¶1 Octavio Pina (Petitioner) was employed as a pipeline installer by American Piping Inspection, Inc. At the time of his injury, he worked at an oilrig site approximately 130 miles away from his home residence. Petitioner traveled weekly to Employer's drilling site; he would work for 6 days and then return home on the weekend. Employer provided a daily per diem payment for lodging and meals incurred by Petitioner.

¶2 Employer used Petitioner's truck to haul work related equipment and materials and paid him $50 per day for the use of his truck. At the time of Petitioner's injury, it was the practice of Employer to pay for the gas necessary to refuel Petitioner's truck each morning before traveling to the rig site. Petitioner was required to stop at the Employer-designated gas station at the time set by the supervisor.

¶3 It is undisputed that Employer also agreed to purchase ice and water each day for the entire crew, but ***only if they stopped at the designated gas station at the time specified by Employer***.[1] Employer argued that it was not *mandatory* for the employees to stop for ice and water; but it is undisputed that ***Employer would not pay for these items unless the employees stopped at the location as directed.*** There were no stores within walking distance of the drilling site where employees could buy ice and water or gasoline. Thus, Petitioner's option on the morning of his injury was to personally pay for the gas for the work day or follow the Employer's instructions and arrive at the gas station at the appointed time. Employer had been paying for Petitioner's gasoline for three months prior to his injury. Employer's safety and compliance representative testified that "[i]f they want water that they don't pay for themselves then they need to be at that – at that place. But it's not mandatory."[2]

¶4 After getting supplies, the employees would drive another 30 miles from the gas station to the drilling site. Once they arrived at the drilling site, all employees were required to attend a safety meeting each morning and sign a log noting their attendance. This log was used as a means for determining who worked each day and identify who was to get paid for the day's work. Both of the Employer's representatives testified that "work" did not begin until the employees signed the log.

¶5 On the morning of September 22, 2014, Petitioner met his supervisor at the designated gas station to get ice, water and gasoline. The supervisor agreed that "Claimant was reporting to work that morning when he made it to the gas station."[3] Petitioner explained that "[he was] supposed to stop at the gas station so they can fill up your tank of gas because you're moving all day long."[4] The supervisor paid for the gas and supplies with the company credit card just as he had been doing for three months. Petitioner ***then asked his supervisor for permission to leave the gas station*** and drive to the drilling site. On his way, Petitioner had a collision and sustained serious injuries. Emergency medical care was given and Petitioner was transported via helicopter for medical treatment. Petitioner never arrived at the drilling site that morning. Although Petitioner did not sign the attendance sheet at the rig site that morning, Employer paid him for a full day of work.

¶6 Petitioner filed a claim for benefits under the Administrative Workers' Compensation Act (AWCA) 85A O.S. §§ 1-125. Employer denied the claim was compensable within the meaning of the AWCA on the following grounds: (1) Petitioner was not performing employment services at the time of injury as required by 85A O.S.

Supp. 2013 § 2 (9) (b) (3); and (2) the injury did not occur in the course and scope of employment pursuant to 85A O.S. Supp. 2013 § 2 (13).

¶7 The administrative law judge held a hearing on March 3, 2015, and determined that Petitioner's injury did not occur in the course and scope of employment within the meaning of the AWCA and denied his claim.

¶8 The Administrative Law Judge (ALJ) made this finding in the Order Denying Compensability:

> "[Petitioner] was paid money when his truck was used on the job site. The [Petitioner] had told [the supervisor] that he had been at a family reunion or party that weekend and was going to the job site to sleep."[5]

The ALJ also found that at the time of the accident Petitioner was not "in furtherance of the affairs of his employer."[6] The record has *no evidence* Petitioner told his supervisor he was leaving the gas station to go the job site to "sleep." The record has *no evidence* that Petitioner ever made such a statement to any person. No witness offered such testimony. The only suggestion about sleep is one leading question made at the hearing before the ALJ when Respondents' attorney asked Petitioner:

> Q. And you went on to the job site to take a nap; is that correct?
>
> A. Well when I went back to work I had to go back to work.
>
> Q. Okay. You went out to the job site, you were on your way to the job site; is that correct?
>
> A. Yes.[7]
>
> Petitioner's attorney then asked Petitioner the following:
>
> Q. ... And you asked your supervisor Mr. Rodriguez's permission before you left the gas station and he knew you were heading to the job site; is that correct?
>
> A. Yes.
>
> Q. Okay. Did you tell him that you're going ahead to the job site so you can take a nap?
>
> A. No.[8]

The supervisor testified that Petitioner told him he was leaving the gas station to drive to the drilling site. There is no testimony in the transcript hearing or any evidence in the record that Petitioner ever made a statement he was going to the rig site to "sleep."

¶9 Petitioner then sought review by the Workers' Compensation Commission (Commission) asserting: (1) that he was acting within the course and scope of his employment at the time of injury within the meaning of 85A O.S. 2013 Supp. § 9 (a); and (2) he was performing an activity that was fundamentally related to his job activities and in furtherance of the affairs or business of Employer. A hearing was held before the Commission on April 24, 2015. In an order issued on April 24, 2015, the Commission affirmed the determination of the Administrative Law Judge.

¶10 Petitioner next filed a Petition for Review with this Court. After briefing, the matter was assigned to the Court of Civil Appeals. On appeal, Petitioner asserted that the finding by the ALJ and decision by the Commission was erroneous in view of the reliable, material, probative and substantial competent evidence and was contrary to law. Petitioner urged that he sustained a compensable injury as contemplated by 85A O.S. Supp. 2013 § 9 (a) and that his stop at the gas station and subsequent travel to get to the work site was *travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer*. 85A O.S. Supp. 2013 § 2 (13). Petitioner further urged that the AWCA violates Okla. Const. Art. 2, § 6 by leaving him without a remedy and deprives him of due process as guaranteed by Okla. Const. Art. 2, §7.

¶11 In an opinion filed September 17, 2015, the Court of Civil Appeals affirmed the order from the Commission. The Court of Civil Appeals analyzed 85A O.S. Supp. 2013 §2 (13) (a) and 85A O.S. Supp. 2013 §2 (8) , and determined that Petitioner's injuries occurred while he was driving from his permanent residence to the job site and as such were excluded from coverage and not a compensable injury. The Court of Civil Appeals also determined that the trip from the gas station to the rig drilling site was a *dual purpose trip* and as such was excluded under 85A O.S. Supp. 2013 § 2 (13) (b). Lastly, the Court of Civil Appeals considered Petitioner's constitutional claim concerning Okla. Const. Art. 2 § 6 and determined that this provision does not guarantee a litigant a specific remedy such as workers' compensation and announced that this constitutional provision was a mandate to the judiciary and not a limita-

tion on the legislature's right to enact laws. *City of Anadarko v. Fraternal Order of Police, Lodge 118*, 1997 OK 14 ¶ 6, 934 P.2d 328, 330.

¶12 Petitioner filed his Petition for Certiorari to the Court of Civil Appeals with this Court. The Court granted his petition.

Standard of Review

¶13 The law in effect at the time of the injury controls both the award of benefits and the appellate standard of review. *Vasquez v. Dillards, Inc.*, 2016 OK 89, 381 P.3d 768; *Brown v. Claims Management Resources Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111, 115. Appellate review of the judgment in this matter is set forth at 85A O.S. Supp. 2013 §78 which provides in pertinent part:

> C. The judgment, decision or award of the Commission shall be final and conclusive on all questions within its jurisdiction between the parties unless an action is commenced in the Supreme Court of this state to review the judgment, decision or award within twenty (20) days of being sent to the parties. Any judgment, decision or award made by an administrative law judge shall be stayed until all appeal rights have been waived or exhausted. The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award only if it was:
>
> 1. In violation of constitutional provisions;
>
> 2. In excess of the statutory authority or jurisdiction of the Commission;
>
> 3. Made on unlawful procedure;
>
> 4. Affected by other error of law;
>
> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
>
> 6. Arbitrary or capricious;
>
> 7. Procured by fraud; or
>
> 8. Missing findings of fact on issues essential to the decision.

¶14 Petitioner alleges error regarding statutory application and interpretation and constitutional claims. The issues relating to the constitutional validity and interpretation of a statute are questions of law which we review under a de novo standard. This review is plenary, independent, and nondeferential. *Bober v. Oklahoma State Universit*y, 2016 OK 78, 378 P.3d 562 [citing *State ex rel. Protective Health Servs. State Dep't. Of Health v. Vaughn*, 2009 OK 61, ¶ 9, 222 P.3d 1058; *Brown v. Claims Management Resources Inc.*, 2017 OK 13, ¶ 10, 391 P.3d 111, 115 (citations omitted)].

¶15 Our interpretation also implicates 85A O.S. Supp. 2013 §78 (c) (5). With respect to the review of factual matters, we adopt the standard used in other administrative proceedings. *Brown*, 2017 OK 13, ¶ 11, 391 P.3d 111, 115 (citations omitted). Thus, with respect to issues of fact, the Commission's order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based. *Id.* However, where there is no dispute as to the facts, whether an accidental injury occurred in the course of employment is a question of law. *Ince v. Chester Westfall Drilling Co.*, 1959 OK 158, 346 P.2d 346.

Analysis

¶16 The AWCA defines "course and scope of employment" as follows:

> "Course and scope of employment" means an activity of any kind or character for which the employee was hired and that relates to and derives from the work, business, trade or profession of an employer, and is performed by an employee in the furtherance of the affairs or business of an employer. The term includes activities conducted on the premises of an employer ***or at other locations designated by an employer and travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer***. This term does not include:
>
> a. an employee's transportation to and from his or her place of employment,
>
> b. travel by an employee in furtherance of the affairs of an employer if the travel is also in furtherance of personal or private affairs of the employee,
>
> c. any injury occurring in a parking lot or other common area adjacent to an employer's place of business before the employee clocks in or otherwise begins work for the employee or after the employee clocks out or otherwise stops for the employer, or
>
> d. any injury occurring while an employee is on a work break, unless the injury occurs while the employee is on a work break inside the employer's facility and

the work break is authorized by the employee's supervisor[.]

85A O.S. 2013 Supp. § 2 (13) (Emphasis added).

¶17 Petitioner worked as a pipeline fitter and *at the request of Employer* his personal pickup truck was used to haul materials relating to work for the Employer at the job site. It is undisputed that at the time of injury, Petitioner was not at the oilrig site, the "premises of an employer." Thus, in order to resolve whether Petitioner's injury fits within the definition of the AWCA we must determine the following: (1) whether Petitioner's activities were *in furtherance of the affairs of Employer and were done at the direction of Employer*, (2) whether Petitioner's travel from the gas station to the drill site was *transportation to and from his place of employment*, and (3) whether the travel by Petitioner was in *furtherance of Employer as well as a personal or private affair of Petitioner*. The parties disagree as to the legal conclusion for each of these issues.

¶18 The uncontroverted testimony from Employer's representatives and from Petitioner reflect that: (1) Employer's representative designated the specific gas station and time for stopping; (2) Petitioner stopped at the gas station for the purpose of filling his gas tank to be used at the work site; (3) the Supervisor acknowledged that Petitioner was "reporting to work that morning when he made it to the gas station;"[9] (4) Petitioner left the gas station with the permission of his supervisor to proceed to the work site; (5) Employer paid for the gas used in Petitioner's truck to haul equipment and supplies at the work site, but only if Petitioner stopped at the designated gas station; (6) Employer paid for water and ice for Petitioner and other employees but only if they stopped as designated by Employer; (7) there were no stores within walking distance of the work site for employees to obtain gasoline or ice and water; (8) Petitioner testified that he left the gas station that morning to drive to the rig drilling site; and (9) there is no evidence in the record that Petitioner said he was leaving the gas station to take a nap.

¶19 When judicial power is used to adjudicate an issue of fact, there must be evidence to affirmatively support the decision.[10] Petitioner had the burden of proof to establish by a preponderance of the evidence that his injury occurred in the course and scope of employment.

¶20 The AWCA specifically envisions that "course and scope of employment" includes "travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer." 85A O.S. 2013 Supp. § 2 (13). Employer used Petitioner's truck to haul equipment and supplies at the oilrig site. Such activity is ***clearly work that furthers the affairs*** of Employer. There were no gas stations or ice and water within walking distance of the oilrig site. Employer paid for Petitioner's gas and he showed up at the gas station on the morning of his injury to accommodate the needs of Employer, because "[he was] supposed to stop at the gas station so they can fill up your tank of gas because you're moving all day long."[11] Employer urged that it was not mandatory for Petitioner to stop, this was just a "perk" for Petitioner. Employer paid a per diem rental fee for the use of Petitioner's truck. We decline to adopt Employer's view. Considering all of the evidence before us we conclude that claimant met his burden to show that he was at the gas station as specifically directed by Employer and done to further the Employer's business needs. We have long recognized that hauling ice and water to an oilrig drilling site is considered "material being hauled for the employer."[12] It was common practice for Employer to provide ice, water and gas to Petitioner. We conclude that Petitioner was hauling material for the benefit of the Employer and was "in furtherance of the affairs of an employer" as contemplated by the AWCA.

¶21 Employer argued that Petitioner was not technically "working" unless he arrived at the rig site and signed in for the safety meeting. We reject Employer's narrow interpretation. It is undisputed that the supervisor acknowledged at the hearing before the ALJ that he considered Petitioner was "reporting for work that morning when he made it to the gas station."[13] Further, Petitioner sought the "permission" of his supervisor before he left the gas station to proceed on to the drill site.

