THE OKLAHOMA BAR
Journal
Volume 89 — No. 4 — 2/10/2018

Court Issue

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OF MATRIMONIAL LAWYERS

Oklahoma Chapter Presents:

Advanced Family Law Concepts

Theory and Practice—Property Division Session

Jon L. Hester, Program Planner and Moderator

Tulsa: February 15, 2018

Norman: OU College of Law, February 16, 2018

6 hours CLE credit including 1 hour of ethics

The program will focus on property division issues in Oklahoma matrimonial cases, including classification, valuation, taxation and related questions and will feature a presentation on ethical matters which arise during the process. Several of the state's top family lawyers are featured in this program.

Topics include: valuation of professional practices, stock options and other company benefits, trusts and their effect on property division and income, joint and separate property issues, **ethical issues** in Property cases, closely held retail and service businesses.

Speakers: Laura McConnell-Corbyn, Melissa Cornell, David Echols, Virginia Henson, Michael Mullins, Moura Robertson

Registration: Fee: $175 prior to February 1, 2018, $200 thereafter

Program check-in begins at 8:30 a.m. Program begins at 9:00 a.m. and closes at 3:50 p.m.

Materials will be available electronically.

Food & Drinks: Continental Breakfast and Lunch provided on site

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THE OKLAHOMA BAR
Journal

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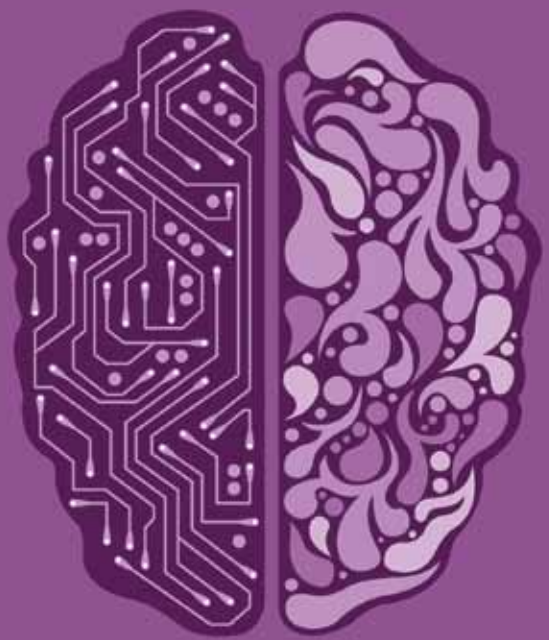
HALF-DAY PROGRAM



INTERRUPT YOUR UNCONSCIOUS BIASES AND MAKE BETTER DECISIONS

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PROGRAM PRESENTER:

Kathleen B. Nalty, Esq., President, Kathleen Nalty Consulting, LLC

Despite our best intentions, research shows we all have it – unconscious, unintentional bias. Unconscious attitudes and beliefs are shaped by all kinds of influences – some of which we would not agree with or accept on a conscious level. Yet, these unconscious thoughts influence decision-making and can have a profound impact in the workplace and practice of law – on retention; productivity; relationships with colleagues, clients, judges, witnesses and jurors; as well as people's careers. The key is to learn how to recognize your own unconscious biases as well as practical ways to interrupt them.

Attendees will create their own personal action plans after learning: How unconscious biases are formed; The ways that implicit cognitive biases can show up in the legal workplace; How to recognize and interrupt your own biases; How to successfully navigate any hidden barriers caused by unintentional bias, and How organizations can institute systemic changes to interrupt bias and foster a more inclusive environment that will allow diversity to thrive.

Kathleen Nalty is an expert in helping organizations develop inclusion strategies to eliminate hidden barriers to success for employees in underrepresented groups. She is an engaging speaker and trainer with a deep passion for assisting individuals and organizations in making changes needed to retain and advance female and diverse talent. While she consults in all industries and sectors, Kathleen has developed a particular expertise in the legal industry, having spoken nationally on behalf of the Center for Legal Inclusiveness and the Minority Corporate Counsel Association. She provides in-depth training sessions on diversity and inclusion as well as unconscious bias.

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2017 OK 103

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

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

ORDER

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

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

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

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

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

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

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

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

Exhibit "B"

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
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2017 OK 104

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

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

ORDER

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

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

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

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

Exhibit "B"

Rules Governing Disciplinary Proceedings.
Chapter 1, App. 1-A

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2018 OK 2

Establishment of Uniform Mileage Reimbursement Rate for Expenses Paid from the Court Fund

SCAD-2018-6. January 16, 2018

ORDER

By reason of the inconsistency in mileage reimbursement rates between the State Travel Reimbursement Act, Title 74 O.S. § 500.4 and the rate of reimbursement for state employees, Title 74 O.S. § 85.45l, for expenses paid from the court fund, the Court directs that uniform rate should be established for the purpose of consistency to assist the accounting and budgeting process in the district courts.

Pursuant to this order all mileage which is reimbursed by the court fund, including, but not limited to jurors, interpreters and witnesses, shall be computed at the standard mileage rate prescribed by the State Travel Reimbursement Act, Title 74 O.S. § 500.4.

The 2018 mileage rate prescribed in the State Travel Reimbursement Act is 54.5 cents per mile.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

COLBERT, REIF, and WYRICK, JJ.

2018 OK 3

In re: Amendments to the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4.

SCAD-2018-7. January 16, 2018

ORDER

Rule 4.6 of the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

RULE 4.6

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

(A) In all judicial elections within ten (10) days after formally announcing and/or qualifying for election or reelection (whichever is

earlier) to any judicial office in the State of Oklahoma, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with the candidate's correct mailing address, current telephone number, e-mail address, facsimile (telefax) number and actual physical address to the Administrative Director of the Courts.

(B) Upon receipt of the notice, the Administrative Director shall by Certified Mail, Return Receipt Requested, or by electronic mail, read receipt requested, cause to be distributed to each candidate who has filed a notice copies of the following:

(1) The Code of Judicial Conduct

(2) Summaries of all previous Formal Advisory Opinions, if any, issued by the Judicial Ethics Panel which relate in any way to campaign conduct and practices.

(3) The Acknowledgment Form

(C) The Acknowledgment Form shall be executed and returned by regular mail by the candidate to the Administrative Director of the Courts within ten (10) days of its delivery to the candidate as shown by the Certified Mail Receipt or by the electronic mail, read receipt.

(D) The Acknowledgment Form shall certify that the candidate has received, has read, and understands the requirements of the Oklahoma Code of Judicial Conduct and agrees to comply with and be bound by the Code during the course of his/her campaign for the judicial office. The Acknowledgment Form shall be in substantially the following form:

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

I, _____, a candidate for judicial office in the State of Oklahoma, have received, have read, understand and agree to comply with the Oklahoma Code of Judicial Conduct during the course of my campaign for judicial office. I specifically understand that if I were to violate the terms of the Code I would be subject to ~~dicipline~~discipline under the Code or under the Rules of Professional Conduct for lawyers.

_____

Date

_____

Signature of Candidate

(E) The failure of a candidate to file the notice as required in Rule 4.6(A) or to file the Acknowledgment Form as required in Rule 4.6(C) shall constitute a Per Se Violation of Canon 4 of the Oklahoma Code of Judicial Conduct and will be a basis for discipline under the Code.

(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

Exhibit "B"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

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Date

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(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

2018 OK 4

In re: Amendments to the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2.

SCAD-2018-8. January 16, 2018

ORDER

Rule 3 of the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

In addition to payment for necessary equipment and its installation the District Courts shall be charged fees for: 1. Access to a telecommunications network known as OneNet; 2. Access to the Wide Area Network provided by O.C.I.S.; and 3. Case-tracking services. The amount of the fees shall be reasonable and set by the Administrative Director of the Courts upon approval by the Chief Justice of the Supreme Court. 20 O.S.Supp.1994 § 1315. The Administrative Director of the Courts shall issue a monthly statement to each District Court receiving services from the Oklahoma Court Information System. Id.

Access to O.C.I.S. or any of its services by county law libraries in counties having a population of less than three hundred thousand (300,000) shall be in accordance with the Rules for Management of County Law Libraries, 20 O.S.Supp.1998 Ch. 17, App. Access to O.C.I.S. or any of its services provided by O.C.I.S. to a county law library in a county having a population of three hundred thousand (300,000) or greater shall be pursuant to an agreement approved by the Chief Justice. The Administrative Director of the Courts shall establish reasonable fees for providing access to O.C.I.S. or any of its services to county law libraries in counties having a population of 300,000 or

greater, and such fees shall be subject to the approval of the Chief Justice.

Exhibit "B"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

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2018 OK 7

IN THE MATTER OF THE ESTATE OF KENNETH LEROY MIDDLETON, deceased, CHERIE BISHOP, Appellant, v. JOHNNY R. MIDDLETON, Appellee.

No. 115,227. January 30, 2018

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

HONORABLE ALLEN J. WELCH, TRIAL JUDGE

¶0 The probate court disqualified one of two co-personal representatives nominated in decedent's will. The disqualified nominee had a felony conviction for DUI. The probate court ruled that this was a conviction for an infamous crime as provided in 58 O.S.2011, § 102(2), and as defined in I*n re Dunham's Estate,* 1937 OK 663, 74 P.2d 117 and *Briggs v. Board of County Commissioners*, 1950 OK 105, 217 P.2d 827. The disqualified nominee appealed and asked this Court to retain this appeal.

APPEAL RETAINED; ORDER OF DISQUALIFICATION AFFIRMED

Terrell Monks, OKLAHOMA ESTATE ATTORNEYS, PLLC, Midwest City, Oklahoma, for Appellant,

Babette Patton, BREATHWIT & PATTON, P.C., Oklahoma City, Oklahoma, for Appellee.

REIF, J.

¶1 Cherie Bishop appeals the probate court order that disqualified her from serving as co-personal representative of the estate of Kenneth Leroy Middleton. Ms. Bishop had been nominated to serve as a co-personal representative in Kenneth's Last Will and Testament. Ms. Bishop's eligibility to serve as co-personal representative was questioned by Johnny R. Middleton, Kenneth's nephew, and the other nominated co-personal representative. Johnny asserted that Ms. Bishop had been convicted of an infamous crime and was not competent to serve as a co-personal representative as provided in 58 O.S.2011 § 102(2).[1] This statute excludes anyone who has been convicted of an infamous crime from serving as an executor of an estate. Based on Ms. Bishop's stipulation that she had a felony DUI conviction, the trial court ruled that she was disqualified to serve as a co-personal representative under the infamous crime exclusion in § 102(2).