¶22 We reject Employer's argument that Petitioner was simply traveling to and from his place of employment at the time of injury. We likewise find no evidence in the record that the travel by Petitioner was for a "dual purpose." The AWCA excludes coverage if an employee's travel is in furtherance of the employer if it is also in furtherance of the employee's personal or private affairs. A thorough review of the record lacks any evidence to support a finding

that Petitioner was engaged in any personal or private reason for his travel from the gas station to the drilling site. The only testimony from the hearing supports that Petitioner obtained his supervisor's permission to travel on to the rig site to continue his work for the day. He arrived at the gas station at the appointed location and time to obtain gas, so he could work all day without stopping, all for the benefit of the Employer. We conclude that Petitioner's travel that morning was for the sole benefit of his Employer. Accordingly, his accident is a covered event under the AWCA as being in the course and scope of his employment.

¶23 Petitioner raised both legal and constitutional claims regarding the denial of his claim for workers' compensation benefits. This Court has long recognized that where relief is available on alternative non-constitutional grounds, we avoid reaching a determination on constitutional issues. *Brown v. Claims Management Resources, Inc.*, 2017 OK 13, ¶ 26, 391 P.3d 111, 119.[14]

¶24 The opinion of the Court of Civil Appeals is vacated. The opinion of the Workers' Compensation Commission is reversed. The opinion of the Administrative Law Judge is reversed, and the matter is remanded for further proceedings consistent with this opinion.

COURT OF CIVIL APPEALS OPINION VACATED; ORDER OF WORKERS' COMPENSATION COMMISSION REVERSED; ORDER OF ADMINISTRATIVE LAW JUDGE REVERSED; CAUSE REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

COMBS, C.J., GURICH, V.C.J., KAUGER, EDMONDSON, COLBERT, REIF, JJ., concur;

WINCHESTER, J. (by separate writing), and WYRICK, J., dissent;

DARBY, J., not participating.

WINCHESTER, J., with whom Wyrick, J., joins, dissenting:

¶1 I would sustain the order of the Workers' Compensation Commission and affirm the Court of Civil Appeals, which found that 85A O.S.Supp.2014, § 2(13)(a) clearly excludes transportation to and from the employee's place of employment and does not fall within the definitions of "in the course of employment" or "arising out of employment." In addition, this trip to the store on the way to the job site was a dual purpose trip excluded under § 2(13)(b) of that statute.

EDMONDSON, J.:

1. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 34, the site supervisor testified that "[the employer] will decide which gas station".

2. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 25.

3. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 36.

4. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 14.

5. Record, p. 36, Order Denying Compensability, filed March 6, 2015, Commission File No. CM-2014-09405Y, Before the Oklahoma Workers' Compensation.

6. Record, p. 36, Order Denying Compensability, filed March 6, 2015, Commission File No. CM-2014-09405Y, Before the Oklahoma Workers' Compensation.

7. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, pps. 11-12.

8. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, pps. 17-18.

9. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 36.

10. *Carbajal v. Precision Builders, Inc.*, 2014 OK 62, ¶ 26, 333 P.3d 258, 265 (2014), also see *Christian v. Gray*, 2003 OK 10, ¶ 44, 65 P.3d 591, 609, An adjudication of an issue of fact in the negative may be based upon an entire absence of proof, or a failure to prove one or more of the required elements necessary to establish a fact.

11. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 14.

12. I*nce v. Chester Westfall Drilling Co.*,1959 OK 158, ¶ 6, 346 P.2d 346, 348, *Helmerich & Payne, Inc. v. Gabbard*, 1958 OK 204, 333 P.2d 964; *Haco Drilling Co., v. Burchette*, 1961 OK 145, 364 P.2d 674, employee found to be within scope of employment when he picked up two co-workers, obtained ice and water for use at the oil drilling site and was on the way to work when accident occurred; see also, *Skinner v. Braum's Ice Cream Store*, 1995 OK 11 ¶ 6, 890 P.2d 922, 925, "We recognized the general rule that the employment relationship does not exist during a commute to and from work in *Haco*. Nevertheless, we held that the driver was acting within the scope of his employment when the accident occurred. The water and ice were necessary to the workforce of the drilling rig. The driver's pick up and delivery of the water was incidental to the business operation."

13. *Octavio Pina, Claimant, v. American Piping Inspection, Inc., Respondent and Berkshire Hathaway Homestate Insurance Co., Insurance Carrier,* Before the Workers' Compensation Commission, Commission Case No. CM-2014-09495Y, Transcript of Hearing Before Administrative Law Judge Michael T. Egan, March 3, 2015, p. 36.

14. Citing, *Bd. Of County Com'rs of Muskogee County v. Lowery*, 2006 OK 31, ¶ 14, 136 P.3d 639, 649; *State ex rel. Fent v. State ex rel. Okla. Water Resources Bd.*, 2003 OK 29, ¶ 12, 66 P.3d 432, 439.

2018 OK CR 10

IKE FRANK NICHOLSON, JR., Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2016-927. April 26, 2018

OPINION

LEWIS, VICE-PRESIDING JUDGE:

¶1 Ike Frank Nicholson, Jr., Appellant, was tried by jury and convicted of second degree murder, in violation of 21 O.S.2011, § 701.8(1), in the District Court of Osage County, Case No. CF-2015-340.[1] The jury sentenced Appellant to life imprisonment. The Honorable M. John Kane IV, District Judge, pronounced judgment and sentence accordingly.[2] Mr. Nicholson appeals.

FACTS

¶2 Appellant and his girlfriend, Carrie Lira, traveled from Bethany to Tulsa in late October, 2015, hoping to locate Carrie's missing sister, Kelli. They learned from Antwuan Adamson that Vallon Broadus might be holding Kelli against her will. On the evening of October 21, Appellant, Carrie Lira, and Antwuan Adamson met at Megan Burkett's residence in Tulsa, expecting that Vallon Broadus might be there with Kelli. Neither Broadus nor Kelli were there when they arrived. They parked their car around the corner, and sat waiting in Antwuan Adamson's car just down the street from the residence.

¶3 Within an hour or two, Vallon Broadus drove up to Burkett's house in a red car and parked in the driveway. Antwuan Adamson had gone inside the Burkett residence before Broadus arrived, and saw some of the incident that followed on a home video surveillance monitor.[3] By Appellant's own account, he got out of a vehicle and quickly approached the car driven by Vallon Broadus, carrying a 12 gauge shotgun and yelling for Kelli to "get out of the car!"[4] Carrie Lira began driving Adamson's car toward the driveway to block Broadus's exit.

¶4 According to Appellant, the red car suddenly lurched backward in his direction, spinning its tires in the gravel, requiring him to step to the left side to avoid being hit. Appellant later admitted to police that he pointed the shotgun's attached flashlight into the driver's eyes as the car went by. He also admitted that the shotgun discharged as he pointed it at the driver, sending several pellets through the driver's windshield, striking and killing Vallon Broadus. The car backed into a large post and stopped.

¶5 After seeing part of the incident on camera, Antwuan Adamson quickly walked outside the house. There he saw the Appellant lowering the barrel of the shotgun from a shooting position. Appellant was standing about ten feet to the front side of the red car. Adamson got into his car. Appellant, still carrying the shotgun, jumped in the back seat and told Adamson to drive him around the corner. He drove to a nearby apartment, where Appellant and Carrie Lira got out. Adamson said Appellant took the shotgun with him. Adamson drove away. The shotgun was never recovered. Appellant and Carrie Lira were later arrested in Oklahoma City.

¶6 In a subsequent recorded interview with investigators, which was played for the trial jury, Appellant stated as Broadus's car came toward him, "I think I shot him. I think I shot the windshield." He denied intending to kill Broadus, saying he wanted to intimidate him and make him cooperate in efforts to find Carrie's sister, Kelli. After the shooting, Appellant and Carrie got in Adamson's car, rode with Adamson around the corner to their own car, and escaped the scene. Appellant essentially claimed he committed an accidental shooting, and fled in a panic because of his past run-ins with the law. The recording also showed that Appellant declined the investigator's request that he provide a DNA sample for comparison. Further facts will be discussed as necessary to the resolution of the issues on appeal.

ANALYSIS

¶7 In Proposition One, Appellant argues that the trial court erred in finding prosecution witness Antwuan Adamson unavailable to testify at trial and admitting the transcript of his preliminary examination testimony. He also argues the admission of the transcript violated his constitutional right to confrontation. This Court reviews the trial court's finding of a witness's unavailability for abuse of discretion. *Mathis v. State*, 2012 OK CR 1, ¶ 20, 271 P.3d 67, 75. An abuse of discretion is a clearly erroneous con-

clusion, contrary to the logic and effect of the facts presented. *Pullen v. State*, 2016 OK CR 18, ¶ 4, 397 P.3d 922, 925.

¶8 We find that the trial court's finding that Adamson was unavailable was not clearly erroneous, and admission of the transcribed testimony was not an abuse of discretion. Because the witness was unavailable, and Appellant had a prior opportunity to cross-examine the witness at preliminary examination, admission of the transcript at trial did not violate Appellant's right to confrontation. *Mathis*, 2012 OK CR 1, ¶ 19, 271 P.3d at 75; *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). Proposition One is denied.

¶9 In Proposition Two, Appellant argues that the flight instruction given by the trial court was reversible error. He waived review for all but plain error when he failed to object or request different instructions at trial. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. Appellant must therefore show a plain or obvious error in this instruction affected the outcome of the trial. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will correct plain error only where it seriously affects the fairness, integrity or public reputation of the proceedings. *Id.* We find no plain or obvious error here. *Mitchell v. State,* 1993 OK CR 56, ¶ 8, 876 P.2d 682, 684; *Ashton v. State*, 2017 OK CR 15, ¶ 36, 400 P. 3d 887, 897. Proposition Two is without merit.

¶10 Proposition Three argues that the trial court's violation of section 894 of Title 22 in two written communications to the jury was reversible error. These communications answered two simple questions by referring jurors back to their instructions. The communications met no objection at trial, waiving all but plain error, as defined above. Section 894 requires that when the jury desires further instruction after retiring to deliberate, the trial court should conduct the jury to the courtroom and instruct them in the presence of, or after notice to, the prosecutor and defense counsel. The written response procedure used here, though it happens in trial courts every day, and was agreed to by counsel after consultation, is a plain violation of the statute. *Cipriano v. State,* 2001 OK CR 25, ¶ 48, 32 P.3d 869, 879 (finding open court requirement of section 894 is mandatory).

¶11 This Court has more than once indicated that when a trial court's communications with the jury violate the dictates of section 894 – even with the agreement or acquiescence of the parties – a "presumption of prejudice arises." *Mitchell v. State*, 2011 OK CR 26, ¶ 130, 270 P. 3d 160, 188 (quoting *Givens v. State*, 1985 OK CR 104, ¶ 19, 705 P.2d 1139, 1142). This presumption of prejudice was said to be rebuttable, and could be "overcome if, on appeal, this Court is convinced that, on the face of the record, no prejudice to the defendant occurred." *Id.* In *Mitchell*, the Court found the presumption of prejudice rebutted where "the court's written response accomplished the same result as if the court had brought the jury into the courtroom and responded verbally." *Id.*

¶12 However, upon closer review of prior cases, we find this presumption of prejudice unjustified when the trial court communicates with the jury in writing after affording counsel notice and an opportunity to be heard. *Smallwood v. State*, 1995 OK CR 60, ¶¶ 80-82, 907 P.2d 217, 237-38 (citing *Brown v. State*, 1975 OK CR 13, ¶¶ 9-10, 530 P.2d 1056, 1058) (holding prejudice is not presumed from trial court's written communication with jury after consulting with counsel). Any suggestion to the contrary in *Mitchell, Givens*, or other published cases, is hereby overruled.[5]

¶13 Reversal of a judgment for a procedural error is prohibited unless the error "has probably resulted in a miscarriage of justice, or constitutes a *substantial* violation of a constitutional or statutory right." 20 O.S.2011, § 3001.1 (emphasis added). The correction of *unpreserved* error always remains a matter of discretion, rather than legal right, and is generally warranted only when the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings . . . ." *Simpson*, 1994 OK CR 40 ¶ 30, 876 P.2d at 700-01 (*quoting United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508, 518 (1993).

¶14 The supplemental instructions here were given to the jury in writing after consultation with counsel. Neither party requested that the jury be returned to the courtroom for these instructions. Appellant has not shown that the instructions themselves were incorrect, or that other instructions should have been given. The trial court's technical violation of section 894 by failing to conduct the jury to the courtroom for these instructions did not seriously affect the fairness, integrity, or public reputation of

the proceedings. *Worcester v. State*, 1975 OK CR 111, ¶ 20, 536 P. 2d 995, 1001 (finding a "technical violation" of section 894 by written communication was harmless error). No relief is warranted. Proposition Three is denied.

¶15 In Proposition Four, Appellant complains that evidence of his prior convictions, and his refusal to give a requested sample of his DNA, should not have been admitted. He failed to object to the evidence and waived all but plain error, as defined above. Evidence that the defendant in a criminal trial has been convicted of a felony is admissible to attack his credibility as a witness "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." 12 O.S.2011, § 2609(A)(1). Convictions involving dishonesty or false statement are also admissible. Evidence of other crimes, wrongs, or bad acts is inadmissible to prove action in conformity therewith, but can be admissible for other purposes not relevant here. 12 O.S.2011, § 2404(B).

¶16 The evidence of Appellant's criminal record was incidentally admitted through Appellant's own references in his statement to police. The evidence was not offered for a specific purpose, and was not otherwise emphasized by the State or defense. The jury was never informed of the precise nature of Appellant's criminal history. The better practice would have been to exclude this evidence by redacting the videotape; but in light of the overwhelming evidence of guilt, this error did not seriously affect the fairness, integrity, or public reputation of the proceedings.

¶17 We reach the same conclusion regarding evidence that Appellant refused to voluntarily provide a DNA sample upon request. In *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, the Court assumed, without deciding, that evidence of a defendant's exercise of his Fourth Amendment right to refuse consent to a search may not be used as substantive evidence of guilt. *Id.*, 2017 OK CR 10, ¶ 40, 400 P.3d at 851. This evidence was incidentally admitted with Appellant's statement, and again, was not emphasized during the trial as evidence of Appellant's guilt. Reviewing for plain error, we find that this evidence did not seriously affect the fairness, integrity, or public reputation of the proceedings, and its admission was harmless beyond a reasonable doubt. Proposition Four is denied.

¶18 In Proposition Five, Appellant argues that prosecutorial misconduct deprived him of a fair trial. The alleged misconduct drew no objection at trial and will be reviewed only for plain error, as defined above. We evaluate the challenged prosecutorial conduct within the context of the entire trial, considering the propriety of the prosecutor's actions, the strength of the evidence, and the corresponding arguments of defense counsel. *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. The Court grants relief for prosecutorial misconduct only when it is so flagrant that it renders the trial or sentencing fundamentally unfair. *Williams v. State,* 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. Appellant has not shown plain or obvious misconduct in the prosecutor's statements, and no relief is warranted. Proposition Five is denied.

¶19 In Proposition Six, Appellant claims he was denied the effective assistance of counsel by his attorney's allegedly unreasonable omission to: (1) fully argue for the exclusion of Antwuan Adamson's prior testimony; (2) conduct thorough cross-exam of Antwuan Adamson at preliminary; (3) object to evidence of his prior convictions and his refusal to provide a DNA sample upon request; (4) object to prosecutorial misconduct; (5) object to improper instructions on flight; and (6) enter a properly worded stipulation.

¶20 Appellant also filed an *Application for Evidentiary Hearing on Sixth and Fourteenth Amendment Claims* (the "Application") seeking remand to supplement the record on appeal with six (6) extra-record exhibits supporting his claim. This Court reviews ineffective assistance claims with the two-pronged test of *Strickland v. Washington,* 466 US 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that the appellant show both unreasonably deficient performance by counsel and resulting prejudice, in the form of an unreliable verdict or sentence. *Id*., 466 U.S. at 687, 104 S.Ct. at 2064.

¶21 We review an application for evidentiary hearing filed pursuant to Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.2017, Ch.18, App., to determine whether Appellant has shown "clear and convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." This standard is less demanding than the underlying *Strickland* test. Where a strong possibility of ineffective counsel is shown by clear and convincing evidence, Appellant should be

afforded further opportunity to develop his claim, and remand is granted. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

¶22 Where our review discloses no clear and convincing evidence of a strong possibility of ineffective assistance, we deny remand for a hearing and, necessarily, conclude that Appellant cannot show that counsel was ineffective under the two-pronged *Strickland* standard. *Id.* Reviewing the extra-record materials and the arguments submitted here, Appellant has not shown that counsel's representation was unreasonably deficient, or that any deficient representation creates a reasonable probability of a different outcome at trial. Appellant's *Application for Evidentiary Hearing on Sixth and Fourteenth Amendment Claims*, and Proposition Six, are therefore denied.

¶23 In Proposition Seven, Appellant argues his sentence is excessive. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen,* 2016 OK CR 18, ¶ 16, 387 P.3d at 928. Appellant's life sentence for murder does not meet that demanding test. Proposition Seven warrants no relief.

¶24 Appellant's Proposition Eight argues that the accumulation of errors in this case warrants reversal or modification. We found error in the trial court's non-compliance with section 894 in its communications to the jury, and the failure to redact references to Appellant's criminal history and exercise of his Fourth Amendment rights from his taped interview with police. These unpreserved errors had no serious effect on the fairness, integrity, or public reputation of the conviction or sentencing proceedings; and any constitutional error was harmless beyond a reasonable doubt. Finding no individual harmful errors, and no prejudicial accumulation of harm from individually harmless errors, this proposition is denied. *Martinez v. State*, 2016 OK CR 3, ¶ 86, 371 P.3d 1100, 1119.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY HONORABLE M. JOHN KANE IV, DISTRICT JUDGE

APPEARANCES AT TRIAL

Stuart Ericson, 115 W. Third St., Ste. 417, Tulsa, OK 74103, Attorney for Defendant

R. Kyle Alderson, Assistant District Attorney, 628-1/2 Kihekah, Third Floor, Pawhuska, OK 74056, Attorney for the State

APPEARANCES ON APPEAL

Virginia Sanders, P.O. Box 926, Norman, OK 73070, Attorney for Appellant

Mike Hunter, Attorney General, Jennifer B. Welch, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Attorneys for Appellee

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

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

¶1 I concur in the Court's decision to affirm the Judgment and Sentence in this case. However, I write separately to express my concerns on the need to correctly and completely cite, and not paraphrase, our prior case law. Specifically, regarding the standard of plain error review, in *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923, citing *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698 we said:

> To be entitled to relief under the plain error doctrine, [the defendant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (citing *United States v. Olano*, 507 U.S.

725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1.

¶2 As I noted in *Underwood v. State*, 2011 OK CR 12, 252 P.3d 221:

> We must be careful with the words we use due to the fact our readers evaluate those words for future arguments. Slight changes give rise to arguments that standards of review have changed when in fact they have not. I would just urge the Court to be consistent in the verbiage it uses to explain the methods utilized in analyzing issues on appeal.

Id., 2011 OK CR 12, ¶ 1-2, 252 P.3d 221, 259 (Lumpkin, J., concurring in result).

KUEHN, J., SPECIALLY CONCURRING:

¶1 I specially concur to address the allegation that the majority is incorrect in paraphrasing the plain error standard. Presiding Judge Lumpkin correctly outlines the established test for plain error developed under the *Simpson* case. However, I completely disagree that the *Simpson* or *Hogan* language, which we all understand fully, has to be drafted word for word in every opinion we release. A paraphrase of the *Hogan* language, properly attributed, is the legally correct way to cite to the plain error test. Mandating that judges of this Court must quote *Simpson* or *Hogan* completely in every analysis is inappropriate, and at times completely unnecessary.

¶2 I would like to note that if a plain error is not found during an analysis, then 1) the language regarding any "affect the [error] had on the outcome of the trial", or 2) the fourth "prong" that is delineated in *Simpson* and *Hogan* – to weigh the harm in an error to correct it – are not only unnecessary to discuss, but are completely irrelevant to the analysis. No error means nothing in the jury's decision was affected and there is nothing to weigh.

¶3 Also, if the Court finds error occurred, then citing to cases that outline the entire test in support of the argument, is not only an appropriate legal writing skill, it is a fundamental way to inform the reader of the standard the Court is applying to the facts. To insinuate that anything less than a verbatim recitation of *Hogan* in each analysis will lead to straying arguments and chaos in deciphering the standard is nonsensical.

¶4 By citing to *Hogan*, the reader knows that the test that was applied is the *Simpson* test. To be exact, the reference to paragraph 38 in *Hogan* will lead the reader to the following language in *Hogan*: "To be entitled to relief under the plain error doctrine, Hogan must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *Hogan* was decided in 2006. In the twelve years since that opinion, this Court has managed to both quote the test, paraphrase and cite to the standard, all without leading the legal world astray, or creating chaos in the legal community on what test this Court has used since 1994 to analyze plain error.

LEWIS, VICE-PRESIDING JUDGE:

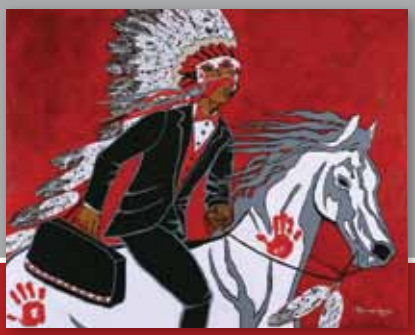
1. The jury acquitted Appellant of first degree murder and convicted him of the lesser included offense of second degree depraved mind murder. The jury was also instructed to consider the lesser included offenses of second degree felony murder in the commission of feloniously pointing a firearm, and first degree manslaughter in the commission of misdemeanor reckless conduct with a firearm.

2. Appellant must serve 85% of his sentence before he is eligible for consideration for parole. 21 O.S.Supp.2014, § 13.1(2).

3. The device had no recorder.

4. Kelli was not in the car, it turns out, and turned up safely after this incident.

5. See also, e.g., *Douglas v. State*, 1997 OK CR 79, ¶¶ 105-106, 951 P. 2d 651, 678-79 (initially presuming prejudice, but finding section 894 error harmless, and encouraging trial courts to "obtain waivers" from the parties); *Boyd v. State*, 1977 OK CR 322, ¶ 13, 572 P. 2d 276, 280 (initially presuming prejudice, though trial court's communication to the jury was reduced to writing in the presence of both counsel, but finding error "in failing to return the jury to the courtroom in compliance with Section 894" was harmless).



THE SOVEREIGNTY SYMPOSIUM XXXI

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

Wednesday Morning

4.0 CLE/CJE credits / 0 Ethics included

7:30 - 4:30 Registration Honors Lounge

8:00 - 8:30 Complimentary Continental Breakfast

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

12:00 - 1:15 Lunch on your own

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

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

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

OVERVIEW AND IMPACT OF TRIBAL BUSINESS

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

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

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

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

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

INTERNATIONAL INTER-TRIBAL TRADE

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

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

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

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

JONNA KAUGER KIRSCHNER, Senior Vice President, Chickasaw Nation Industries

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

Photo credit: Eric Tippeconnic Briefcase Warrior, Joseph French Photography

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

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

MODERATORS: WINSTON SCAMBLER, Student of Native American Art

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

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

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

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

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

PATRICK RILEY, Artist, Art Educator and Mask Maker

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

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

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

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

MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court

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

MICHAEL BURRAGE, Whitten Burrage Law Firm

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

JULIE CUNNINGHAM, Executive Director, Oklahoma Water Resources Board

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

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

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

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

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

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

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

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

ROBERT HAYES, Methodist Bishop of Oklahoma, Retired

Wednesday Afternoon

4 CLE/CJE credits / 0 Ethics included

7:30 - 4:30 Registration Honors Lounge

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

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

OPENING CEREMONY

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

PRESENTATION OF FLAGS

HONOR GUARDS: KIOWA BLACK LEGGINGS SOCIETY

SINGERS: **SOUTHERN NATION**

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

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

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

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

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

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

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

HONOR AND MEMORIAL SONGS: SOUTHERN NATION

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

Grand Ballroom D-E-F

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

(A CONTINUATION OF THE MORNING PANEL)

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

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

Crystal Room

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

(A CONTINUATION OF THE MORNING PANEL)

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

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

Grand Ballroom A-B
Grand Ballroom C

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

(A CONTINUATION OF THE MORNING PANEL)

MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court

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

Thursday Morning

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

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

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

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

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

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

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

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

JOHN REIF, Justice, Oklahoma Supreme Court

Grand Ballroom A& B

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

MODERATOR: DANA KUEHN. Judge, Oklahoma Court of Criminal Appeals

CO-MODERATOR: ARVO MIKKANEN, (*Kiowa/Comanche*), Assistant United States Attorney and Tribal Liaison, Western District of Oklahoma

Thursday Afternoon

4.5 CLE/CJE credits / 0 Ethics included

3:30 - 3:45 Afternoon Coffee / Tea Break

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

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

TRICIA TINGLE, *(Choctaw),* Associate Director - Tribal Justice, Office of Justice Services, Bureau of Indian Affiars

JARI ASKINS, Administrative Director of the Courts, Former Lt. Governor of Oklahoma, Former District Court Judge

WILLIAM P. BOWDEN, Major General (Retired), United States Air Force

TOM WALKER, Judge, Court of Indian Offenses, Anadarko

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

(A CONTINUATION OF THE MORNING PANEL)

PHIL LUJAN, (*Kiowa/Taos Pueblo*), Holistic Health for Tribal Youth, Seminole Nation

JENNIFER KIRBY, Director, Youth Services & Special Projects and Interim Director, Family Assistance, Cherokee Nation Human Services

BRANDON ARMSTRONG, Senior Probation Officer Cherokee Nation

KEVIN HAMIL, Director of Reintegration, Choctaw Nation

ALISHA EDELEN,Assistant Director of Juvenile Services, Choctaw Nation

AMBER LOFTIS, Juvenile Services Coordinator, Choctaw Nation

DOLORES SUBIA BIGFOOT, Director, Tribal Youth and Training and Technical Assistance Center

JANE SILOVSKY, Treatment for Children with Sexual Behavior Problems, University of Oklahoma Child Study Center

TODD CRAWFORD, Executive Officer, Aalhakoffichi' Adolescent Transitional Living Facility, Chickasaw Nation

JAKE ROBERTS, Project Eagle Director, Ponca Tribe of Oklahoma

JANELLE BRETTEN, Senior Project Researcher and Planner, Office of Juvenile Affairs

BRIAN HENDRIX, Deputy Assistant of Native American Affairs, Oklahoma Secretary of State

KIMEE WIND-HUMMINGBIRD, Director, Children & Family Services Administration

SHELLY HARRISON, Tribal Prosecutor, Muscogee (Creek) Nation

DEBRA GEE, Executive Officer and General Counsel, Chickasaw Nation (Juvenile Justice Subcommittee of the Inter-tribal Council of the Five Civilized Tribes)

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

CO-MODERATORS: MATTHEW MORGAN, (*Chickasaw*), Director of Gaming Affairs, Division of Commerce, Chickasaw Nation

NANCY GREEN, *(Choctaw)*, Green Law Firm, Ada, Oklahoma

ERNIE STEVENS, Jr. *(Oneida)*, Chairman, National Indian Gaming Association

JONODEV CHAUDHURI, *(Muscogee (Creek))*, Chairman, National Indian Gaming Commission

KATHRYN ISOM-CLAUSE, (*Taos Pueblo*), Vice Chair, National Indian Gaming Commission

WILEY HARWELL, Executive Director, Oklahoma Association for Problem and Compusive Gambling

G. DEAN LUTHEY, Jr., Gable Gotwals

MICHAEL MCBRIDE, **III**, Crowe and Dunlevy

ELIZABETH HOMER, *(Osage)*, Homer Law Chartered

WILLIAM NORMAN, (*Muscogee (Creek*)) Hobbs, Strauss, Dean & Walker

NOTICE

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May

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

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

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

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

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

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

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

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

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

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

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

28 **OBA Closed** – Memorial Day

30 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272

June

2 **OBA Diversity Committee meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Telana McCullough 405-267-0672

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

7 **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

8 **OBA Alternative Dispute Resolution Section meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

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

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

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

Court of Civil Appeals Opinions

2018 OK CIV APP 33

ONB BANK AND TRUST COMPANY, Plaintiff, vs. JULIA KWOK and WILLIAM R. SATTERFIELD, Defendants/Appellants, vs. MINGO ENERGY, LLC, Intervenor/ Appellee.