¶2 In concluding that a felony DUI conviction was a conviction for an infamous crime as provided in § 102(2), the trial court relied upon *In re Dunham's Estate*, 1937 OK 663, 74 P.2d 117 and *Briggs v. Board of County Commissioners,* 1950 OK 105, 217 P.2d 827. The *Dunham* case construed another probate code statute – 58

O.S.1931 § 126(2) – that excludes anyone convicted of an infamous crime from serving as an administrator or administratrix of an estate.[2] The *Briggs* case construed a statute – 51 O.S.1941 § 8 – that provides for the vacation of a public office upon conviction of the office holder of an infamous crime.[3] Both cases similarly observed that if the crime for which the individual was convicted carried felony punishment under Oklahoma law, then the individual had been convicted of an infamous crime.

¶3 Ms. Bishop acknowledges that this is the settled law. She nonetheless argues that this Court should retain this appeal and "change the current state of the law to define an 'infamous crime' as a crime of moral turpitude." In response, Johnny Middleton offered no objection to this Court reviewing 58 O.S.2011 §102(2), to determine if the term infamous crime should be "narrowed." Mr. Middleton urges, however, that any new rule concerning infamous crime be applied prospectively so that steps and distributions that have already been completed in the probate of Kenneth's estate will not be disturbed.

¶4 This appeal was retained because the change in case law that Ms. Bishop seeks could only be ordered by this Court. Upon review, we decline to grant her relief.

¶5 We note that the Legislature has taken no action in the past 80 years to disapprove of this Court's interpretation of infamous crime as used in the probate code and 51 O.S.2011 § 8. In fact, the Legislature actually codified the *Briggs* interpretation of infamous crime as used in 51 O.S.2011 § 8. In 1981, the Legislature replaced the term "infamous crime" with the term "any felony."[4] As concerns 58 O.S.2011 §§ 102(2) and 126(2), the Legislature has undertaken no amendment of these statutes since *Dunham* was decided in 1937.

¶6 In view of these circumstances, we must conclude that the Legislature has tacitly approved the *Dunham* interpretation of infamous crime to mean a felony under Oklahoma law. This interpretation provides a "bright line" rule that is easily understood and applied. Respect for stare decisis dictates that any change or narrowing of this longstanding rule come from the Legislature, and not this Court.

¶7 Ms. Bishop admits that she has a felony conviction under Oklahoma law for D.U.I. and thus has a conviction for an infamous crime. By the express command of statute, she is not competent to serve as an executor. Accordingly, the trial court did not err in entering an order that disqualifies her from serving as a co-personal representative of the Estate of Kenneth Leroy Middleton.

APPEAL RETAINED; ORDER OF DISQUALIFICATION AFFIRMED.

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

REIF, J.

1. Section 102 provides:
"No person is competent to serve as executor who at the time the will is admitted to probate is
1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding and integrity."

2. Section 126 provides:
"No person is competent to serve as administrator or administratrix, who, when appointed, is:
1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity."

3. The *Briggs* court stated: "If Briggs was convicted of an offense which is a felony under the laws of this State, his office became vacant by operation of law by virtue of 51 O.S. 1941 § 8, which provides: 'Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: . . . Conviction of any infamous crime or any offense involving a violation of his official oath; provided, that no conviction, as a cause of vacation of office, shall be deemed complete so long as an appeal may be pending, or until final judgment is rendered thereon.'" 1950 OK 105 at ¶6, 217 P.2d at 829.

In 1981, § 8 was amended and the current version of § 8 states:
"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office:
First. The death of the incumbent or his resignation.
Second. His removal from office or failure to qualify as required by law.
Third. Whenever any final judgment shall be obtained against him for a breach of his official bond.
Fourth. Ceasing to be a resident of the state, county, township, city or town, or of any district thereof, in which the duties of his office are to be exercised or for which he may have been elected or appointed.
Fifth. Conviction in a state or federal court of competent jurisdiction of any felony or any offense involving a violation of his official oath; provided, that no conviction, as a cause of vacation of office, shall be deemed complete so long as an appeal may be pending, or until final judgment is rendered thereon.
Sixth. Upon entering of a plea of guilty or nolo contendere in a state or federal court of competent jurisdiction for any felony or any offense involving a violation of his official oath.
The fact by reason whereof the vacancy arises shall be determined by the authority authorized to fill such vacancy."

4. The 1981 amendment substituted, in subparagraph Fifth, "Conviction in a state or federal court of competent jurisdiction of any felony" for the language in the previous version of the statute which read, "Conviction of any infamous crime." 51 O.S.2011 § 8 (Historical and Statutory Notes)..

2018 OK 8

STATE OF OKLAHOMA, ex rel., OKLAHOMA BAR ASSOCIATION,

Complainant, v. MEAGAN ELAINE BROOKING, Respondent.

SCBD No. 6496. January 30, 2018

RULE 6 DISCIPLINARY PROCEEDING

¶0 Complainant Bar Association initiated a disciplinary proceeding against Respondent Attorney for turning back the date on the court clerk's filing stamp to show timely filing of a pleading that was late. Following a hearing, a trial panel of the Professional Responsibility Tribunal recommended suspension for a period up to six months. Upon de novo review, this Court finds that Respondent is guilty of misconduct and the appropriate discipline is suspension for sixty days.

RESPONDENT SUSPENDED FROM THE PRACTICE OF LAW FOR SIXTY DAYS AND ORDERED TO PAY COSTS.

Stephen L. Sullins, Assistant General Counsel, Oklahoma City, Oklahoma, for Complainant Oklahoma Bar Association,

Charles F. Alden, III, Oklahoma City, Oklahoma, for Respondent Attorney

REIF, J.

¶1 The General Counsel of the Oklahoma Bar Association asks this Court to discipline attorney Meagan Elaine Brooking (Respondent), pursuant to Rule 6, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, Ch. 1, App. 1-A. The General Counsel asserts that discipline is warranted after finding merit to the grievance filed by the Associate District Judge in Pontotoc County. This grievance reported that Respondent turned back the date on the Court Clerk's filing stamp to show a pleading was filed on April 15, 2017, when Respondent had, in fact, submitted the pleading for filing on April 19, 2017.

¶2 In response, Respondent admitted that she turned back the filing stamp on this occasion and also assisted the General Counsel in identifying three other instances in which she may have turned back the Court Clerk's filing stamp. Following a hearing, a three member trial panel of the Professional Responsibility Tribunal determined that Respondent's admitted action on April 19,2017, constituted misconduct. The trial panel further concluded, however, that misconduct had not been established by clear and convincing evidence in the other three identified instances.

¶3 The General Counsel and counsel for Respondent proposed that Respondent receive a public reprimand. The trial panel rejected this proposal, observing "the intentional backdating of official court documents [is] a serious offense deserving more than a public reprimand." The trial panel unanimously recommended that Respondent be suspended for up to six months, "[as] a deterrent to Respondent and to other members of the Bar who might consider such a course of action [to avoid late filing]."

¶4 Even though the recommendation of the trial panel is always helpful, this Court must independently determine appropriate discipline. This is so, because the regulation of licensure, ethics, and discipline of legal practitioners is a nondelegable, constitutional responsibility solely vested in this Court in the exercise of our exclusive jurisdiction. *State ex rel. Oklahoma Bar Ass'n v. Taylor*, 2000 OK 35, ¶4, 4 P.3d 1242, 1247. This Court must conduct a de novo review of the record to determine whether an attorney has engaged in misconduct and to assess the appropriate discipline for any misconduct that may have occurred. *State ex rel. Oklahoma Bar Ass'n v. Garrett,* 2005 OK 91, ¶3 127 P.3d 600, 602.

¶5 Upon de novo review, we conclude that Respondent engaged in misconduct on April 19, 2017, by turning back the date on the Court Clerk's filing stamp to show a pleading submitted that day, was filed on April, 15, 2017. Respondent concedes that this action violated Rule 1.1 (Competence),[1] Rule 1.3 (Diligence),[2] and 3.3 (Candor toward the Tribunal)[3] of the Rules of Professional Conduct, 5 O.S.2011, Ch. 1, App. 3-A.

¶6 Additionally, Respondent acted intentionally and with the purpose to deceive the court and the other party when she turned back the court clerk's filing stamp. Such conduct is the type of dishonesty, deceit and misrepresentation while engaged in the practice of law that is forbidden by Rule 8.4[4] of the Rules of Professional Conduct. Though she maintains she had no bad motive or evil intent, her wilful conduct is sufficient to support a violation of Rule 8.4.

¶7 We further find, as did the trial panel, that these violations constitute a "serious offense." In our opinion, suspension from the practice of law would provide appropriate discipline to deter such misconduct by Respondent and other members of the bar.

¶8 In determining the period of suspension, we have taken into account the following mitigating circumstances: (1) Respondent's cooperation with the General Counsel's investigation, (2) the absence of prior disciplinary action, (3) a good reputation in Pontotoc County as a skillful and honest attorney, (4) organizational changes in her law office to prevent missing future filing deadlines, (5) the absence of advantage to Respondent's clients by the turning back of the Court Clerk's filing stamp, and (6) the economic hardship suspension poses to Respondent as a single mother. Based on these mitigating factors, we impose a suspension for sixty days from the date of this opinion. Respondent is also ordered to pay the costs of this proceeding within sixty days of the date of this opinion.

RESPONDENT SUSPENDED FROM THE PRACTICE OF LAW FOR SIXTY DAYS AND ORDERED TO PAY COSTS.

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

Kauger, J., concurs in part; dissents in part

Kauger, J., concurring in part and dissenting in part

"I would suspend her for six months."

REIF, J.

1. Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

2. Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

3. Rule 3.3 states::
"(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(4) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

4. Rule 8.4 states:
" It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

2018 OK 9

ELIZABETH CATES, individually and on behalf of others similarly situated, Plaintiff/Appellant, v. INTEGRIS HEALTH, INC., an Oklahoma corporation, Defendant/Appellee.

Case No. 114,314. January 30, 2018

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, THE HONORABLE JUDGE ROGER STUART, PRESIDING

¶0 Plaintiff/Appellant is a former patient of Defendant/Appellee's medical facility and claims that Defendant/Appellee wrongfully billed her, and others like her, for services. She filed this action in state court, alleging state-law claims for breach of contract, violation of the Oklahoma Consumer Protection Act, and deceit. Defendant/Appellee successfully moved to dismiss these claims on the ground that they are expressly preempted by the federal Employee Retirement Income Security Act. On appeal, we reversed and held that Plaintiff/Appellee's claims are not preempted. We now grant rehearing, vacate our prior opinion, and issue the following opinion that reaches the same result.[1]

REHEARING GRANTED; OPINION OF THE COURT ISSUED JUNE 19, 2017, WITHDRAWN; JUDGMENT OF THE DISTRICT COURT REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS

Terry W. West, Bradley C. West, Gregg W. Luther, and J. Shawn Spencer, The West Law Firm, Shawnee, Oklahoma, for Plaintiff/Appellant.