Case No. No. 114,871; Cons. w/114,875 October 16, 2017

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANA LYNN KUEHN, TRIAL JUDGE

AFFIRMED

John W. Moody, Tulsa, Oklahoma, for Defendant/Appellant Julia Kwok

E. Diane Hinkle, Bartlesville, Oklahoma, for Defendant/Appellant William R. Satterfield

Michael D. Colvin, Jude T. Barreneche, FIDELITY NATIONAL LAW GROUP, Dallas, Texas, and

Garry M. Gaskins, II, Logan L. James, DRUMMOND LAW, PLLC, Tulsa, Oklahoma, for Intervenor/Appellee

JANE P. WISEMAN, JUDGE:

¶1 Appellants Julia Kwok and William R. Satterfield appeal from a trial court order quieting title in favor of Intervenor and Appellee Mingo Energy, LLC. After review, we find no error and affirm.

BACKGROUND

¶2 The parties are familiar with the lengthy history, facts, and proceedings of this case, and we will repeat only the pertinent ones here. ONB Bank and Trust Company filed this quiet title action against Appellants claiming fee simple ownership of the surface interest of real property described as "[t]he West Half of the Southeast Quarter of the Southwest Quarter (W/2 SE/4 SW/4) of Section Twelve (12), Township Eighteen (18) North, Range Twelve (12) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof." ONB alleged it "acquired interest and title in and to" the property and another tract of land through a sheriff's deed in June 2011, but later conveyed the property to Mingo Industries, LLC.

¶3 In response, Satterfield claimed "title to the subject property was not properly foreclosed in the non-judicial sale" because, after he received notice of the sale, he timely mailed his notice to the mortgagee that the property was his homestead and he elected judicial foreclosure. Kwok claims title by virtue of a quitclaim deed from Satterfield.

¶4 After ONB filed a motion for summary judgment, Appellants in a joint objection to the motion argued that the Oklahoma Power of Sale Mortgage Foreclosure Act (OPSMFA) does not support a judgment in ONB's favor. They claimed the notice of sale from Nationwide Capital Group, Inc., mistakenly directed Satterfield to file his objection in Oklahoma County, rather than Tulsa County where the property is located. Appellants asserted, "Despite the defective notice, the Tulsa County records reflect that on May 16, 2007, [Satterfield] sent notice via certified mail to [Nationwide] objecting to said sale and requesting a judicial foreclosure as required by Title 42 O.S. §45." They asserted that pursuant to 46 O.S. § 43, after Nationwide received the objection, it was required to pursue foreclosure by judicial proceeding. Appellants asserted the sale was null and void because the non-judicial sale failed to comply with the OPSMFA.

¶5 The trial court granted ONB's motion for summary judgment. A different division of this Court in Case No. 111,584 reversed the trial court's decision and remanded the case for further proceedings. The Court stated it reversed the trial court's decision on the ground that:

> the record establishes the presence of contested issues of material fact as to whether (1) Satterfield gave notice of his homestead claim and election for judicial foreclosure, (2) subsequent purchasers were put on inquiry of his claim, and (3) Satterfield had knowledge of the proceedings subsequent to his election for judicial foreclosure.

The Court stated:

> ONB moved for summary judgment, asserting the dispute was controlled by 46 O.S. 2011 §47(A), which provides in part,

"The mortgagee's deed shall raise a presumption of compliance with the requirements of this act regarding the exercise of the power of sale and the sale of the property, including the giving of the notice of intention to foreclose and of sale and the conduct of the sale. Such deed shall constitute conclusive evidence of the meeting of such requirements in favor of purchasers for value and without actual notice so long as the failure to meet those requirements would otherwise render the sale only voidable and, even if the sale is void, after the passage of two (2) years from the date of the recording of the deed."

ONB submitted evidence showing the mortgagee's deed, conveying the property from Nationwide as mortgagee to Nationwide as buyer, was recorded July 11, 2007, and a deed from Nationwide to 75 Enterprises, L.L.C., with documentary stamps of $330.00. It submitted evidence that ONB became the owner of the property by sheriff's deed upon foreclosure of a mortgage from 75 Enterprises, L.L.C. ONB argued the mortgagee's deed became conclusive evidence of meeting the Act's requirements after the passage of two years from the date the deed was recorded.

In response, Satterfield argued that the "conclusive evidence" clause did not apply in this case because the grantee in the mortgagee's deed was not a bona fide purchaser for value without actual notice, inasmuch as Nationwide took title from itself. He argues the subsequent purchasers were not without notice, because his notice of homestead claim and election for judicial foreclosure were filed of record.

The trial court granted summary judgment in favor of ONB, making extensive findings of fact, including that over the past five years, the property had been conveyed to a third party who mortgaged it and a judicial foreclosure of that mortgage has been completed, resulting in a Sheriff's Deed to ONB. The trial court concluded that Satterfield and his grantee Kwok were "estopped by laches since the filing of the Sheriff's Deed in 2007 from asserting any claims now." It awarded ONB's attorney an attorney fee of $3,500.00 plus court costs and statutory post-judgment interest.

The Court noted that the OPSMFA "sets forth the procedure for foreclosing a mortgage in which the mortgagor has conferred upon the mortgagee the power to sell the mortgaged property. 46 O.S. 2011 §43(A)(2)." The OPSMFA, however, specifically provides that the Act "'shall not apply to … [a] mortgage on the mortgagor's homestead if, after the notice of sale is given to the mortgagor pursuant to subsection B of [§45], the mortgagor elects judicial foreclosure in compliance with the provisions of subparagraphs b and c of paragraph 2 of subsection A of [§ 43]' [46 O.S.2011 § 41(7)]." The Court also cited 46 O.S.2011 § 43(A)(2)(b) which provides:

> [I]n a mortgage transaction involving the mortgagor's homestead, if the mortgagor, at least ten (10) days before the property is to be sold under the power of sale, sends written notice by certified mail to the mortgagee stating that the property involved is the mortgagor's homestead and that judicial foreclosure is elected, and files of record a copy of such notice which contains the legal description of the property in the office of the county clerk of the county where the property is located, the mortgagee must pursue any foreclosure by judicial proceeding in a court of competent jurisdiction; provided, however, the mortgagee may contest the mortgagor's claim of homestead in the judicial foreclosure action or in another action such as by declaratory judgment . . . .

¶6 The Court stated: "In the present case, Satterfield put on evidence he complied with the procedure, as set forth in the notice he received, for claiming homestead and electing foreclosure. He put on evidence his failure to timely file the election in the land records was caused by neglect excusable by the mistake in the notice of sale." The Court noted that Satterfield's "election letter to Nationwide's attorney on its face stated it was sent by certified mail and included a tracking number." Satterfield's filings, however, did "not include a green card showing the attorney received the letter." The Court concluded, "This evidence establishes a contested issue of material fact as to whether Satterfield timely elected judicial foreclosure. If he did, the Act no longer applied and Nationwide was required to foreclose judicially."

¶7 The Court stated:

Section 45 of the Act provides that the mortgagee's deed is conclusive evidence of the meeting of the Act's requirements after the passage of two years from the date the deed was recorded, but only "in favor of purchasers for value and without actual notice." However, if the Act no longer applied because Satterfield elected judicial foreclosure, then this section cannot save the sale that took place after the election. On the other hand, if Satterfield did not timely elect judicial foreclosure, purchasers for value and without actual notice were entitled to rely on the Mortgagee's Deed pursuant to §45.

A purchaser of land takes the property with constructive notice of whatever appears in the conveyances constituting the chain of title. *Creek Land & Imp. Co. v. Davis*, 1911 OK 85, 28 Okla. 579, 115 P. 468. If those documents present sufficient facts to put a prudent person on inquiry, the purchaser will be charged with actual notice of whatever reasonable inquiry would have disclosed. *Id.* Filing instruments of record is constructive notice only to those subsequent in the chain of title, not to those prior in the chain of title. *Straub v. Swaim*, 296 P.2d 147, 148-149 (Okla.1956).

Satterfield filed his election of record in the office of the County Clerk of Oklahoma County after the sale of the property but before the Mortgagee's Deed was filed. This record raises a fact issue regarding whether this filing would put a prudent person on inquiry, so as to charge a subsequent purchaser with actual knowledge of his claim.

The trial court based its summary judgment ruling on estoppel by laches, finding Satterfield and Kwok were "estopped by laches since the filing of the Sheriff's Deed in 2007 from asserting any claims now." The doctrine of laches is available only in equitable matters. *Skinner v. Scott*, 1911 OK 282, ¶5, 118 P. 394, 396. The time that will constitute a bar to an action varies and is determined by the circumstances of each case. *Id.* The party invoking the laches defense must show (1) unreasonable delay, (2) coupled with knowledge of the relevant facts, (3) resulting in prejudice. *Smith v. Baptist Foundation of Oklahoma*, 2002 OK 57, ¶9, 50 P.3d 1132, 1138.

> The record in this case lacks evidence that Satterfield knew about any of the proceedings subsequent to his demand for judicial foreclosure. Satterfield is not charged with constructive knowledge of filings subsequent to his interest. The Affidavit of Compliance with Oklahoma Power of Sale Mortgage Foreclosure Act contains no certificate of mailing, and the record contains no certified mail receipt dated before the affidavit's existence, as the trial court found. The record contains no 2007 Sheriff's Deed as cited by the trial court. If one or more material facts is not supported by admissible evidence, we must determine that judgment for the movant was not proper. *State ex rel. Macy v. Thirty Thousand Seven Hundred Eighty [O]ne Dollars & No/100*, 1993 OK CIV APP 170, ¶4, 865 P.2d 1262.

¶8 The Court of Civil Appeals concluded the trial court erred in granting summary judgment because issues of material fact remained "as to whether (1) Satterfield gave notice of his homestead claim and election for judicial foreclosure, (2) subsequent purchasers were put on inquiry of his claim, and (3) Satterfield had knowledge of the proceedings subsequent to his election for judicial foreclosure."

¶9 After remand, the trial court on July 15, 2014, granted the motion to intervene filed by Mingo Energy, LLC. In its petition to quiet title, Mingo Energy asserted it had fee simple ownership and actual possession of the property and asked the trial court to quiet title in its favor against Appellants.

¶10 A non-jury trial was held on January 19, 20, and 21, 2016. The trial court issued its findings of facts and conclusions of law on March 4, 2016, which we summarize in the following paragraphs.

¶11 This case involves two tracts of land – a 20-acre tract and a 9.76-acre tract adjacent to the 20-acre tract. Satterfield obtained a mortgage from Bank of America in September 2001 secured by both tracts of land. He defaulted on the mortgage, and in August 2004, he filed a petition for Chapter 11 Bankruptcy in the Northern District of Oklahoma, in which he claimed a homestead exemption on three properties, including both the 9.76-acre tract and the 20-acre tract.

¶12 Satterfield filed an application for homestead exemption for the 9.76-acre tract with the Tulsa County Assessor on February 27, 2006.

After a request from Bank of America, the Bankruptcy Court lifted the bankruptcy stay and authorized sale of the 20-acre property "through litigation or pursuant to Oklahoma's non-judicial power of sale foreclosure act." On April 10, 2006, in a pleading in the Bankruptcy Court, Satterfield "specifically repudiate[d] his claim for homestead exemption on the 20 Acre Tract filed in his original bankruptcy schedules." Satterfield also made "a judicial admission that the 9.76 Acre Tract . . . is his primary residence and is the only property on which he is claiming a homestead exemption." He later "judicially admitted he was only entitled to a homestead exemption in one acre of the 9.76 Acre Tract."[1] The Bankruptcy Court held that he was limited to a homestead exemption of $5,000 in the 9.76-acre tract. Kevin Blaney, attorney for Bank of America, on June 15, 2006, mailed a "Notice of Intent to Foreclose by Power of Sale" on both tracts to Satterfield and the bankruptcy trustee. Bank of America assigned its interest in the note to Nationwide Capital Group, Inc., and the assignment was recorded in Tulsa County on October 30, 2006. Blaney, again as attorney for Nationwide, filed an amended notice of sale in January 2007, which provided a non-judicial foreclosure for both tracts would occur on March 29, 2007. Blaney issued a notice of postponed sale on May 9, 2007. Satterfield sent a letter to Blaney on May 16, 2007, acknowledging receipt of the notice of postponed sale, claiming a homestead exemption in both tracts, electing judicial foreclosure of the homestead, and electing against a deficiency judgment.