Kevin D. Gordon and Alison M. Howard, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, for Defendant/Appellee.

Wyrick, J.:

¶1 Elizabeth Cates claims that Integris wrongfully billed her for services she received after being admitted to one of Integris's facilities following a car accident. She also claims that Integris has performed the same wrongful billing practice on other patients. The question in this appeal is whether these patients may pursue state-law remedies for their alleged harms.

¶2 Cates brought state-law claims for breach of contract, deceit, and violation of the Oklahoma Consumer Protection Act, 15 O.S. §§ 751 *et seq*. But Integris argues that Cates's claims are expressly preempted by the federal Employee Retirement Income Security Act[2] (ERISA). This is so, says Integris, because the claims "relate to" an ERISA plan.[3] According to Integris, Cates may vindicate her rights only through pleading a claim under the cause of action established in ERISA.[4] The district court agreed with Integris and dismissed Cates's claims. We now reverse and hold that Cates's state-law claims are not expressly preempted and may proceed below.

I.

¶3 This case arises out of two agreements: one between Cates and Integris, the other between Integris and Cates's health insurance Participating Provider Organization (PPO). The agreement between Cates and Integris is a hospital admission form she signed that provides the promise of healthcare and services in exchange for Cates's promise to comply with hospital rules.[5] It also specifies that Cates is responsible for all charges "that remain after any third party payment . . . unless the Hospital is prohibited by contract between third party and Hospital from billing Patient for these amounts."[6] The second agreement at issue, the one between Integris and the PPO, is called a "Participating Hospital Agreement," and it secures medical services for insurance-plan beneficiaries in exchange for the hospital's promise to accept pre-arranged, discounted prices.[7] According to Cates, it also specifies that the hospital may not bill her "except for a copay or deductible or coinsurance, or, in cases where Integris has confirmed the services are not covered, advised the patient the services are not covered prior to delivering the services, and the patient agreed to pay for those services."[8]

¶4 Cates argues that these two agreements work in tandem to require Integris first to submit all charges to her insurance provider before billing her directly.[9] She alleges that following her hospital visit, Integris did not submit the charges to her insurer as required, but instead simply filed and asserted a lien against her. She also alleges that Integris has employed the same billing tactic with many of its patients.[10] Accordingly, Cates brought a class action against Integris alleging the following four claims: (1) breach of contract, (2) breach of contract to which Cates is a third-party beneficiary, (3) violation of the Oklahoma Consumer Protection Act, and (4) "deceit."[11]

¶5 Integris countered that Cates's claims were "completely" preempted, meaning that they should be treated as federal ERISA claims and could be removed to federal court.[12] Upon removal, however, the federal courts disagreed and remanded the case back to state court for lack of subject-matter jurisdiction.[13]

¶6 Integris now argues that Cates's state-law claims are "expressly" preempted, meaning that they cannot be brought at all.[14] The Oklahoma district court agreed and granted Integris's motion to dismiss on that basis. Cates then filed this appeal, which we retained.

II.

¶7 The standard of review for a district court's decision granting a motion to dismiss[15] is *de novo*.[16] The purpose of such a review is to test the law that governs the claim, not the underlying facts.[17] As such, we take all factual allegations in the petition as true and draw all reasonable inferences therefrom.[18] We also do not require the plaintiff to specify a theory of recovery, nor a particular remedy.[19] If relief is possible under any set of facts that can be gleaned from the petition, the motion to dismiss should be denied.[20]

¶8 The particular law tested in this motion to dismiss is ERISA express preemption – a treacherous "thicket" for any court to navigate.[21] The basis for ERISA express preemption is found at 29 U.S.C. § 1144(a), which states "[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] plan." The key in that standard is the phrase "relate to."[22] The U.S. Supreme Court has said that those words give ERISA a preemption clause that is "conspicuous for its breadth,"[23] preempting anything that "relates to" an ERISA plan in the "normal . . . common sense" meaning of the phrase.[24] But the Supreme Court has also said that "relate to" cannot be taken to its logical extreme,

lest we find ourselves playing Six Degrees of ERISA, where *everything* eventually relates to an ERISA plan.[25] Our job is thus to determine whether Cates's claims fairly "relate to" her ERISA plan, not in the broadest sense of the phrase, but rather in its "normal . . . common sense" meaning.

A.

¶9 Integris argues that Cates's claims "relate to" an ERISA plan because they cannot be decided without reference to her underlying employee benefit plan – a.k.a the ERISA "Plan."[26] Specifically, Integris contends that "any right to have INTEGRIS bill and accept payment from the Plan rather than Plaintiff, applies only to services covered under the terms of the Plan,"[27] and thus that Cates's claims cannot be adjudicated without interpretation of what is and is not a "covered" charge under the plan.[28] This is especially true, argues Integris, because the real right Cates seeks to vindicate is her right to receive an in-network discount for the services rendered – a discount that applies only to "covered" services under the plan.[29] If Integris is correct, it would appear that its express-preemption defense is a strong one.[30]

¶10 Integris's argument, however, misapprehends the thrust of Cates's case. Cates isn't asking for Integris to accept payment from her health insurer for these bills, and she isn't looking for a discount.[31] Rather, Cates says that the two contracts she references (the admission form and the PPO agreement) prohibit Integris from billing her at all *if Integris did not first submit those charges for confirmation of coverage and authorization*. In other words, under Cates's theory, it does not matter whether the charges were "covered," only whether they were first submitted to the insurer. Accordingly, there would be no need to reference and interpret the ERISA plan in order to ascertain what was and wasn't "covered" or to itemize her bill into what would or wouldn't have been discounted. In the words of Plaintiff's counsel, if Integris failed to first submit the charges to the insurer, Integris "get[s] zero."[32]

¶11 An examination of each of Cates's claims bears this out. First is her claim for breach of contract, the elements of which are (1) the formation of a contract, (2) breach of the contract, and (3) damages as a result of that breach.[33] Cates alleges she formed a contract with Integris when she signed the hospital admission form[34] providing that she would be responsible for payment "unless the Hospital is prohibited by contract between third party and Hospital from billing Patient for these amounts."[35] She claims that such a third-party contract exists (the PPO agreement) and that it prohibits Integris from billing her unless it first submits the charges to her insurer for review. She further alleges that Integris billed her without first submitting the charges to her insurer for review, thus breaching both the PPO agreement and the admission form. Cates also alleges that Integris filed and asserted a lien against her for the relevant charges and that she and every other putative class member have suffered damages as a result of Integris's billing practices.[36] Assuming each of these allegations to be true, Cates has stated a colorable claim for relief – and has done so without reference to the ERISA plan.

¶12 The same is true of Cates's claim for breach of a contract to which she is a third-party beneficiary (*i.e.*, the PPO agreement), as it was necessarily breached as part of her first claim, and the only additional element she must prove is that the PPO agreement was made expressly for her benefit.[37] Cates alleges as much in her petition,[38] and we have no trouble inferring that a PPO agreement is made for the express benefit of the insurance beneficiaries receiving services under it.

¶13 Cates's third claim alleges a violation of the Oklahoma Consumer Protection Act, 15 O.S. §§ 751 *et seq*. That law authorizes "a private right of action" whenever a person commits "any act or practice declared to be a violation of the Consumer Protection Act."[39] Cates claims a violation of the provisions that prohibit "[k]nowingly caus[ing] a charge to be made by any billing method to a consumer for services . . . or products which the person knows was not authorized in advance by the consumer."[40] Again, based on Cates's interpretation of the two agreements at issue,[41] there is a conceivable set of facts by which she could establish that she did not consent to the relevant charges and that Integris knew that when it billed her – and again, she could do all of this without reference to the ERISA plan.

¶14 Cates's last claim is for what she calls "deceit." In this count, she alleges that Integris, through filing and asserting its lien against each putative class member, represented that each class member was indebted to Integris.[42] She then claims that the representation – in light of her theory of the case – is false, that it

is material, that Integris made it either with knowledge that it was false or with reckless disregard for its truth, that Integris made it with the intention that each class member act upon it, and that each class member has been harmed as a result.[43] This sounds a lot like the basis for a common-law fraud claim,[44] especially if Cates could establish that class members relied on the lien in paying on the debt or otherwise acting to their detriment. This claim can also be made without any reference to the ERISA plan; the only documents Cates needs are the lien, the two agreements she relies upon to demonstrate that it was wrongfully filed, and whatever evidence she has to demonstrate she acted upon it to her detriment. A set of facts thus exists for which relief would be possible without reference to the ERISA plan.

B.

¶15 Because we are applying federal law, we are cognizant of federal court decisions analyzing ERISA preemption. The conclusion we reach today is consistent with those decisions. Most analogous is the Seventh Circuit's decision in *Kolbe & Kolbe Health & Welfare Benefit Plan v. Medical College of Wisconsin, Inc*.[45] In *Kolbe*, the ERISA plan itself sought to bring state-law, breach-of-contract claims against a hospital, alleging – just as Cates – that the hospital had breached third-party-provider agreements to which the plaintiffs were express beneficiaries.[46] There, the hospital had requested, accepted, and retained payment from the plan for services rendered to a patient that was not an insured under the plan.[47] The plan argued that this was a breach of the network provider agreements because those agreements naturally provided insurance payments only for services provided to insurance beneficiaries.[48] The district court dismissed the plan's claims as expressly preempted, but the Seventh Circuit reversed, holding that those claims "d[id] not require interpreting or applying the Plan, nor d[id] [they] relate to the Plan in any significant way."[49] Just as here, the court explained that "plaintiffs' pleadings make it unnecessary to review the Plan," and that the state-law claims could be resolved with reference to only "the member or service agreements and the provider agreements."[50] The Seventh Circuit then bolstered its decision with the conclusion that "plaintiffs' state law breach of contract action is an area of traditional state regulation that contains allegations which seek to satisfy the statutory objectives of ERISA and is not an alternative enforcement mechanism of ERISA."[51] The same is true here.

¶16 We are also persuaded by two other federal appellate decisions in which a healthcare provider was the plaintiff seeking to avoid express preemption.[52] In those cases the healthcare providers treated patients after receiving assurances from the ERISA plan[53] that the services were covered, but were then denied payment from the plan once the providers submitted their requests.[54] In holding that the providers' claims were not preempted, both courts noted that the providers' relevant state-law claims did not seek to recover benefits under the ERISA plans, but rather sought to recover damages that resulted from the providers' reliance on the plans' alleged misrepresentations.[55] In other words, plaintiffs were – as here – pressing claims that did not rely on an interpretation of the plan in order to secure relief.[56]

¶17 These federal courts also looked to two other factors that support today's decision. First, the courts also looked to the capacity of the parties as an indication that the claims were not preempted.[57] The Fifth Circuit in *Memorial Hospital System* explained that "the most important factor for a court to consider in deciding whether a state law affects an employee benefit plan 'in too tenuous, remote, or peripheral a manner to be preempted' is whether the state law affects relations among ERISA's named entities" – i.e., "the employer, the plan, the plan fiduciaries, and the beneficiaries."[58] The court then held that because the hospital sued in its capacity as a hospital (rather than in its capacity as the assignee of patient's benefits) and because the insurer was sued based solely on its promise to pay (rather than on its obligations under the ERISA plan), these claims did not threaten to impact the relations between two ERISA entities, and thus were not what Congress intended to eliminate when it decided to preempt that which might "relate to" an ERISA plan.[59] The Tenth Circuit cited *Memorial Hospital System* to hold the same in *Hospice of Metro Denver, Inc*.[60]

¶18 Second, the federal courts asked whether the plaintiffs would have adequate alternative recourse in the event their state-law claims were preempted – in other words: could they bring federal-law claims under ERISA?[61] In both cases, the plan had denied payment upon its determination that the services rendered were not covered under the express terms of

the plan, which, as both courts explained, meant that the provider would not be successful in the event it sought recovery under the ERISA cause of action.[62] While both courts noted that the lack of a remedy under ERISA does not normally affect a preemption determination, both courts nevertheless found it useful to consider – especially in terms of whether such a result furthered Congress's intent with ERISA.[63] As the Fifth Circuit explained in *Memorial Hospital System*:

> If providers have no recourse under either ERISA or state law in situations such as the one *sub judice* (where there is no coverage under the express terms of the plan, but a provider has relied on assurances that there is such coverage), providers will be understandably reluctant to accept the risk of non-payment, and may require up-front payment by beneficiaries – or impose other inconveniences – before treatment will be offered. This does not serve, but rather directly defeats, the purpose of Congress in enacting ERISA.[64]

¶19 Both factors cut in favor of allowing Cates's claims to proceed in this case. First, Cates's claims do not affect the relations between ERISA entities. The healthcare provider in this case (Integris) is not Cates's employer, the ERISA plan, or a plan fiduciary, nor is it acting in the capacity of the beneficiary in this lawsuit. As in the two cases above, Integris is merely acting as a hospital. Moreover, Cates (the plan beneficiary) isn't acting in her capacity as an ERISA principal, as she is not using this action to recover benefits under the terms of her plan. Rather, she is seeking to enforce a promise made outside the ERISA plan, again just like the claimants in the two previously cited cases. Cates is merely a patient suing her hospital – nothing more.

¶20 Second, the result of Integris's argument is that Cates is left without any legal recourse to challenge its billing practices. While arguably Cates could file an ERISA claim against Integris to enforce her rights under the plan,[65] she can prevail only if the services were actually covered by her ERISA plan. If Integris is right, however, and the services Cates received were not covered, then Cates is in the very same position as the hospitals would have been in the two cases above: left holding the bag. "Congress's primary purpose in enacting ERISA," however, "was to protect the interests of plan beneficiaries,"[66] and the Fifth Circuit in *Memorial Hospital System* explained that when providers erect obstacles to those beneficiaries' procurement of services, the providers "directly defeat" Congress's purpose.[67] If Integris was required to submit Cates's bill to a third party as part of the bargain struck for healthcare, Integris's refusal to do so represents the very kind of obstacle Congress sought to eliminate, and one that we think Congress would want removed even if state law must do the lifting.

* * *

¶21 Based on the allegations in Cates's petition, we hold that she has stated claims for relief that do not "relate to" her ERISA plan as that term has been interpreted by the federal courts. Accordingly, Integris's motion to dismiss on the ground of express preemption should have been denied. The judgment of the trial court is therefore reversed, and the case is remanded with instructions to proceed in a manner consistent with this opinion.[68]

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

Colbert, J., dissents.

Kauger, J., not participating.

1. *See Tomahawk Res., Inc. v. Craven*, 2005 OK 82, ¶ 1, 130 P.3d 222, 224-25 (supp. op. on reh'g) (listing the reasons for granting rehearing).

2. 29 U.S.C. §§ 1001 *et seq*. (2012).

3. *See id*. § 1144(a) ("Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.").

4. *See id*. § 1132.

5. *See* ROA, Doc. 6, Pl. Class Members' Am. Resp. to Mot. to Dismiss, Ex. 2, at 1 ("In consideration of admission and/or treatment, the patient agrees to abide by the rules of the Hospital."); *see also id*. at 2 ("The patient hereby assigns to Hospital all benefits under any insurance policy, health plan, worker's compensation or other third party payor liable to the patient, in consideration for services rendered by the Hospital.").

6. *Id*. at 2 ("The undersigned understands that the patient, or another person who specifically agrees to guarantee payment for the patient, is responsible for the payment of all charges of the Hospital relating to services rendered by the Hospital to the patient that remain after any third party payment (which include, but are not limited to, applicable coinsurance, co-payments, deductibles and amounts for services or treatments that are not covered or for which payment has been denied by any third party) unless the Hospital is prohibited by contract between third party and Hospital from billing Patient for these amounts.").

7. *See* ROA, Doc. 4, Def.'s Mot. to Dismiss, at 2.

8. *See* ROA, Doc. 10, Tr. of Hr'g on Def.'s Mot. to Dismiss, at 15:4-9 ("[The PPO agreement] prohibits hospital from billing [the patient] except for a copay or deductible or coinsurance, or, in cases where Integris has confirmed the services are not covered, advised the patient the services are not covered prior to delivering the services, and the patient agreed to pay for those services prior."). The copy of the PPO agreement was filed under seal and was not included as part of the record on appeal.

9. ROA, Doc. 3, First Am. Pet., at 3.

10. *Id*. at 4.

11. *Id*. at 4-5.

12. *See generally Aetna Health Inc. v. Davila*, 542 U.S. 200, 207-09 (2004) (describing the effect of complete preemption); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (same).

13. *Cates v. Integris Health, Inc.*, No. 5:12-cv-00763-F, 2014 WL 12493272, at *6 (W.D. Okla. Sept. 30, 2014); *see also Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1137 (10th Cir. 2014) (opining that the connection between Cates's claims and her ERISA plan was "too attenuated" to support complete preemption).

14. *See generally Davila*, 542 U.S. at 208-09 (describing the effect of ERISA's express preemption provision (29 U.S.C. § 1144(a)) and distinguishing it from complete preemption); *see also* Scott D. Pomfret, *Emerging Theories of Liability for Utilization Review Under ERISA Health Plans*, 34 Tort & Ins. L.J. 131, 145 n.83 (1998) (explaining and distinguishing complete and express preemption).

15. There was some confusion below as to whether Integris's motion to dismiss should have been converted to one for summary judgment in light of the materials attached to the briefs. *See* 12 O.S.2011 § 2012(B) ("If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment."). Because the motion could have been decided with reference only to the petition and those materials referenced by and integral to the petition, we agree with the district court's decision that the motion need not be converted to one for summary judgment. *See Tucker v. Cochran Firm-Criminal Defense Birmingham L.L.C.*, 2014 OK 112, ¶ 30, 341 P.3d 673, 684-86; *see also KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 13, 9 P.3d 683, 688-89 ("We will presume the trial court found every special thing necessary to be found to sustain the general finding and conclusion." (internal quotation marks omitted)); *Armstrong v. Gill*, 1964 OK 88, ¶ 8, 392 P.2d 737, 738 ("[T]here [is] a presumption that the court acted properly and did all that was necessary to sustain the proceedings . . . .").

16. *Dani v. Miller*, 2016 OK 35, ¶ 10, 374 P.3d 779, 785.

17. *Id*. ¶ 10, 374 P.3d at 785-86.

18. *Id*. ¶ 10, 374 P.3d at 786.

19. *Id.*

20. *Id*. ¶ 11, 374 P.3d at 786.

21. *See Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1184 (10th Cir. 2003) ("[A]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path." (alteration in original) (quoting *Gonzales v. Prudential Ins. Co.*, 901 F.2d 446, 451-52 (5th Cir. 1990))).

22. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

23. *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

24. *Ingersoll-Rand Co.*, 498 U.S. at 139.

25. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." (internal quotation marks and citation omitted)).

26. ROA, Doc. 4, Def.'s Mot. to Dismiss, at 17.

27. *Id*. at 3.

28. *Id*. at 17.

29. *Id*. at 2-3, 17.

30. *See Ingersoll-Rand Co.*, 498 U.S. at 140 ("Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan." (alteration in original)).

31. ROA, Doc. 10, Tr. of Hr'g on Def.'s Mot. to Dismiss, at 38:18-24 ("We're not looking for a discount. [Integris] do[es]n't get anything. They get zero because they didn't play by the rules. And so, they keep trying to redraft this to be a discount that's controlled by the PPO. No, they can't bill us. Period. Period. They can't bill us. That's our argument, no matter how many times [defense counsel] tries to restate it, that's our argument.").

32. *Id*.

33. *Dig. Design Grp., Inc. v. Info. Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834, 843.

34. Counsel for Integris also appears to have conceded the contractual nature of this form, stating after the trial court asked whether counsel agreed that Cates has a contract with the hospital: "Well, it's an admitting form and, yeah, it does – it does look like a contract, yeah, it provides obligations." ROA, Doc. 10, Tr. of Hr'g on Def.'s Mot. to Dismiss, at 17:25-18:2.

35. ROA, Doc. 6, Pl. Class Members' Am. Resp. to Mot. to Dismiss, Ex. 2, at 2 (emphasis added).

36. ROA, Doc. 3, First Am. Pet., at 3-4

37. *See Great Plains Fed. Sav. & Loan Ass'n v. Dabney*, 1993 OK 4, ¶ 9, 846 P.2d 1088, 1093.

38. ROA, Doc. 3, First Am. Pet., at 5.

39. 15 O.S.2011 § 761.1(A).

40. *Id*. § 753(25)-(26).