¶13 Satterfield filed an application for stay in the Bankruptcy Court in which he requested a stay of the non-judicial foreclosure of both tracts. The Court noted that Satterfield claimed his primary residence is on the smaller tract adjoining the larger tract and that he asked the Bankruptcy Court to stay the non-judicial foreclosure. The Bankruptcy Court denied Satterfield's application.

¶14 On the day listed in the notice of postponed sale, May 31, 2007, "the Mortgagee withdrew the 9.76 Acre Tract from the sale via oral announcement" but the 20-acre tract was sold to Nationwide Capital Group, Inc. Satterfield's letter giving notice that he wanted a judicial foreclosure was misrouted to the Oklahoma County Clerk's office and was not filed in Tulsa County until June 22, 2007. Satterfield was incarcerated from January 2005 until September 1, 2008, after being convicted of odometer tampering and conspiracy.

¶15 Nationwide conveyed the property to 75 Enterprises, LLC, and the deed was recorded on August 7, 2008. In July 2008, 75 Enterprises executed a mortgage in favor of ONB, and granted a security interest in the 20-acre tract to ONB. 75 Enterprises defaulted and ONB foreclosed its interest in the property. The 20-acre tract was sold at sheriff's sale, where ONB reclaimed title to the tract. ONB conveyed the 20-acre tract to Mingo Industries, LLC, in October 2011. Mingo Industries, LLC, in turn conveyed the 20-acre tract to Mingo Energy, LLC, in January 2014.

¶16 Satterfield asked Kwok in December 2010 "to purchase his house and thirty acres (29.76 acres) as he was having financial difficulties." Satterfield represented to "Kwok that he owned the house and the thirty acres and that she would be purchasing all thirty acres." Kwok brought the property taxes up to date and "paid Nationwide Capital $194,000 for what she thought was the house and thirty acres." On August 3, 2011, "Satterfield signed and filed with the Tulsa County Clerk a Quit Claim Deed for the 20 Acre Tract . . . attempting to convey it to Defendant Kwok." Kwok became aware she had purchased only 9.76 acres and the house on it, and not the 20-acre tract, only when she received a letter from ONB. As found by the trial court, "Kwok, a real estate investor and accomplished financial professor, never questioned why Defendant Satterfield would need to deed her [the] property she already purchased and closed on with Nationwide Capital."

¶17 The trial court noted that to decide whether Mingo Energy or Kwok has title to the 20-acre tract, it must determine when Satterfield lost title to the property. As part of this determination, the court was required to "decide when and what of his property was exempted as homestead, and whether or not he timely requested judicial foreclosure proceedings under [46 O.S. § 43]."

¶18 The court found that Mingo Energy is the holder of legal title because at the time Satterfield filed Chapter 11 bankruptcy, which was later converted to a Chapter 7 bankruptcy, all of his property, including the 20-acre tract, became property of the bankruptcy estate. All of the bankruptcy estate's property was transferred to the bankruptcy trustee, Patrick Mal-

loy, upon his appointment, "inuring to him all of Satterfield's rights and benefits associated in the property." Malloy did not abandon the 20-acre tract nor was it exempt. The court concluded, "As such, at the time of Satterfield's May 16, 2007 election for judicial sale, all ownership rights to the property had already been vested in the Trustee and divested from Satterfield." Satterfield did not have standing to make a homestead exemption claim or request a judicial foreclosure because he had no ownership rights in the 20-acre tract. Only Malloy "had standing and could make such demand, which [he] never did." Because Satterfield had no ownership rights, he could not convey ownership of the 20-acre tract to Kwok in August 2011. The court further found that the Bankruptcy Court had found that the 20-acre tract was not Satterfield's homestead and had allowed the non-judicial foreclosure of that tract to go forward. The trial court stated it "will honor under *res judicata* all Orders which pertain to this matter and issued by the United States Bankruptcy Court." Accordingly, the trial court adopted the Bankruptcy Court's conclusion that the 20-acre tract did not qualify for homestead exemption.

¶19 The court also found that "all notices of the sale were in accordance with Title 46, and the Bank reacted appropriately upon receiving the May 16, 2007 letter from Satterfield which tried to elect judicial foreclosure on both the 9.76 Acre Tract and the 20 Acre Tract." The court found that Kevin Blaney "made a legally permissible bifurcation under the mortgage agreement to withdraw the 9.76 Acre Tract from the non-judicial foreclosure sale and continue with the Title 46 Power of Sale proceeding as to the 20 Acre Tract." It concluded the sale of the 20-acre tract was appropriate because neither Satterfield nor Kwok had any ownership interest in that tract.

¶20 Finally, the court concluded Satterfield intentionally clouded the title to the 20-acre tract by purporting to convey it to Kwok and that Kwok continued to cloud Mingo Energy's title by refusing to quitclaim the property.

¶21 The court held Mingo Energy is the owner of the 20-acre tract in fee simple and is entitled to possession of the property. The court perpetually enjoined both Kwok and Satterfield from claiming any right, title, or interest in the 20-acre tract and adjudged Mingo Energy to have superior right, title, and interest to the property.

¶22 Kwok and Satterfield appeal.

STANDARD OF REVIEW

¶23 "An action to quiet title is one of equitable cognizance." *Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, n. 30, 119 P.3d 192. "[O]n review we must accord deference to the trial court's determination of the facts." *In re Estate of Brown*, 2016 OK 112, ¶ 2, 384 P.3d 496. "The trial judge has the opportunity to observe the conduct and demeanor of the witnesses, and we will not disturb the trial court's findings of fact unless they are clearly contrary to the weight of the evidence or to some governing principle of law." *Id.*

ANALYSIS

¶24 We see no error by the trial court in quieting title to the property in favor of Mingo Energy. The trial court correctly concluded that the 20-acre tract became property of the bankruptcy estate after Satterfield filed bankruptcy and that ownership rights to the property became vested in Malloy as the trustee after his appointment. In *Viersen v. Boettcher,* 1963 OK 262, ¶ 0, 387 P.2d 133 (syl. no. 2 by the Court), the Oklahoma Supreme Court explained:

> In federal court bankruptcy proceedings, title to the assets of the bankrupt vests in the trustee in bankruptcy on the filing of a petition under the bankruptcy law, and that title is not subject to divestiture by judgment in an action against the bankrupt, commenced after bankruptcy, to which the trustee is not a party.

In *Brumfiel v. U.S. Bank*, 618 F. App'x 933, 937 (10th Cir. 2015), the Tenth Circuit Court of Appeals stated:

> Under 11 U.S.C. § 541(a)(1), the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." When a Chapter 7 bankruptcy petition is filed, "[t]he trustee of the bankruptcy estate has the sole capacity to sue and be sued over assets of the estate." *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1184 n. 3 (10th Cir.2011) (citing 11 U.S.C. § 323(b)).

¶25 In *Gunartt v. Fifth Third Bank*, 355 F. App'x 66, 68 (7th Cir. 2009), the Seventh Circuit Court of Appeals held the Bankruptcy Court "correctly concluded, [the debtor] lacked standing to pursue [claims against a bank challenging a foreclosure] because at the commencement of his bankruptcy, all of his property,

including the claims against the bank, became part of the bankruptcy estate, giving the trustee exclusive standing to litigate the claims." In *In re Failla*, 838 F.3d 1170, 1173 (11th Cir. 2016), the Eleventh Circuit Court of Appeals described the issue before the Court as "whether a person who agrees to 'surrender' his house in bankruptcy may oppose a foreclosure action in state court." The Eleventh Circuit agreed "with the bankruptcy court and the district court that 'surrender' requires debtors to drop their opposition to a foreclosure action." *Id.* at 1176. The Court stated, "Debtors who surrender property must get out of the creditor's way." *Id.* at 1177.

¶26 Here, the Bankruptcy Court authorized sale of the property "through litigation or pursuant to Oklahoma's non-judicial power of sale foreclosure act." The Bankruptcy Court found, through the application of Oklahoma law, specifically 31 O.S. § 2, that Satterfield was entitled, not to the property itself, but to the sum of $5,000 as his homestead exemption in the 9.76-acre tract. Section 2(C) provides:

> The homestead of any person within any city or town, owned and occupied as a residence only, or used for both residential and business purposes, shall consist of not exceeding one (1) acre of land, to be selected by the owner.
>
> For purposes of this subsection, at least seventy-five percent (75%) of the total square foot area of the improvements for which a homestead exemption is claimed must be used as the principal residence in order to qualify for the exemption. If more than twenty-five percent (25%) of the total square foot area of the improvements for which a homestead exemption is claimed is used for business purposes, the homestead exemption amount shall not exceed Five Thousand Dollars ($5,000.00).

31 O.S.2011 § 2(C). The Bankruptcy Court found that 57.99 percent, at a minimum, of the house on the 9.76 acres was used for business purposes as an event venue, and therefore Satterfield was entitled to claim as a homestead exemption only the sum of $5,000. The trial court found Satterfield made "a judicial admission that the 9.76 Acre Tract . . . is his primary residence and is the only property on which he is claiming a homestead exemption." He later also "judicially admitted he was only entitled to a homestead exemption in one acre of the 9.76 Acre Tract."

¶27 The trial court adopted the Bankruptcy Court's conclusion that the 20-acre tract did not qualify for homestead exemption and further found the trustee had not abandoned the property. The trustee had not objected to lifting the automatic stay and, as the trial court found, was directed by the Bankruptcy Court's order to sell the property within 120 days of the order or foreclosure would proceed if no sale had been reached. The Bankruptcy Court authorized a non-judicial foreclosure, the mortgagee conducted a non-judicial foreclosure, and Satterfield admittedly had notice of that sale.

¶28 The trial court's decision to quiet title is neither against the clear weight of the evidence nor contrary to law. Satterfield admitted in the bankruptcy proceeding that he was not entitled to a homestead exemption on the 20-acre tract. He then continued to pursue a homestead exemption claim on this property, and thus oppose the foreclosure of the property, after the Bankruptcy Court lifted the automatic stay, allowing the mortgagee to pursue such foreclosure. Appellants do not explain or even address in their appellate briefing how they can have it both ways – confess that the 20-acre tract was not subject to any homestead exemption and simultaneously assert homestead rights to the property entitling Satterfield to certain protections in a non-judicial sale.

¶29 As a final matter, we reject Kwok's and Satterfield's arguments regarding the settled law of the case and the effect of the previous Court of Civil Appeals' opinion. After review of the summary judgment record in the previous appeal, another division of this Court listed three issues of material fact requiring reversal and further proceedings on remand. If the appellate court reverses a judgment and remands the case, "it returns to the trial court as if it had never been decided, save only for the 'settled law' of the case." *Smedsrud v. Powell*, 2002 OK 87, ¶ 13, 61 P.3d 891. After the mandate issues, "[t]he parties are relegated to their prejudgment status and are free to re-plead or re-press their claims as well as defenses." Id. (emphasis omitted). Except to the extent that the appellate court ruling becomes the settled-law-of-the-case, "the parties are entitled to introduce additional evidence, supplement the pleadings and expand the issues" on remand. *Parker v. Elam*, 1992 OK 32, ¶ 13, 829 P.2d 677.

¶30 We see nothing in the record to indicate that the issues regarding the Bankruptcy Court's previous rulings and their effect – and the undis-

puted fact that the property was part of the bankruptcy estate – were considered by this Court in the previous appeal. Nor is there anything in the Opinion restricting the parties exclusively to those three fact issues. If additional material facts surfaced and were disputed by the parties on remand, there is nothing in the Opinion in Case No. 111,584, or in the settled-law-of-the-case doctrine, to prohibit their consideration. To the contrary, we find nothing in the "settled law" in the Opinion which would control or conflict with the issues raised in this appeal. After reversal of the summary judgment and remand, the case was tried to the court, the trial court considered the evidence presented and the arguments of counsel, and decided the case on the merits as set forth in the court's extensive, detailed findings of fact and conclusions of law.

CONCLUSION

¶31 Having examined the record on appeal and finding no error, we affirm the trial court's order.

¶32 **AFFIRMED**.

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

JANE P. WISEMAN, JUDGE:

1. It is not disputed that because the house and the 9.76-acre tract on which it sits are located within the city limits of Tulsa, the homestead exemption, in the absence of other factors, is limited to one acre of the overall 9.76 acres, as we discuss below. 31 O.S.2011 § 2(C).

2018 OK CIV APP 34

ARTHUR M. PARKS, Plaintiff/Appellant, vs. STATE OF OKLAHOMA ex rel., PARDON AND PAROLE BOARD, Defendant/ Appellee.

Case No. 116,207. December 22, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA SWINTON, JUDGE

AFFIRMED

Arthur M. Parks, Lexington, Oklahoma, *Pro Se,*

Melissa L. Blanton, OKLAHOMA PARDON AND PAROLE BOARD, Oklahoma City, Oklahoma, for Defendant/Appellee.