41. *See* ROA, Doc. 6, Pl. Class Members' Am. Resp. to Mot. to Dismiss, Ex. 2, at 2 ("The undersigned understands that the patient, or another person who specifically agrees to guarantee payment for the patient, is responsible for the payment of all charges of the Hospital relating to services rendered by the Hospital to the patient that remain after any third party payment (which include, but are not limited to, applicable coinsurance, co-payments, deductibles and amounts for services or treatments that are not covered or for which payment has been denied by any third party) unless the Hospital is prohibited by contract between third party and Hospital from billing Patient for these amounts."); ROA Doc. 10, Tr. of Hr'g on Def.'s Mot. to Dismiss, at 15:4-9 ("[The PPO agreement] prohibits the hospital from billing [the patient] except for a copay or deductible or coinsurance, or, in cases where Integris has confirmed the services are not covered, advised the patient the services are not covered prior to delivering the services, and the patient agreed to pay for those services prior.").

42. ROA, Doc. 3, First Am. Pet., at 4.

43. *Id*. at 4-5.

44. *See Bowman v. Presley*, 2009 OK 48, ¶ 13, 212 P.3d 1210, 1217-18 (listing the elements of common-law fraud as: "1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his (or her) own detriment").

45. 657 F.3d 497 (7th Cir. 2011).

46. *Id*. at 504.

47. *Id*.

48. *Id*. at 500-01, 504.

49. *Id*. at 504 (citing *Trs. of the AFTRA Health Fund v. Biondi*, 303 F.3d 765, 780 (7th Cir. 2002)).

50. *Id*. at 504-05.

51. *Id*. at 505 (citing *Biondi*, 303 F.3d at 773-82).

52. *See Hospice of Metro Denver, Inc. v. Grp. Health Ins. of Okla., Inc.*, 944 F.2d 752 (10th Cir. 1991); *Mem'l Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990).

53. In *Memorial Hospital System*, the plaintiff provider received assurance from the plan beneficiary's employer, whom the provider claimed was acting as the ERISA plan's agent. 904 F.2d at 238.

54. *Hospice of Metro Denver, Inc.*, 944 F.2d at 753; *Mem'l Hosp. Sys*, 904 F.2d at 238.

55. *Hospice of Metro Denver, Inc.*, 944 F.2d at 754; *Mem'l Hosp. Sys*, 904 F.2d at 244.

56. *Hospice of Metro Denver, Inc.*, 944 F.2d at 754 ("[Plaintiff] does not claim any rights under the plan, and does not claim any breach of the plan contract. The promissory estoppel claim does not seek to enforce or modify the terms of the plan . . . ."); *Mem'l Hosp. Sys*, 904 F.2d at 250 ("[Plaintiff] has brought this state law action in its independent status as a hospital, and [patient's] assignment of benefits is irrelevant to [plaintiff's] right to recover. . . . [Plaintiff] neither seeks benefits from the plan nor claims that the plan acted improperly in processing and denying [plaintiff's] claim. The claim is thus independent of the plan's actual obligations under the terms of the insurance policy and in no way seeks to modify those obligations.").

57. *Hospice of Metro Denver, Inc.*, 944 F.2d at 756; *Mem'l Hosp. Sys*, 904 F.2d at 249-50.

58. 904 F.2d at 249 (quoting *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1467-68 (5th Cir. 1986)).

59. *Id*. at 250.

60. 944 F.2d at 756; *see also David P. Coldesina, D.D.S., P.C., v. Estate of Simper*, 407 F.3d 1126, 1136 (10th Cir. 2005) (explaining that the class of "[c]laims that do not affect the relations among the principal ERISA entities" – and thus escape preemption – "[n]ecessarily" includes claims that affect relations between only one ERISA entity and some outside/non-ERISA entity).

61. *Hospice of Metro Denver, Inc.*, 944 F.2d at 755; *Mem'l Hosp. Sys*, 904 F.2d at 247-48.

62. *Hospice of Metro Denver, Inc.*, 944 F.2d at 753, 755; *Mem'l Hosp. Sys*, 904 F.2d at 238, 247; *see also* 29 U.S.C. § 1132(a)(1)(B) (2012) ("A civil action may be brought – (1) by a participant or beneficiary … (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

63. *Hospice of Metro Denver, Inc.*, 944 F.2d at 755; *Mem'l Hosp. Sys*, 904 F.2d at 247-48.

64. 904 F.2d at 247-48.

65. *See Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1137-38 (10th Cir. 2014) (permitting a plan beneficiary to bring an ERISA claim against a healthcare provider to enforce rights under his plan). We reiterate, however, that this is not the claim Cates brings in this lawsuit.

66. *David P. Coldesina, D.D.S., P.C.*, 407 F.3d at 1136 (citing *Ingersoll-Rand Co.*, 498 U.S. at 137).

67. 904 F.2d at 247-48.

68. We also note that *all* we have decided is the sufficiency of Cates's petition at this motion-to-dismiss juncture. Whether the agreements she cites are indeed contracts, what their terms actually require, and all the other elements of her claims remain for the district court to determine on remand.

2018 OK 10

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

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

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

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

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

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

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

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Winchester, J., not voting.

Juvenile Instruction No. 2.7

Instructions for Verdict Forms

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

OR

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

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

Notes on Use

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

Committee Comments

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

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

Juvenile Instruction No. 2.7A

Instructions for Verdict Forms for Failure to Correct Conditions

If you find that the State has proved by clear and convincing evidence that the parental rights of the parent to the child should be terminated on the statutory ground that the parent has failed to correct one or more conditions that led to the finding that the child was deprived after the parent had been given at least three (3) months to correct the conditions, you must indicate this finding by putting a check mark on the line next to each uncorrected condition on the verdict form entitled Terminate Parental Rights for that parent and that child given to you, and then sign and return the verdict form. Otherwise, you should sign and return the verdict form entitled Do Not

Terminate Parental Rights for that parent and that child.

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

Notes on Use

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

Committee Comments

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

Juvenile Instruction No. 3.4

Failure to Correct Conditions

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

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

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

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

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

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

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

Notes on Use

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

Committee Comments

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

Juvenile Instruction No. 3.6

Previous Termination of Rights to Another Child

The State seeks to terminate the parent's rights on the basis that a child has been born to a parent whose parental rights to another child have already been terminated before. In order to terminate parental rights on this basis, the

State must prove by clear and convincing evidence each of the following elements:

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

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

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

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

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

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

Notes on Use

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

Juvenile Instruction No. 3.11

Definition of Heinous and Shocking Abuse

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

a. a substantial risk of death,

b. extreme physical pain,

c. protracted disfigurement,

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

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

f. a bone fracture,

g. sexual abuse or sexual exploitation,

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

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

j. any other similar aggravated circumstance.

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

Juvenile Instruction No. 3.13

Definition of Neglect

"Neglect" means:

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

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

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

(3) supervision or appropriate caretakers, or

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

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

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

(2) illegal activities, or

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

c. abandonment.

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

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

Juvenile Instruction No. 3.14

Definition of Heinous and Shocking Neglect

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

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

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

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

d. any other similar aggravating circumstance.

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

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

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

Juvenile Instruction No. 3.19

Abuse Subsequent to Previous Abuse or Neglect

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

1. The child has been adjudicated to be deprived;

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

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

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

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

Notes on Use

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

Juvenile Instruction No. 3.19A

Definition of Failure to Protect

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

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

1. Knew the identity of the **abuser/(person who neglected the child)** but **(lied about)/**

concealed/(failed to report) the child **abuse/neglect**; or

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

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

Notes on Use

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

Juvenile Instruction No. 3.23

Conditions from Previous Deprived Adjudication Have Occurred Again

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

1. The child has been adjudicated to be deprived in this case;
2. There has been a previous deprived adjudication of **(the child)/(a sibling of the child)**;
3. The **condition/conditions** that led to the deprived adjudication in this case **was/were** the subject of the previous deprived adjudication, and the parent was given an opportunity to correct the **condition/conditions** in the previous case; and,
4. Termination of parental rights is in the best interests of the child.

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

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

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

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

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

Notes on Use

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

2018 OK 11

JP ENERGY MARKETING, LLC, a foreign corporation, Plaintiff/Appellee, v. COMMERCE AND INDUSTRY INSURANCE COMPANY, a foreign corporation; Defendant, ALTERRA AMERICA INSURANCE COMPANY, a foreign corporation; NAVIGATORS INSURANCE COMPANY, a foreign corporation; BITCO GENERAL INSURANCE COMPANY, a foreign corporation, Defendants/Appellants.

No. 115,285; Cons. w/115,281; 115,293
February 5, 2018

ORDER AWARDING APPEAL RELATED ATTORNEY FEES

¶1 Plaintiff/Appellee JP Energy sought declaratory relief in the district court from Defendant/Appellant insurers Alterra, Navigators and BITCO after the insurers denied coverage and refused to provide Plaintiff with a defense in related litigation.[1] The trial court entered an order awarding summary judgment to JP Energy. The Court of Civil Appeals affirmed the trial court's decision. On September 25, 2017, we denied the insurers' petitions for certiorari, and issued an order approving the COCA opinion for publication styled JP Energy Mktg., L.L.C. v. Commerce and Indus. Ins. Co., et al., Case No. 115,285, *consolidated with* 115,281 and 115293.

¶2 JP Energy subsequently filed a motion seeking appeal related attorney's fees and

costs.[2] JP Energy maintains it is the prevailing party in the underlying declaratory judgment action and relies on 36 O.S.2011 §3629 as authority for such an award. JP Energy posits that it provided proof of loss when it requested insurers provided it with a defense and indemnity from any future losses associated with the Payne County fire. Section 3629 provides:

> A. An insurer shall furnish, upon written request of any insured claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not, by reason of the requirement so to furnish forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion.
>
> B. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of fifteen percent (15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict. This provision shall not apply to uninsured motorist coverage.

¶3 Although this Court has not yet rendered a decision on the aforementioned question, the federal courts have awarded attorney fees pursuant to 36 O.S.2011 § 3629. The Tenth Circuit first examined prevailing party attorney fees in An-Son Corporation v. Holland-America Insurance Co., 767 F.2d 700 (10th Cir.1985). The Circuit Court concluded this Court had historically given § 3629(B) a broad application. Id. at 703-704. The An-Son Court then concluded § 3629 was applicable to declaratory judgment actions. Id. at 704. In doing so, the Circuit Court emphasized the importance of making an insured whole and rejected the insurer's argument that § 3629 only applied to "first party actions where the insured has sustained a loss and the insurer rejects a claim made under the policy."[3]

¶4 Subsequently, in Stauth v. National Union Fire Ins. Co. of Pittsburgh, 236 F.3d 1260, (10th Cir. 2001), the Tenth Circuit held that "notification to Insurers of the existence of the [underlying lawsuits], followed by the institution of the declaratory judgment action when coverage under the 1996 Policies was denied, would be all that was necessary to satisfy a 'proof of loss' requirement."[4] Id. at 1265. By succeeding in the declaratory judgment action, Fleming was deemed the prevailing party under § 3629(B). Id. at 1266. See also Atain Specialty Ins. Co. v. Tribal Constr. Co., No. CIV-11-1379-D, 2013 WL 3776621 (W.D. Okla. July 17, 2013) (finding an insurer entitled to attorney fees pursuant to § 3629 after securing a declaratory judgment concluding it had no duty to defend or indemnify the insured.)[5]

¶5 We find the federal court decisions persuasive. Accordingly, JP Energy's motion for an appeal-related attorney's fee is granted. On remand, the trial court is directed to determine, in an adversarial hearing with notice, the amount of an attorney's fee to be awarded. 12 O.S.2011 § 696.4(C).

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5th DAY OF FEBRUARY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

¶7 Kauger, Wyrick, JJ., concur in part and dissent in part.

Wyrick, J., concurring in part and dissenting in part.

"I would deny both fees and costs."

1. Several landowners in Payne County brought suit against JP Energy associated with a fire caused during work on the Great Salt Plains Pipeline.

2. In a reply brief filed on November 16, 2017, JP Energy withdrew its request for appellate costs.

3. The An-Son opinion quoted the following language from 7C Appleman, Insurance Law and Practice § 4691 (1979):

> After all, the insurer had contracted to defend the insured, and it failed to do so. It guessed wrong as to its duty, and should be compelled to bear the consequences thereof. If the rule laid down by these courts [which have denied recovery] should be followed by other authorities, it would actually amount to permitting the insurer to do by indirection that which it could not do directly. That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. ***If the insurer can force him into a declaratory judgment proceeding and, even though it loses such action, compel him to bear the expense of***

such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above. (emphasis added).

4. Citing Shadoan v. Liberty Mut. Fire Ins. Co., 1994 OK CIV APP 182, ¶ 15, 894 P.2d 1140, 1144.

5. Atain asserted that the proof of loss requirement in § 3629 was met when the insured notifies the insurer of a lawsuit for which coverage is demanded, citing An-son, Stauth and Hambelton v. Canal Ins. Co., 405 P.App'x 321 (10th Cir.2001) (unpublished opinion) which quoted Dixson Produce, LLC v. Nat'l Fire Ins. Co. of Hartford, 2004 OK CIV APP 79, 99 P.3d 725.¶20. Ironically. counsel for Alterra in this case, who seeks to defeat JP Energy's request for attorney fees, also served as counsel for Atain which successfully sought and was awarded attorney fees.

2018 OK 12

STACEY GAASCH, as Personal Representative of the Estate of TROY GAASCH, Deceased, Plaintiff/Appellant, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendant/ Appellee, and McGivern & Gilliard, P.C., an Oklahoma corporation, Defendant.

No. 113,035. February 6, 2018

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

¶0 Plaintiff brought an action in the District Court alleging an insurance company failed to timely provide reasonable and necessary medical treatment as ordered by the Workers' Compensation Court. Insurance company filed a motion for summary judgment which was granted by the Honorable Patricia G. Parrish, District Judge. Plaintiff appealed and the Court retained the appeal. We hold: (1) Plaintiff's District Court action alleging breach of contract also included a request for damages resulting from the death of the workers' compensation claimant, (2) The District Court action was based upon alleged delay by a workers' compensation insurer in providing medical care as previously awarded by the Worker's Compensation Court, and (3) The District Court action against the workers' compensation insurer is precluded by an exclusive remedy provided by the Workers' Compensation Act.

JUDGMENT OF THE DISTRICT COURT AFFIRMED

Victor Owens, Tulsa, Oklahoma, for Plaintiff/ Appellant.

Jim Loftis, Loftis & Barnard, Norman, Oklahoma, for Plaintiff/Appellant.

Derrick T. DeWitt and Melanie K. Christians, Nelson, Terry, Morton, DeWitt, Paruolo & Wood, Oklahoma City, Oklahoma, for Defendant/Appellee.

EDMONDSON, J.

¶1 Plaintiff brought an action in the District Court alleging the St. Paul Fire and Marine Insurance Company failed to timely provide reasonable and necessary medical treatment as previously ordered by the Workers' Compensation Court. St. Paul filed a motion for summary judgment which was granted. We conclude plaintiff's District Court action based upon a previous workers' compensation court adjudication required plaintiff to obtain a certification order prior to bringing an action in District Court.

¶2 Troy required multiple surgeries over several years due to his work-related injury. Troy was hospitalized due to his work-related injury. He allegedly became malnourished with accompanying weight loss and different physicians recommended a nutritional consult. A nurse case manager recommended monthly a nutritional consult. Troy died during his hospitalization approximately six months after the initial recommendation for a nutritional consult.

¶3 Prior to his work-related injury, Troy underwent a gastric bypass surgery and allegedly suffered from a malabsorption syndrome secondary to this surgery. A disagreement arose between insurer and Troy concerning whether the insurer was required to pay for a nutritional consult. Insurer claimed Troy's nutritional problems were created prior to his work-related injury and his nutritional state in the hospital was not due to the work-related injury.

¶4 During his hospitalization Troy's counsel filed a Form 9 and requested an order from the Workers' Compensation Court for treatment by a nutritionist. The Form 9 was filed three days prior to Troy's death.[1] Two days later and one day prior to his death, St. Paul Fire & Marine Insurance Company, the workers' compensation insurance carrier, approved the request for a nutritional consult. Troy died on February 26, 2010.

¶5 A few months later the Workers' Compensation Court held a hearing on the issue of death benefits. The court found "without a doubt that claimant died as a direct result of the original injury." The court made findings in support of this conclusion and relied upon one doctor's report and another doctor's autopsy

report. The court awarded a lump sum payment, continuing payments, and an amount for funeral expenses. The payments were ordered to be paid to the surviving spouse and two children. This order was affirmed in part and modified in part by a three judge panel of the court. The order was reduced because one of the children was an adult. The panel agreed that claimant died as a direct result of his original work-related injury combined with "consequential injuries." The Court of Civil Appeals agreed in a subsequent appeal.

¶6 Stacey Gaasch, as personal representative of Troy's estate, brought an action in the District Court for Oklahoma County, and alleged the workers' compensation insurance carrier failed to provide Troy with the reasonable and necessary medical treatment as required by "the final orders of the Oklahoma Workers' Compensation Court."[2] Plaintiff alleged McGivern & Gilliard, P.C., had acted as the agent for the insurer. Plaintiff stated the insurer breached its duty of "good faith" and characterized this allegation as a "bad faith" claim.

¶7 The second part of the petition plaintiff characterized as a claim for "wrongful death." Plaintiff alleged Troy's survivors suffered compensable damages arising from the insurer's breach of its duty of good faith and fair dealing associated with the insurance contract. The third part of the petition alleges the defendants (1) continued to deny approval of reasonable and necessary medical treatment until the day before Troy died, (2) made statements shortly before his death it would be cheaper for the insurer if Troy would die, and (3) the insurer's conduct and statements caused Stacey severe emotional distress.

¶8 A motion to dismiss was filed by McGivern & Gilliard and St. Paul. The motion to dismiss by McGivern & Gilliard was denied on Plaintiff's intentional infliction of emotional distress claim, and the trial court noted plaintiff had agreed the bad faith and wrongful death claims were not being asserted against McGivern & Gilliard.

¶9 The motion to dismiss brought by St. Paul was granted on plaintiff's "claim of bad faith" and denied on plaintiff's wrongful death claim. The trial court noted plaintiff voluntarily dismissed with prejudice the claim against St. Paul based upon intentional infliction of emotional distress.[3]

¶10 One claim was left for adjudication against McGivern & Gilliard, the one for intentional infliction of emotional distress. Plaintiff subsequently filed a dismissal with prejudice for "this case," *i.e.*, all causes of action against McGivern & Gilliard, and this party dropped out of the case. After the dismissal of McGivern & Gilliard one claim was left for adjudication in this case, the claim against St. Paul for wrongful death.

¶11 St. Paul sought summary judgment on plaintiff's wrongful death claim. St. Paul argued: (1) No wrongful death claim may arise from the breach of an insurance contract; (2) Plaintiff's exclusive remedy was provided by the worker' compensation statutes; (3) No evidence exists that Troy's death was the result of a denial of the nutritional consult; (4) No order was issued by the Workers' Compensation Court required for a breach of contract claim; and (5) Any claim for damages based upon a breach of contract would be limited to the value of the nutritional consult. St. Paul also argued Troy could have obtained a nutritional consult and submitted the charge to the Workers' Compensation Court as part of his claim. Defendant asserted Troy could have, at any time, filed a Form 9 with the Workers' Compensation Court and the issue of a nutritional consult would have been set for trial and determination by the Workers' Compensation Court.

¶12 Plaintiff responded to St. Paul's arguments and argued the wrongful death claim was not based upon a tort, but breach of an insurance contract. Plaintiff also argued the workers' compensation death benefits did not bar a separate recovery for wrongful death because the insurer did not "stand in the shoes of the employer." Plaintiff argued no certification order from the Workers' Compensation Court was required to bring a District Court action for an insurer's failure to provide medical benefits to a person covered by an insurance contract, *i.e.*, opinions from this Court requiring a certification order apply to bad faith actions and not actions for breach of contract. Plaintiff also argued that "medical providers, with rare exception, require authorization from a workers' compensation carrier prior to providing treatment." Further, plaintiff alleged the lack of a timely authorization from St. Paul was a cause of Troy's death.

¶13 The District Court granted St. Paul's motion for summary judgment. The trial court simultaneously determined plaintiff's motion

for partial summary judgment was moot because of the judgment granted to St. Paul. Plaintiff appealed and this Court retained the appeal. Our review is limited to those assignments of error listed in plaintiff's petition in error which are supported by argument and authority in plaintiff's trial court briefs.[4]

I. Wrongful Death and Plaintiff's Alleged Breach of Contract

¶14 The common law provided no remedy in tort when a person's injury to another resulted in that person's death because the injured person's right of action abated on death.[5] Generally, a cause of action in the common law based on contract survived and could be enforced by the personal representative of the deceased.[6] Whether an action survived was not based upon the form of the action being in contract versus tort, but whether the alleged injury was to property and rights of property which survived, or injury to the person which did not survive.[7]

¶15 The harshness of this situation was ameliorated by statutes allowing for the decedent's personal representative to bring an action for the decedent's death only if at the time of his or her death, the decedent had a right of recovery for the injuries in suit.[8] General survival and abatement statutes are codified at 12 O.S.2011 §§ 1051-155, inclusive, where, for example, 12 O.S. §§ 1051[9] & 1053[10] include causes of action for injury to the deceased, including pain and suffering, as well as a cause of action for damages resulting from the death of the injured person.[11]

¶16 The § 1053 action allows a plaintiff to recover for "loss of consortium and the grief of the surviving spouse." Plaintiff argues a wrongful death action may be based upon a breach of contract where damages for personal injuries are sought. Again, plaintiff argues the action is for consequential damages resulting from a wrongful death and is based in contract.