Bay Mitchell, Presiding Judge:

¶1 Plaintiff/Appellant Arthur M. Parks (Appellant) appeals from an order dismissing his claim against Defendant/Appellee the State of Oklahoma *ex rel.*, Pardon and Parole Board (the State) for failure to state a claim for which relief may be granted and finding his claim subject to the registry of frivolous and malicious appeals. After *de novo* review, we find Appellant could prove no set of facts which would entitle him to relief because the Pardons and Paroles provisions, 57 O.S. 2011 §331 *et seq*., do not require the Pardon and Parole Board to reconsider an inmate for parole after his initial denial. We also affirm the court's finding that Appellant's action is subject to the registry of frivolous and malicious appeals.

¶2 Appellant, an inmate of the Oklahoma Department of Corrections, was sentenced to life imprisonment on April 6, 1989. Appellant was denied parole in April 2015. The Pardon and Parole Board (the Board) voted to set off Appellant's next parole reconsideration for five years. Appellant filed a lawsuit in Oklahoma County seeking a declaratory judgment that the Administrative Code conflicts with statutory changes concerning the scheduling of parole reconsideration. Specifically, Appellant claimed the Board's discretion to set off his next reconsideration date was nullified when the Legislature repealed 57 O.S. 2011 §332.7 in 2013.

¶3 The trial court dismissed Appellant's case, finding that Appellant was required to bring his suit under the Uniform Post-Conviction Procedure Act in Stephens County, where Appellant's judgment and sentence were imposed.[1] Appellant then filed an "Amended Petition" and argued that the relief he was seeking, *i.e.*, declaratory relief under the Administrative Procedures Act, was not available under the Uniform Post-Conviction Procedure Act. The State filed a motion to dismiss. The State argued that Appellant had no liberty interest in parole and that the Board's discretion to set off parole consideration was not repealed by the Legislature. The State also requested a finding that Appellant's action was frivolous, malicious, failed to state a claim upon which relief may be granted, and thus, was subject to the registry of frivolous or malicious appeals pursuant to 57 O.S. 2011 §566.2. The court agreed with the State, dismissed the case with prejudice, found that Appellant's action failed to state a claim upon which relief may be granted, and found it was subject to the registry for frivolous and malicious appeals.

¶4 "When reviewing a trial court's dismissal of an action an appellate court examines the

issues *de novo." Rogers v. Quiktrip Corp*., 2010 OK 3, ¶4, 230 P.3d 853, 855-56 (footnote omitted). "The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim." *Id*. A motion to dismiss should not be sustained unless it appears without doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Niemeyer v. U.S. Fid. & Guar.*, 1990 OK 32, ¶5, 789 P.2d 1318, 1321.

¶5 We agree with the State that Appellant failed to state a claim upon which relief may be granted. First, as noted by the State, it is well-settled that a prisoner has no liberty interest in parole. *See Shabazz v. Keating*, 1999 OK 26, ¶9, 977 P.2d 1089, 1093 ("In short, there is no protectible liberty interest in an Oklahoma parole … this State's parole release procedure, which affords no more than an expectation (or hope) of parole, is not surrounded with due process protection.") (footnotes and emphasis omitted); *see also Kelly v. Oklahoma Pardon and Parole Bd*., 1981 OK CR 143, ¶2, 637 P.2d 858, 858 ("Neither the Oklahoma Constitution nor the United States Constitution gives a prisoner any right to be considered for parole.").

¶6 Second, the Pardons and Paroles provisions, 57 O.S. 2011 §331 *et seq*., do not, as urged by Appellant, require the Board to reconsider an inmate for parole after his initial denial. Title 57 O.S. Supp. 2013 §332.7(D) provides as follows:

> D. Any inmate who has parole consideration dates calculated pursuant to subsection A, B or C of this section shall be considered at the earliest such date. Except as otherwise directed by the Pardon and Parole Board, any person who has been considered for parole and was denied parole or who has waived consideration shall not be reconsidered for parole:
>
> 1. Within three (3) years of the denial or waiver, if the person was convicted of a violent crime . . . unless the person is within one (1) year of discharge; or
>
> 2. Until the person has served at least one-third (1/3) of the sentence imposed, if the person was eligible for consideration pursuant to paragraph 3 of subsection A of this section. Thereafter the person shall not be considered more frequently than once every three (3) years, unless the person is within one (1) year of discharge.

This provision, in short, provides that the Board may not reconsider a person for parole sooner than three years after his previous denial, unless that person is within one year of being discharged. The provision does *not*, however, require the Board to reconsider an inmate's parole every three years or establish a limitation on how long the Board may postpone reconsideration.

¶7 Appellant focuses on the discretionary language in §332.7(D) and argues that the Legislature nullified that language when it repealed 57 O.S. §322.17 in 2013. This argument fails for several reasons. First, the Board's authority to postpone parole reconsideration is not derived from §332.7. As noted above, §332.7 merely imposes a minimum amount of time that must pass before a previously denied inmate may be reconsidered for parole. Further, we disagree with Appellant's argument that the Legislature implicitly nullified the Board's discretion when it repealed 57 O.S. §322.17. Section 322.17 provided:

> No person who is appearing out of the normal processing procedure shall be eligible for consideration for parole without the concurrence of at least three (3) members of the Pardon and Parole Board. The vote on whether or not to consider such person for parole and the names of the concurring Board members shall be set forth in the written minutes of the Board meeting at which the issue is considered.

Appellant, however, fails to explain how or to otherwise convince us that the repeal of §322.17 requires the Board to reconsider previously denied prisoners for parole at any particular time. If anything, the repeal of this provision gives the Board *more* leeway to schedule parole reviews, as a three-member vote is no longer required to consider prisoners out of the normal processing procedure.

¶8 Appellant also argues the court erred when it found his claim was frivolous, malicious, fails to state a claim upon which relief may be granted and was, therefore, subject to the registry of frivolous or malicious appeals. When a prisoner has had three or more actions or appeals dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted, the court may require that prisoner to prepay filing fees. 57 O.S. 2011 §566.2(A). Section 566.2(B) requires the Administrative Office of the Courts

to maintain a registry of frivolous or malicious appeals, which is posted on the Oklahoma Supreme Court Network website. The trial court here properly found that Appellant failed to state a claim upon which relief could be granted. Accordingly, we find the court did not abuse its discretion by finding this action is subject to the registry.

¶9 AFFIRMED.

BUETTNER, C.J., and GOREE, J. (sitting by designation), concur.

Bay Mitchell, Presiding Judge:

1. The Uniform Post-Conviction Procedure Act is codified at 22 O.S. 2011 §1080 *et seq*. Section 1080 provides as follows:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
> (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
> (b) that the court was without jurisdiction to impose sentence;
> (c) that the sentence exceeds the maximum authorized by law;
> (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> (f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;
> may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, April 19, 2018

C-2017-749 — Larry William Davis, Petitioner, entered negotiated pleas of no contest for the crime of Possession of Controlled Dangerous Substance (Methamphetamine) with the Intent to Distribute in Case Nos. CF-2016-436, CF-2016-572, and CF-2017-24 and to Possession of Methamphetamine in Case No. CF-2017-24 in the District Court of Cherokee County. The Honorable Mark Dobbins, Associate District Judge, accepted Davis's pleas and sentenced him according to the plea agreement to fifteen years imprisonment with eight years suspended on each charge of possession with intent to distribute and five years' imprisonment on the charge of simple possession. The sentences were to be served concurrently. Da-vis filed a timely application to withdraw plea that the district court denied after holding the prescribed hearing. Davis appeals the denial of his motion to withdraw plea. The Petition for Writ of Certiorari is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-620 — Appellant Gerald Albert Snider was tried by jury and convicted of First Degree Rape in the District Court of Tulsa County, Case No. CF-2014-4118. The jury recommended as punishment imprisonment for fourteen (14) years and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-1178 — Appellant, Katherine Renee Morales, was tried by jury and convicted of Trafficking in Illegal Drugs (Methamphetamine) (Count 1) After Two or More Felony Convictions; Possession of a Controlled Dangerous Substance (Marijuana) (Count 2); and Possession of a Controlled Dangerous Substance Without a Valid Prescription (Alprazolam) (Count 4) in District Court of Blaine County Case Number CF-2015-96. The jury recommended as punishment imprisonment for forty (40) years and a $50,000.00 fine in Count 1, and incarceration in the county jail for one (1) year and a $1,000.00 fine, each, in Counts 2 and 4. The trial court sentenced accordingly and ordered each of the sentences to run concurrently. It is from the judgment and sentences that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Specially Concur; Rowland, J., Concur.

F-2016-739 — Appellant, Mario Garces, Jr., was tried by jury and convicted of Kidnapping (Count 1), and First Degree Rape (Counts 2-4), before Associate District Judge Eric G. Yarbrough, in District Court of Harmon County Case Number CF-2015-20. The jury recommended as punishment imprisonment for seventeen (17) years and a fine in amount of $8,000.00 in Count 1. The jury recommended as punishment imprisonment for twenty-one (21) years and a fine in the amount of $9,000.00 each in Counts 2 through 4. The trial court sentenced Appellant accordingly, imposed a $250.00 presentence investigation fee and $150.00 OSBI lab fee in Count 1. The trial court further imposed a $100.00 Victim Compensation Assessment in each count, and ordered the sentences to run consecutively. It is from these judgments and sentences that Appellant appeals. The Judgment and Sentence of the District Court is here-by AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concurring in part dissenting in part; Rowland, J., Concur.

RE-2017-57 — Leslie Kay Mosby, Appellant, appeals from an order of the District Court of Craig County, entered by the Honorable Harry M. Wyatt, Associate District Judge, revoking Appellant from the mental health court program and imposing sentencing in Case Nos. CF-2015-16 and CF-2015-17. In Case No. CF-2015-16, Appellant was sentenced to seven years imprisonment on each of Counts 1 and 2, with the sentences ordered to run consecutively. In Case No. CF-2015-17, Appellant was sentenced to one year imprisonment, with the sentence ordered to run concurrently with her sentences in Case No. CF-2015-16. AFFIRMED, but REMANDED to amend the Judgment and

Sentence in Case No. CF-2016-16 to reflect that the seven year sentence in Count 2 shall run concurrently with the seven year sentence in Count 1. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

C-2017-922 — Petitioner Bradley Travis Wayne Long entered a blind plea of *nolo contendere* in the District Court of Delaware County, Case No. CF-2008-188, to First Degree Manslaughter. The Honorable Barry V. Denny, Associate District Judge, accepted the plea and sentenced Petitioner to forty-five (45) years imprisonment with the last twenty (20) years suspended. On September 29, 2011, Petitioner filed a *pro se* Application for Post-Conviction Relief complaining that counsel had failed to properly initiate his appeal. The State responded on October 7, 2011, and construed the Application as a request to withdraw the plea out of time to which it did not object. On July 12, 2012, the trial court ordered Petitioner's appellate rights reinstated and appointed the Indigent Defense System to represent Petitioner. On December 2016, Petitioner filed with the District Court a *pro se* Motion to Reverse and Remand arguing that as counsel had neither contacted him nor responded to his communications, his right to a timely appeal was denied and the denial of the assistance of counsel and due process required dismissal of his conviction or favorable sentence modification. On April 17, 2017, Petitioner filed a Writ of Mandamus with this Court making similar arguments. This Court ordered the District Court to act on Petitioner's December 12, 2016 motion. On June 29, 2017, Petitioner, by and through counsel, filed a Motion to Withdraw Plea of *Nolo Contendere*. At a hearing held the same day, the court denied the motion finding there was no authority to vacate or modify the sentence but agreed to a hearing on the Motion to Withdraw Plea. The withdrawal hearing was set for August 25, 2017. After hearing testimony from Petitioner and argument from counsel, the motion to withdraw was denied. Petitioner appeals the denial of his motion. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-805 — Tommy Weldon Robbins, Appellant, was tried by jury in Case No. CF-2015-684, in the District Court of Carter County, for the crimes of Count 1: Burglary in the Second Degree, and Count 2: Knowingly Concealing Stolen Property, both After Former Conviction of Two or More Felonies. The jury returned a verdict of guilty and recommended as punishment on Count 1: twenty-five years imprisonment and Count 2: twenty years imprisonment. The Honorable Dennis R. Morris, District Judge, sentenced Robbins in accordance with the jury's verdicts and ordered the terms of confinement to run consecutively. From this judgment and sentence Tommy Weldon Robbins has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-744 — James Thomas Foster, Appellant, was tried by jury, in Case No. CF-2014-5226, in the District Court of Tulsa County, for the crimes of Count 1: Maiming, After Former Conviction of Two Felonies, and Count 2: Assault and Battery (misdemeanor). The jury recommended punishment of twenty years imprisonment on Count 1. However, the jury was not presented the issue of punishment for Count 2. Judge Smith sentenced Foster in accordance with the jury's recommendation as to Count 1 and imposed a ninety day county jail sentence on Count 2. Judge Smith further imposed various costs as well as post-imprisonment supervision of not less than nine months but not greater than twelve months. Judge Smith ordered the sentences on both counts to run concurrently and also ordered credit for time served. From this judgment and sentence James Thomas Foster, has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