¶17 Historically, when an action is a claim which seeks to recover for unliquidated damages for a personal injury caused by negligence, *although the negligence complained of amounts to a breach of contract on the part of the defendant*, the action is one *ex delicto* and the law of torts governs that claim.[12] We have explained a surviving spouse's wrongful death action "is purely statutory, [and] suit may be brought only by a person expressly authorized by statute to do so" within the two-year limitations period provided by § 1053.[13] Of course, an action founded upon a contract survives and may be brought by an executor or administrator of the deceased.[14]

¶18 We have explained that the injury-to-the-plaintiff action lies only if at the time of death the decedent had a right of recovery for the injury in suit,[15] but the wrongful death independent survivor statutory action is viewed as *not* a derivative action[16] arising completely from the personal-injury-to-the-plaintiff action.[17] An action for breach of contract and an action in tort may arise from the same set of facts and a person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach of contract or tort theory, or both.[18] A person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach of contract or tort theory, or both; but even if the evidence supports both, the claimant can achieve but a single recovery.[19] This single recovery by a plaintiff has been historically recognized by the Legislature in statute, and our Court has explained that an employer and insurance carrier have been protected from a claimant obtaining a "double recovery" for the same injury.[20]

¶19 As we explain, plaintiff's action against the insurance carrier is for allegedly causing or contributing to the cause of the worker's death, this same death for which workers' compensation benefits were paid. Plaintiff's action is attempting to make the insurance carrier a type of unspecified "successive tortfeasor"[21] or impose one type of "concurrent-breach-of-contract doctrine"[22] where the insurance carrier's actions independent of the workers' compensation cause of action have concurred with the injury element of the compensation cause of action to produce the single or indivisible injury, *i.e.*, the death of the deceased. Further, plaintiff's alleged successive/concurrent cause of action assumes a right to recover damages without the prior payment of death benefits creating any legal consequence for the asserted successive/concurrent cause of action.

¶20 Plaintiff's action arises from a workers' compensation insurance policy and a court-ordered duty based on that policy where (1) plaintiff alleges a death occurred and (2) workers' compensation death benefits were previously paid for that death. Plaintiff's District Court action to recover for Troy's injury is governed by workers' compensation jurisdic-

tional remedies as we now explain, and we need not reach the issues of alleged successive or concurrent liability for an injury for which workers' compensation benefits were previously paid.[23]

II. District Court Action Based Upon Delay in Workers' Compensation

Medical Care Must Be Certified by the Workers' Compensation Court

¶21 Plaintiff has brought an action against a workers' compensation insurer. An insurer's duty may arise from one of three possible sources: (1) an express promise to pay in the insurance contract, (2) a promise implied in fact, or (3) a promise implied in law.[24] An example of a promise implied in fact is a third-party beneficiary contract.[25] Plaintiff relies upon the employer's workers' compensation insurance policy being created for the benefit of workers such as the plaintiff and the third party beneficiary statute, 15 O.S. 2011 § 29,[26] as well as an order of the Workers' Compensation Court requiring St. Paul to pay for Troy's medical care.

¶22 A worker's compensation insurer owes a duty to act in good faith and deal fairly towards the injured employee who by statute is made a third-party beneficiary to the insurance.[27] In *Sizemore v. Continental Cas. Co*. we said that a bad faith claim against a workers' compensation insurer is separate from the injured worker's employment relationship, and it arises against an insurer only after there has been an award against the employer.[28]

¶23 Our 2009 opinion in *Summers v. Zurich American Insurance Company*[29] addressed an allegation an insurer had failed to provide benefits in a timely manner as ordered by the Workers' Compensation Court, and the plaintiff brought a District Court action alleging a violation of the insurer's duty of good faith and fair dealing. We noted the procedure for a worker obtaining an order from the Workers' Compensation Court prior to filing an action in a District Court and the required notice to an employer and insurer. The procedure for obtaining an order in the Workers' Compensation Court provided a respondent and insurance carrier with a hearing and an opportunity for them show a good cause why a benefit previously ordered by that court had not been provided.[30] If the insurer failed to show good cause for not providing a court-ordered benefit, then the Workers' Compensation Court issued an order with specific findings stating the basis for that court's determination on the insurer's failure of proof in the proceeding before the court.

¶24 We explained the procedure for obtaining a certification order was not restricted to a workers' compensation monetary award, and "encompasses an insurer's bad faith refusal to provide any benefits which (1) have been ordered in a final order of the Workers' Compensation Court and (2) have been certified as having not been provided as ordered."[31] If a claimant received a Workers' Compensation Court order certifying that non-monetary benefits were not provided as awarded by that court, then the claimant could "proceed with a tort claim for bad faith in district court."[32]

¶25 In *Meeks v. Guarantee Insurance Company*,[33] the Court emphasized the above-referenced language in *Summers* explaining our prior opinion in *Sizemore*[34] and the certification procedure in the Workers' Compensation Court.[35] The employer and its insurer must be given at least ten days notice "prior to the trial on certification."[36] This trial adjudicates a claimant's allegation that a previously awarded benefit was not provided. This procedure provides employer with a notice and opportunity to be heard on the issue whether a particular workers' compensation benefit was previously awarded and whether good cause exists for not granting the claimant's application for a certification order.

¶26 The Court again explained that an employee seeking to obtain previously awarded non-monetary benefits should proceed directly to a rule of the Workers' Compensation Court which provides notice to the employer and the insurance carrier, and then a certification order may issue if the insurer fails to demonstrate good cause.[37] We stated this Rule applies when the issue is a failure of insurer to provide previously awarded medical benefits or monetary benefits.[38] In *Meeks* the employee could proceed with the District Court bad-faith action "[b]ecause the certification requirements were met here."[39] A certification order must state: (1) the identity or nature of the previously awarded benefit, (2) this previously awarded benefit was not provided as ordered, and (3) employer/insurer lacked good cause in failing to show why a certification order should not be granted.[40]

¶27 Plaintiff agreed with St. Paul that no certification order had been issued by the Workers' Compensation Court. Plaintiff argued no

certification order from the Workers' Compensation Court was necessary because the insurer ultimately approved the nutritional consult. Plaintiff also argued the certification order applies where a workers' compensation benefit has been denied, and does not apply when a benefit has been delayed. In support of this statement plaintiff argues a Workers' Compensation Court has no jurisdiction to determine "unreasonable delay" in providing a benefit previously awarded. Plaintiff's view is that an employer/insurer should not be entitled to a hearing when an alleged benefit has been delayed and in such case an action on the contract for failing to provide reasonable and necessary medical care may be immediately brought in a District Court. We disagree.

¶28 Generally, a wrongful death action has constitutional protection by Okla. Const. Art. 23 § 7.[41] In 1963 we explained Art. 23 § 7 had been amended by the people in 1950 in order to substitute a statutory exclusive workers' compensation remedy for the remedy provided by the general wrongful death statute.[42] Twenty years later we explained an action under the Workers' Compensation Law was the exclusive remedy against an employer for deaths covered by that Act.[43] A worker's allegation of not receiving a previously awarded benefit is adjudicated by the Workers' Compensation Court, and this adjudication is not limited to employer's denial of a benefit versus a delay by an employer *or an insurer* in providing a benefit. In *Stewart v. Mercy Health Center, Inc.*,[44] we stated: "Our jurisprudence makes it clear that failure to obtain an order of the Workers' Compensation Court certifying the award as unpaid is a *jurisdictional requirement* to filing a bad faith claim for failure to pay benefits in the district court."[45] This workers' compensation insurance carrier had its legal duty for providing payment adjudicated by an order of the Workers' Compensation Court. Plaintiff, like any other claimant seeking to enforce an award requiring an insurer to provide a benefit, "must first utilize the mechanism provided in section 42(A) of the Act and have the award certified for enforcement."[46] The insurer has a workers' compensation statutory right to defend its conduct in the context of its good-cause burden.[47] We have previously recognized a worker as a third-party beneficiary to the insurer's workers' compensation insurance contract may hold the insurer liable for a delay or failure to pay or provide for coverage as required by its policy utilizing the remedy provided by workers' compensation statutes.

¶29 Plaintiff attempts to go around this procedure we classified as a "jurisdictional requirement" in *Stewart* by characterizing the claim as a breach of contract and an action for damages resulting from an alleged wrongful death. The clear public policy expressed in the amended version of Art. 23 § 7 requires available workers' compensation remedies for any type of wrongful death claim to be pursued in the Workers' Compensation Court when required by the workers' compensation statutes.[48]

¶30 Plaintiff argues the scope of the remedies for a plaintiff's action against an insurer are different in a District Court from those available before the Workers' Compensation Court. A mere difference in a remedy does not demonstrate an unconstitutionally inadequate or insufficient remedy.[49] Plaintiff also refers to Okla. Const Art. 5 § 46[50] and alleges workers' compensation insurers receive different treatment than other insurers for the purpose of a wrongful death claim. This allegation fails to recognize that the people expressed their desire in Art. 23 § 7 for workers' compensation wrongful death related claims to be adjudicated within the workers' compensation jurisdictional boundaries.

III. Conclusion

¶31 Plaintiff's District Court action alleging breach of contract also included a request for consequential damages for the death of an individual based upon a workers' compensation insurance carrier's legal duties as previously determined by the Workers' Compensation Court. Plaintiff's District Court action against the workers' compensation carrier required plaintiff to use the exclusive remedy provided by the Workers' Compensation Act prior to seeking relief in District Court. The summary judgment granted by the District Court to St. Paul is affirmed.

¶32 COMBS, C.J.; GURICH, V.C.J.; and KAUGER, WINCHESTER, and EDMONDSON, JJ., concur.

¶33 WYRICK, J., concur in judgment.

¶34 COLBERT, REIF, JJ., dissent.

EDMONDSON, J.

1. Defendants' Motion for Summary Judgment, Appellant's Record on Accelerated Appeal, Tab 8, Exhibit 19.

2. Plaintiff's First Amended Petition, Appellant's Record on Accelerated Appeal, Tab 2.

3. Order of the District Court on defendants' motions to dismiss, Appellant's Record on Accelerated Appeal, Tab 6.

4. This appeal was prosecuted pursuant to Rule 1.36 which provides for the trial court filings to serve as the appellate briefs and the assignments of error on appeal are those listed in an appellant's petition in error which are supported by argument and authority. *Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, ¶ 4, 394 P.3d 1224, 1229.