Thursday, April 26, 2018

S-2017-608 — Appellant, The State of Oklahoma charged Appellee Michaelle Johnson in Okmulgee County District Court, Case Number CF-2016-18, with Possession of a Controlled Dangerous Substance With Intent to Distribute (Count 1) and three misdemeanors, Driving While License Suspended or Revoked (Count 2), Driving Left of Center (Count 3), and Failure to Maintain Insurance or Security (Count 4). Johnson filed a motion to suppress the narcotics evidence. The Honorable Kenneth E. Adair, District Judge, sustained Johnson's motion to suppress. At a subsequent hearing, Judge Adair affirmed his earlier ruling suppressing the evidence. The State of Oklahoma appeals the suppression order. We exercised jurisdiction pursuant to 22 O.S.2011, § 1053. The Order of the District Court sustaining Johnson's motion to suppress is REVERSED

and the matter REMANDED for further proceedings. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

RE-2017-270 — Richard Louis Asher, Appellant, appeals from the revocation of the six year balance of his suspended sentence in Case No. CF-2008-248E in the District Court of Ottawa County, by the Honorable William E. Culver, Special Judge. AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

Thursday, May 3, 2018

F-2016-1169 — Kerry Elizabeth Lalehparvaran, Appellant, was tried by jury for the crime of Permitting Child Abuse (Count 3) in Case No. CF-2015-242 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at thirty years. The trial court sentenced accordingly. From this judgment and sentence Kerry Elizabeth Lalehparvaran has perfected her appeal. AFFIRMED. Opinion: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2016-273 — Jimmie Alfred Wheeler, Appellant, was tried by jury for the crimes of Count 1: Possession of Firearm, After Former Felony Conviction, After Two or More Prior Felony Convictions and Count 2: Attempting to Elude a Peace Officer, in Case No. CF-2014-1385, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment six-and-a-half (6-½) years imprisonment as punishment on Count 1 and nine (9) months imprisonment plus a $2,000.00 fine on Count 2. The Honorable Thad Balkman, District Judge, sentenced accordingly, and ordered both counts to run concurrently and ordered credit for time served. From this judgment and sentence Jimmie Alfred Wheeler has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2017-0092 — Appellant, Cody Allen Creech, entered pleas of guilty on June 24, 2008, in each of the following Oklahoma County District Court cases to one count of Robbery With A Firearm: Case Nos. CF-2007-5366, CF-2007-5403, CF-2007-5539, CF-2007-5540, CF-2007-5543 and CF-2007-5561. In each case Appellant was sentenced to twenty years suspended except for the first nine years to do, with rules and conditions of probation. The sentences were all ordered to be served concurrently. The State filed an application to revoke Appellant's suspended sentences in Case Nos. CF-2007-5366, CF-2007-5403, CF-2007-5539 and CF-2007-5540 on December 28, 2016, alleging Appellant committed the new crime of Count 1 – Burglary in the First Degree, Count 2 – Pointing a Firearm at Another and Count 3 – Possession of a Firearm, After Conviction of a Felony, as alleged in Oklahoma County District Court Case No. CF-2016-4792. Following a revocation hearing on January 17, 2017, before the Honorable Ray C. Elliott, District Judge, Appellant's suspended sentences were revoked in full. The sentences were all ordered to run concurrently. The sentences were also ordered to run concurrent with Case Nos. CF-2007-5543 and CF-2007-5661. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Kuehn, J. Lumpkin, P.J.: concur; Lewis, V.P.J.: concur; Hudson, J.: concur; Rowland, J.: concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, April 20, 2018

116,376 — In Re The Matter of: K.C., K.C., S.C, L.C., Deprived Children, Laura Casey now Laura Radosavlevici, Appellant, vs. Cody Casey, Appellee. Appeal from The District Court of Coal County, Oklahoma. Honorable Clay Mowdy, Judge. Appellant, Laura Casey now Laura Radosavlevici (Mother), the biological mother of the minor children: K.C., born 1/14/2002; K.C., born 2/22/2004; S.C., born 11/10/2006; and L.C., born 11/3/2008, appeals from the trial court's order denying her motion to vacate the order terminating her parental rights pursuant to 10A O.S. 2011 §1-4-904(B)(5) (failure to correct conditions). Each of the children is an Indian child under the Oklahoma Indian Child Welfare Act, 10 O.S. 2011 §40 *et seq.*, and the Federal Indian Child Welfare Act of 1978, 25 U.S.C.A. §1901 *et seq.* The Choctaw Nation was notified of and intervened in the proceeding. We find the trial court's order terminating Mother's parental rights is fatally deficient because the order does not make the requisite ICWA findings, it does not comply with *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, and the trial court denied Mother due process when it sustained State's motion to terminate Mother's parental rights for non-appearance at the trial. Mother's counsel was present at trial; therefore, Mother was entitled to trial by jury

in absentia. *In re H.M.W.*, 2013 OK 44, 304 P.3d 738. For these reasons, we hold the trial court abused its discretion when it denied Mother's motion to vacate the order terminating her parental rights. The trial court's order denying Mother's motion to vacate is reversed and the court's order terminating Mother's parental rights is vacated. This matter is remanded for further proceedings. VACATED, REVERSED AND REMANDED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,430 — Harold Capron, Plaintiff/Counter-Defendant/Appellant, vs. Kim Wayne; Excel PM, LLC; Mark Fletcher; Danny Ferguson; and Keven Partin, Defendants/Counter-Claimants/Appellees, and Hugh Adrian Potts; Yvonne Ruth Potts; Carlos Maldonado; and The Rader Group, Inc. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Dana L. Keuhn, Judge. Plaintiff/Counter-Defendant/Appellant Harold Capron appeals orders dismissing his conversion claim and granting summary judgment in favor of Defendants/Counter-Claimants/Appellees Kim Wayne; Excel PM, LLC; Mark Fletcher; Danny Ferguson; and Keven Partin on Capron's fraud claim. Capron has failed to present a record creating a dispute of material fact on his fraud claim. Capron also has not shown that he could state a claim for conversion of a security deposit that was not returned at the end of his lease. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J. concur.

Friday, April 27, 2018

116,508 — U.S. Bank, National Assoc., as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2006-NCI, Plaintiff/Counter-Defendant/Appellee, vs. Douglas J. Barry and Rebecca S. Barry, Defendants/Counter-Claimants/Appellants, Defendants/Counter-Claimants/Appellants, and Monty Thomas, deceased, Florene Thomas; Spouse, if any, of Douglas J. Barry; Spouse; if any, of Rebecca S. Barry; John Doe Occupant; Rex D. Brooks; Boaz Candy & Tobacco Co.; State of Oklahoma, ex rel. Oklahoma Tax Commission; Kim Baker; and Unknown Heirs, Successors and Assigns of Monty Thomas, deceased, Defendants. Appeal form The District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Judge. Defendants/Appellants Douglas J. Barry and Rebecca S. Barry appeal from summary judgment entered in favor of Plaintiff/Appellee U.S. Bank, N.A., as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2006-NCI (Bank) in Bank's foreclosure action. The Barrys also appeal the trial court's determination of the priority of a lien held by Cross-Plaintiff/Appellee Rex D. Brooks. The record shows no dispute of material fact as to Bank's standing, Bank's note being in default, and Brooks's lien being secondary to Bank's. Bank was entitled to judgment as a matter of law and we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Wednesday, April 18, 2018

115,207 — In re the marriage of: Laura Marie Benik, Petitioner/Appellee, vs. Francis E. Benik, Respondent/Appellant. Appeal from Order of the District Court of Tulsa County, Hon. Stephen R. Clark, Trial Judge. Appellant Francis Benik appeals the district court's order construing the terms of the parties' divorce decree and finding him guilty of indirect contempt. We find that the district court correctly interpreted the divorce decree's language regarding property division and committed no error when it found that Laura Benik became the owner of one-half of the assets identified in the decree and was entitled to any loss or gain related to those assets. Further, we find no error in the district court's finding that Mr. Benik was guilty of indirect contempt for willfully violating the decree. The order of the district court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Wednesday, April 25, 2018

115,369 — In Re The Marriage Of: Rochelle R. Adickas, Petitioner/Appellee, v. John A. Adickas, Respondent/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge. The trial court Respondent, John A. Adickas, appeals an Order denying his Motion to Disqualify Attorney Roe Simmons as Attorney for Petitioner, Rochelle Adickas. Respondent has not demonstrated any legal or factual basis to disqualify attorney Simmons. After review of the Record and the trial court's findings and conclusions leading to the denial of Respondent's motion to disqualify Petitioner's attorney, this Court finds that the trial court's findings and conclusions are clearly supported by the evidence and its application of ethical standards is free

of error. Therefore, the judgment of the trial court denying Respondent's motion to disqualify Petitioner's attorney is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, P.J., and Goodman, J., concur.

(Division No. 3)
Friday, April 20, 2018

116,485 — In the Matter of K.C., Alleged Deprived Child: Brittany Roberts, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Gregory J. Ryan, Trial Judge. A jury returned a verdict terminating Mother's parental rights on the grounds that Mother failed to correct the conditions leading to the deprived adjudication. Mother argues State did not prove by clear and convincing evidence that she failed to correct the conditions leading to the deprived adjudication of Child. There is clear and convincing evidence to support the findings that the conditions to be corrected were not corrected and to support the finding that it is in Child's best interest that Mother's parental rights be terminated. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

(Division No. 4)
Wednesday, April 25, 2018

115,269 — Steven Schwartz and Lauren Schwartz, Plaintiffs/Appellees, v. Paul Williamson and Marvel Williamson, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. In this action brought pursuant to the Residential Property Condition Disclosure Act, 60 O.S. 2011 §§ 831-839, Defendants appeal from the trial court's order denying their motion for new trial in which they claimed the jury's verdict for damages in favor of Plaintiffs was contrary to law, excessive, and influenced by passion and prejudice. As a preliminary procedural matter, we agree with Plaintiffs that Defendants failed to raise as an issue in their motion for new trial the propriety of the trial court's grant of partial summary judgment to Plaintiffs on the issue of liability; therefore, Defendants may not raise that issue on appeal. Defendants' argument that "[o]ne possibility for the excessive amount of the verdict" was as a result of the trial court's failure to give a definitional instruction cannot succeed because the instructions given by the trial court are not in error and correctly state the type of damages – actual damages – to which Plaintiffs are entitled pursuant to 60 O.S. 2011 § 837(B). Defendants did not object or otherwise except to an absence of a definitional instruction. Consequently, we conclude the trial court did not abuse its discretion in denying Defendants' motion for new trial based on erroneous jury instructions. Defendants also argue the jury verdict in excess of out-of-pocket expenses incurred by Plaintiffs is contrary to law because the "actual damages" allowable pursuant 60 O.S. § 837(B) only encompass the expenses Plaintiffs incurred in the "digging up and replac[ing] of" the defective drain pipes. This restrictive reading of § 837(B) is inconsistent with the plain meaning of the statutory language. The "including" clause states actual damages are more than just the cost of repairing the defect, and the word "suffered" in its ordinary meaning encompasses more than just the cost of repairing the defect and may include emotional distress caused as a result of the defect existing in the property. We thus conclude the jury verdict is not contrary to law and the amount awarded given the evidence adduced at trial is neither excessive nor was it influenced by passion or prejudice. Consequently, the trial court did not abuse its discretion in refusing to grant Defendants' motion for new trial. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, April 27, 2018

116,453 — Richard Lynn Dopp, Plaintiff/Appellant, v. Mark Knutson, Buddy Honaker, Joel McCurdy, Tim Wilkinson, Ray Larimar, Dr. Bevant, Dr. Brisolara, Brian Wideman, Frank O'Claire, Theresa Sellers, Shirley May, Dr. Cooper, A. Fox, Nikki Gillespie, Scott Hunsucker, Linda Jester, Raymond Byrd, Joshua Fields, Dr. Paine, Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Tipping Davis, Trial Judge, denying Prisoner Richard Lynn Dopp's motion to reconsider an earlier order, filed June 19, 2017, which dismissed his suit against all Defendants. Based on this record, we cannot determine which claims against which Defendants were preserved, and which are now untimely. It is Prisoner's duty to prove the trial court has jurisdiction to hear these claims. Prisoner has failed to establish this. Defendant O'Claire was properly dismissed for failure of service upon him. Defendants Knutson, Honaker, McCurdy, Wilkinson, Larimer, Wideman, Brisolara, Byrd,

May, Cooper, Fox, Paine, Fields, Jester, Hunsucker, Gillespie, Bevant, and Sellers were properly dismissed because of Prisoner's failure to show any claims against them had been pressed according to the requirements of the Oklahoma Governmental Tort Claims Act. The trial court correctly denied Prisoner's motion for reconsideration. Prisoner's claim was properly dismissed. The trial court's order is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 2)
Thursday, March 29, 2018

115,342 — Amanda Sue Morgan, now Tran, Plaintiff/Appellant, vs. JPS Surgical, Inc., an Oklahoma corporation; DJO, Incorporated, a foreign corporation; and I-Flow Corporation, Defendants, and Mood, Inc. and Curlin Medical, Inc., Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

Monday, April 2, 2018

116,052 — Shalalah Sanders, Plaintiff/Appellant, vs. Marcella Smothers, an individual, Defendant/Appellee. Appellant's Pettion for Rehearing is hereby *DENIED*.

(Division No. 3)
Friday, March 2, 2018

115,893 — Jean McGill Exemption Trust, Plaintiff/Appellant, vs. Noble Investments, Defendant/Appellee. Appellant's Petition for Rehearing, filed February 2, 2018, is *DENIED*.

Wednesday, March 14, 2018

116,267 (Comp. w/ 116,100, 116,504 — OSU-AJ Homestead Medical Clinic, PLC, and Moore Primary Care, Inc., Petitioners/Appellants, vs. The Oklahoma Health Authority, The Oklahoma Health Care Authority Board, Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority, Respondents/Appellees. Appellee's Petition for Rehearing, filed February 8, 2018, is *DENIED*.

Tuesday, March 13, 2018

116,100 (comp. w/116,267, 116,504) — Moore Primary Care, Inc., Randall Carter, P.A., Maryam Butler, P.A., Petitioner/Appellant, vs. The Oklahoma Health Care Authority Board, The Oklahoma Health Care Authority, Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority, and Telligen, Inc., an Iowa corporation, Respondents/Appellees. Appellant's Petition for Rehearing, filed February 8, 2018, is *DENIED*.

116,504 (comp. w/116,100, 116,267) — Mary Kathryn Mercer, D.O., Petitioner/Appellant, vs. The Oklahoma Health Care Authority Board, The Oklahoma Health Care Authority, Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority, and Telligen, Inc., an Iowa corporation, Respondents/Appellees. Appellant's Petition for Rehearing, filed February 8, 2018, is *DENIED*.

Wednesday, March 28, 2018

115,580 — In re the Marriage of Tyna Marie Barnett and Alvin James Barnett, Jr.: Tyna Marie Barnett, Petitioner/Appellee, vs. Alvin James Barnett, Jr., Respondent/Appellant. Respondent's Petition for Rehearing, filed March 8, 2018, is *DENIED*.

Monday, April 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. Appellant's Petition for Rehearing and/or Rehearing En Banc, filed April 2, 2018, is *DENIED*.

Tuesday, April 10, 2018

115,956 — TMH West, LLC, an Oklahoma Limited Liability Company; and The Meat House OKC, LLC, Plaintiffs/Appellees, vs. PCPA, LLC; Prime Choice Franchising, LLC; Prime Choice Brands, LLC; and Dave Bane, Defendants/Appellants. Appellees' Petition for Rehearing, Combined with Brief in Support, filed February 23, 2018, is *DENIED*.

Tuesday, May 1, 2018

115,633 — Shannon Bernice Nealy, Petitioner/Appellee, vs. William Dale Bryles, Defendant/Appellant. Appellant's Petition for Rehearing and Brief in Support, filed April 19, 2018, is *DENIED*.

(Division No. 4)
Wednesday, March 28, 2018

115,474 — Jon Christian, Petitioner/Appellant, vs. Daisy Christian, Respondent/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

SERVICES

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POLYGRAPH EXAMINATION

Board Certified	Court Qualified
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Life Fellow – ACFEI	FBI National Academy

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

SEEKING AN ASSOCIATE ATTORNEY TO WORK WITH US IN A SMALL NW OKC LAW FIRM. Our practice areas currently include family law, employment law, immigration and other areas of civil litigation. We are members in good standing of the Oklahoma Bar Association, and are located in beautiful new offices in a very client- and traffic-friendly area. Our ideal candidate would be an attorney with 1 to 2 years in a complimentary practice. Please email your resume and cover letter to vickie@mazaherilaw.com. Please make your subject line reads: Associate Attorney Position.

CITY OF BETHANY IS SEEKING AN ASSOCIATE CITY ATTORNEY. Part-time position with possibility of development into a full-time position. Job duties include: reports to city council; provides legal services and counsel to the city council, city administrator, department directors and all boards and commissions as requested; conducts legal research, handles litigation and communicates effectively; and attends numerous nightly meetings. Qualifications: requires a Juris Doctorate degree or equivalent from an accredited law school and two years of professional legal experience in government, administration and related areas preferred; must be a member in good standing of the Oklahoma Bar Association and be admitted to practice in all necessary courts; must possess a valid Oklahoma driver's license and be able to attend evening meetings in Bethany as directed; residence in Bethany is preferred; and intent of position is to provide a successor for incumbent upon his retirement. To apply, submit a letter of interest including a resume to City of Bethany, Attn: City Clerk, P.O. Box 219, Bethany, OK 73008 or email to susan.tate@bethanyok.org. Position open until filled. Compensation negotiable based upon experience. The City of Bethany is an equal opportunity employer.

POSITIONS AVAILABLE

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

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

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

DISTRICT 2 DISTRICT ATTORNEY seeking assistant district attorneys for positions in Beckham and Custer counties. Primary responsibilities include the criminal prosecution of felony and misdemeanor offenses and other special assignments. Must reside within the district within a reasonable period of time from acceptance of employment. Salary commensurate with experience. State benefits available. Position available immediately. Please send resume with any salary requirements to Duaina.megee@dac.state.ok.us or District Attorney's Office, P.O. Box 36, Arapaho, OK 73620.

THE CHOCTAW NATION OF OKLAHOMA IS SEEKING AN ATTORNEY. Primary responsibilities include negotiating, writing, reviewing, summarizing, researching and executing a wide variety of agreements for business and internal support units. Candidates must be eligible for admission to practice law in the state of Oklahoma. A Juris Doctorate from an accredited law school, as well as a minimum of five years business/transactional attorney experience is required. Please apply at careers.choctawnation.com.

PRAY WALKER, PC, A FULL-SERVICE TULSA FIRM, SEEKS AN ASSOCIATE ATTORNEY with one to three years' experience to work in its Energy Group. The primary focus of the position will be preparation of oil and gas title opinions. Experience in rendering the same and/or comparable landman work required. Qualified candidates should submit cover letter, resume and law school transcript to dcurtis@praywalker.com.

POSITIONS AVAILABLE

NATIONAL LAW FIRM IS SEEKING AN OIL AND GAS ASSOCIATE with 3-5 years' experience to join its growing Energy Group in Denver. The ideal candidate should be a highly motivated self-starter who does well working on their own and in a team environment. Significant experience drafting title opinions in the DJ Basin is preferred, as is a license to practice in Colorado. Landman experience is a plus. Excellent academic qualifications and communication skills required. Firm offers a competitive salary and excellent benefits in a friendly, business casual setting. Send cover letter, resume and writing sample to kackerman@lathropgage.com. Visit www.lathropgage.com.

THE OKLAHOMA WORKERS' COMPENSATION COMMISSION is accepting applications for a qualified general counsel in our Oklahoma City office. The general counsel is the commission's chief legal officer and manages the commission's Counselors' Division and its staff. Primary duties include advising the commission's three commissioners, its executive director and other commission personnel on legal issues affecting the agency, and engaging in public education seminars. The general counsel position requires substantial experience and skills as an attorney. Candidates must have outstanding leadership, analytical, research and written and oral communication skills, and demonstrate reliability by managing time effectively and productively. Other important qualifications are knowledge and understanding of adjudicatory procedures, basic administrative law and rules of practice and procedure before the commission. Knowledge of Oklahoma state government processes, the public records and open meeting laws, employment law and of workers' compensation laws are also required. Familiarity with the Oklahoma legislative process is advantageous. Applications will be accepted until 11:59 p.m. Friday, May 25, 2018. This is full-time employment with state benefits and the pay range is $75,000 - $100,000 and is commensurate with experience and qualifications. Application forms may be downloaded from https://www.ok.gov/wcc/About_the_Commission/Employment/index.html. Submit application form, resume and writing sample to Human.Resources@wcc.ok.gov or mail to 1915 N. Stiles, Suite 309, Oklahoma City, OK 73105.

AV RATED DOWNTOWN OKC insurance defense firm is accepting resumes for an associate attorney with 2 to 6 years civil litigation experience. Candidate should be self-motivated, detail oriented and have strong research and writing skills. Competitive salary and benefits. Send replies to lawfirmresumes@outlook.com.

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

POSITIONS AVAILABLE

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

POSITIONS AVAILABLE

ADVOCATE GENERAL FOR THE OKDHS, OFFICE OF CLIENT ADVOCACY. Position will plan, organize and direct the development and implementation of the Office of Client Advocacy to include coordination of the various programs within the office; supervise personnel assigned to the office; directs the operations of the Office of Client Advocacy's advocacy, investigations, and grievance programs to include ensuring maintaining an intake system for receipt of referrals; ensuring the appropriate disposition of referrals, and timely processing of investigations to completion; and maintaining a system for prompt processing of grievances to resolution in accordance with laws, rules and policies. Requires active membership in the Oklahoma Bar Association and three years of experience engaged in the practice of law. Salary will be commensurate with education and experience. Excellent benefits package. To apply go to www.jobapscloud.com/OK and find Unclassified Positions, then submit via JobAps using the link for this position. Contact Talent Acquisitions at 405-521-6219 for more information. Submission deadline is May 31, 2018 at 11:59 p.m. EOE.

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

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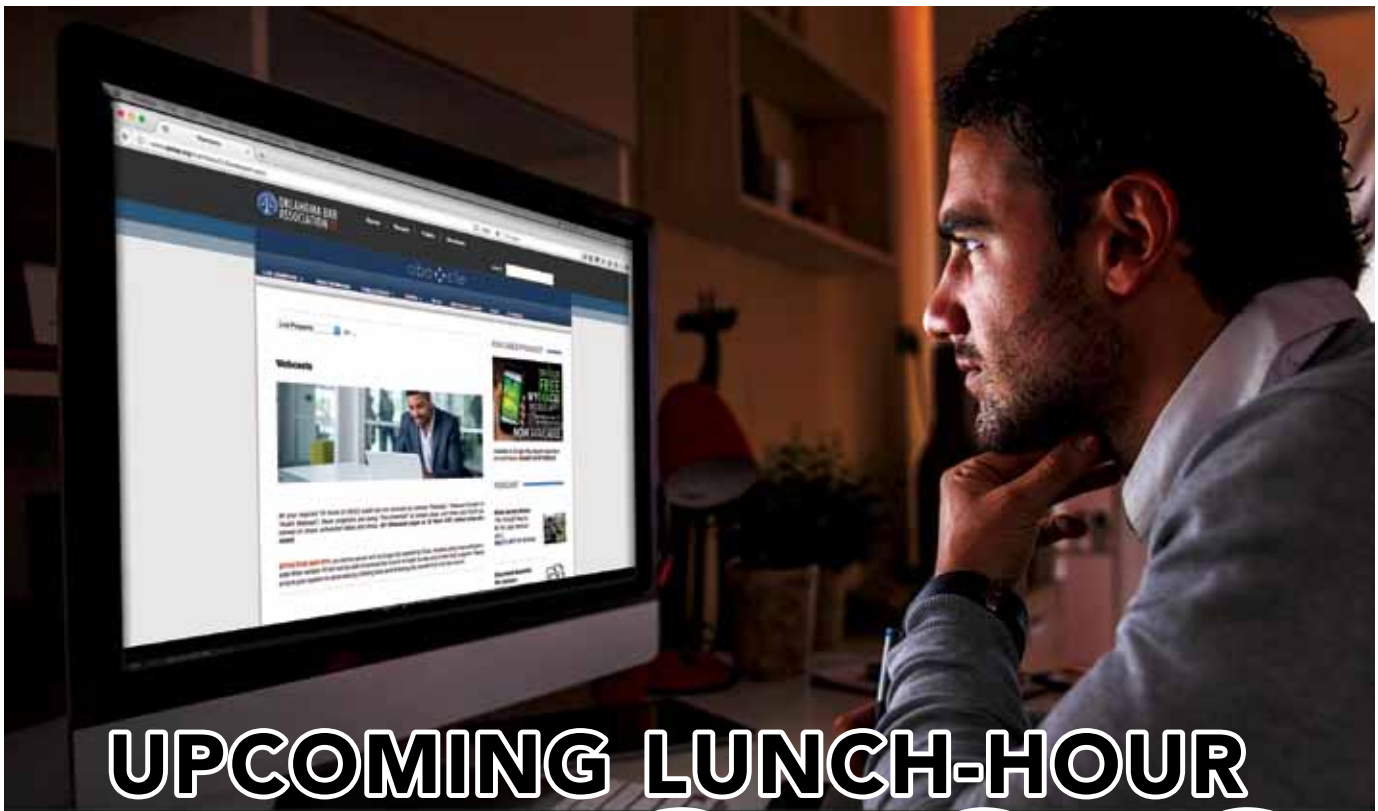

UPCOMING LUNCH-HOUR WEBCASTS

ALL of your required 12 hours of MCLE credit can be received by viewing Live Webcasts. These programs are being "live-streamed" at certain dates and times and MUST be viewed on these scheduled dates and times:

Tuesday, May 22
The Art of War and Cross Examinations
Presented by MESA CLE with
Joel Oster, Comedian at Law

Tuesday, May 22
Document Assembly for Lawyers
Presented by CLESeminars.com with
John Federico, Esq.

Thursday, May 24
Discover Hidden and Undocumented Google Search Secrets
Presented by CLESeminars.com with
Carole Levitt, Esq. & Mark Rosch

Saturday, May 26 @ 9 a.m.
The 2018 Ethy Awards
Presented by MESA CLE with
Sean Carter, Humorist at Law

Tuesday, May 29
The Bonehead Play: Avoiding Costly Errors
Presented by MESA CLE with
Professor Mark Yochum

Wednesday, May 30
Advanced Google Search for Lawyers
Presented by CLESeminars.com with
Carole Levitt, Esq. & Mark Rosch

Thursday, May 31
An Overview of Music Copyright Law Using the Beatles as a Case Study
Presented by CLESeminars.com with
Jim Jesse, Esq.

Wednesday, June 6
Social Media Horror Stories From the Trenches
Presented by MESA CLE with Ruth Carter

Tuesday, June 12
Improper Attorney-Client Relations: Sex With Clients (and Other Really Dumb Things to Do)
Presented by MESA CLE with
Professor Mark Yochum

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