5. *Nealis v. Baird*, 1999 OK 98, ¶ 19, 996 P.2d 438, 446.

6. *Treese v. Spurrier Lumber Co.*, 1925 OK 998, 242 P. 235, 237.

7. *Kramer v. Eysenbach*, 1939 OK 394, 96 P.2d 1049, 1052-1053, quoting *Columbian National Life Ins. Co. v. Lemmons*, 1923 OK 1147, 222 P. 255 (The line of demarcation at common law, separating those actions which survive from those that do not, is that in the first the wrong complained of affects primarily and principally property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the rights of property affected are merely incidental.). *See, e.g.*, Note, I*nadequacies of English and State Survival Legislation*, 48 Harv.L.Rev. n. 5, 1008 (1935) (stating same principle relied on in *Kramer v. Eysenbach, supra*, concluding "This distinction is recognized in all the authorities, " and relying in part on *Jenkins v. French*, 58 N.H. 532, 533 (1879).

8. *Nealis*, 1999 OK 98, ¶ 19, 996 P.2d at 446.

9. 12 O.S.2011 § 1051:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

10. 12 O.S.2011 § 1053:

A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.

B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate.

The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.

The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.

The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

D. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division.

E. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.

F. 1. The provisions of this section shall also be available for the death of an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes.

2. The provisions of this subsection shall not apply to:

a. acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented, or

b. acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

3. Under no circumstances shall the mother of the unborn child be found liable for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

11. *Boler v. Security Health Care, L.L.C.*, 2014 OK 80, ¶ 10, 336 P.3d 468, 472, citing *Ouellette v. State Farm Ins. Co.*, 1994 OK 79, 918 P.2d 1363, 1366, and Okla. Const. Art. 23, § 7 for the principle that Oklahoma's Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of decedent's death. *See Deep Rock Oil Corp v. Sheridan,* 173 F.2d 186, 190 (10th Cir. 1949) (Two separate and distinct causes of action arose if the injury and the death of the deceased was caused by the negligence of defendant, one was for injury to plaintiff's person, such as pain and suffering, which survives pursuant to 12 O.S. § 1051; and the other an independent cause of action for damages resulting from the death of the injured person inuring to the benefit of the surviving spouse, children, if any, or next of kin, and brought pursuant to 12 O.S. § 1053.

See also St. Louis & S.F.R. Co. v. Goode, 1914 OK 237, 142 P. 1185, 1188 (Comp. Laws 1909 § 5943 (12 O.S §1051) and § 5944 (12 O.S.§ 1052) involve a right independent of the right of action provided by Comp. Laws 1909 § 5945 (12 O.S. § 1053) and § 5946 (12 O.S. § 1054), and: "When it is once conceded or established that the widow's action, under section 5945 of the statute, is an entirely new cause of action, it follows that it is independent, both in the right and the enforcement of it, of section 5943; in other words, this last-named section might be stricken from the law without injury to the right to recover the widow's damage. . . This leads us to believe that the two causes of action, in cases such as this, are coexistent; that a recovery on the one does not bar a recovery on the other; that the damages to the estate begin with the wrong and cease with the death; that the widow's damages begin with the death; that they do not cover the same field, nor do they overlap.").

12. *Martin v. Chicago, R. I. & P. Ry. Co.*, 1915 OK 216, 148 P. 711, 714, quoting *Doremus v. Root et al.*, 94 Fed. 760, 761 (C. C. Wash. 1899).

13. *Hamilton By and Through Hamilton v. Vaden*, 1986 OK 36, 721 P.2d 412, 415.

14. *Columbian National Life Ins. Co. v. Lemmons*, 1923 OK 1147, 222 P. 255 (Court relied on 1921 Okla. Stat. 1198 (now codified at 58 O.S.2011 § 252) and stated a cause of action would survive to the administrator if founded on a contract, and then observed "the same rule applies in actions on implied or quasi contracts, although founded upon a tort.").

58 O.S.2011 § 252: "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by or against their respective testators and intestates."

15. *Ouellette v. State Farm Mutual Automobile Ins. Co.*, 1994 OK 79, n. 14, 918 P.2d 1363,1366.

16. *Boler*, 2014 OK 80, ¶ 27, 336 P.3d at 477, and authority cited in note 11 *supra*.

17. *Nealis v. Baird*, 1999 OK 98, ¶ 19, 996 P.2d 438, 446.

18. *Estate of Hicks ex rel. Summers v. Urban East, Inc.*, 2004 OK 36, ¶ 14, 92 P.3d 88, 92 citing *Finnell v. Jebco Seismic*, 2003 OK 35, 67 P.3d 339, 344.

19. *Estate of Hicks, supra* and *Finnell, supra*, at note 18.

20. *See*, for examples, both *Nicholas v. Morgan*, 2002 OK 88, ¶¶12, 17, 58 P.3d 775, 780, 782, discussing former 85 O.S. § 44, and the prohibition on "double recovery," and *ACCOSIF v. American States Ins. Co.*, 2000 OK 21, ¶¶ 7-8, 1 P.3d 987, 992-993, discussing a difference between a subrogation claim and a statutory recoupment against a workers' compensation claimant.

21. Compare, (1) *Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, n. 70, 376 P.3d 212, citing *Thomas v. E-Z Mart Stores, Inc.*, 2004 OK 82, ¶ 21, 102 P.3d 133, 139, where the Court distinguished joint tortfeasors causing injury by concerted actions pursuant to a common purpose or design, and concurrent tortfeasors causing a single and indivisible injury by independent actions with (2) *Hoyt v. Paul R. Miller, M.D., Inc.*, 1996 OK 80, 921 P.2d 350, 355-356, explaining a physician is a "successive tortfeasor," and not a joint or concurrent one, when the physician negligently treats a plaintiff suffering from a previous tort injury.

22. One court has stated the concurrent-breach-of-contract doctrine is "[w]hen two defendants independently breach separate contracts, and it is not 'reasonably possible' to segregate the damages, the defendants are jointly and severally liable." *In re: Emerald Casino, Inc.*, 867 F.3d 743, 765 (7th Cir. 2017) quoting *InsureOne Indep. Ins. Agency, LLC v. Hallberg*, 364 Ill.Dec. 451, 976 N.E.2d 1014, 1030 (App. Ct. 1st Dist. 2012). *Cf. DKN Holdings LLC v. Faerber,* (2015) 61 Cal.4th 813, 189 Cal.

Rptr.3d 809, 352 P.3d 378, 385 (citing Restatement (Second) of Judgments, § 49, and stating "The injured party has separate claims against each obligor, regardless of whether the obligation arises from a tort or breach of contract."); *Restatement (Second) Judgments*, § 49 (1982) ("A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor."); *Carris v. John R. Thomas and Associates, P.C.*, 1995 OK 33, 896 P.2d 522, 526 (distinguishing tort claim and contract claim against different parties arising from the same set of facts). We expressly decline to address the applicability of Restatement (Second) of Judgments § 49 or the concurrent-breach-of-contract doctrine in Oklahoma jurisprudence or its application herein. *See In Re Guardianship of Berry*, 2014 OK 56, n. 43, 335 P.3d 779 and *Young v. Station 27, Inc.*, 2017 OK 68, n. 36, 48, 404 P.3d 829 cited in note 23 *infra.*

23. We need not address whether the asserted cause of action exists or the effect of the paid compensation benefits upon that cause of action because the workers' compensation remedy acts as procedural bar to plaintiff's District Court action as we have explained herein. This is so because (1) the parties have not defined the nature of the District Court cause of action and addressed the successive/concurrent issues, (2) our disposition herein makes such inquiry hypothetical and advisory, and (3) we do not address such issues in an appeal. *In Re Guardianship of Berry*, 2014 OK 56, n. 43, 335 P.3d 779 (we decline to address a purely hypothetical question in an appeal); *Young v. Station 27, Inc.*, 2017 OK 68, n. 36, 48, 404 P.3d 829 (issues present but not briefed by the parties may be treated on appeal as hypothetical).

24. *Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, n. 11, 398 P.3d 11, 17, citing *Shebester v. Triple Crown Insurers*, 1992 OK 20, 826 P.2d 603, 610; *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681, 684.

25. *Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, ¶ 17, 398 P.3d at 17.

26. 15 O.S.2011 § 29: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

27. *Meeks v. Guarantee Ins. Co.*, 2017 OK 17, n.4, & ¶ 9, 392 P.3d 278, 284.

28. *Sizemore v. Continental Cas. Co.*, 2006 OK 36, ¶ 14, 142 P.3d 47, 51.

29. 2009 OK 33, 213 P.3d 565.

30. *Id*. 2009 OK 33, ¶ 10, 213 P.3d at 568.

31. *Summers*, 2009 OK 33, ¶ 9, 213 P.3d at 568.

32. *Id*. 2009 OK 33, ¶ 13, 213 P.3d at 569.

33. 2017 OK 17, 392 P.3d 278.

34. *Sizemore v. Continental Cas. Co.*, 2006 OK 36, 142 P.3d 47.

35. *Meeks*, 2017 OK 17, ¶ 13, 392 P.3d at 285.

36. *Meeks*, 2017 OK ¶ 9, 392 P.3d at 284, citing 85 O.S. Supp. 2008, Ch. 4, Workers' Compensation Court Rules, Rule 58. Rule 58, Certification of awards, states:

> "An application for an order directing certification to district court of any workers' compensation award may be heard after notice to the respondent and insurance carrier has been given at least ten (10) days before the scheduled trial thereon. At such trial the respondent and insurance carrier shall be afforded an opportunity to show good cause why the application should not be granted."

37. *Id*. 2017 OK 17, ¶ 14, 392 P.3d at 285.

38. *Id*. 2017 OK 17, ¶ 14, 392 P.3d at 385 ("This rule is applicable whether an employee seeks judicial relief for a nonmonetary award, e.g., medical benefits, or where an employer has failed to comply with, but ultimately satisfies, a WCC award of monetary benefits.").

39. *Id*. 2017 OK 17, ¶ 1, 392 P.3d at 281.

40. *Meeks*, 2017 OK 17, ¶ 14, 392 P.3d 278, 285.

41. *F. W. Woolworth Co. v. Todd*, 1951 OK 36, 231 P.2d 681, 684 (the right of action to recover damages for the wrongful death of a person was provided Oklahoma Statutes 1893 § 4313 (12 O.S. § 1053), and that "was one legislative act which the framers of the constitution desired to keep intact, and to that end they included Section 7, Article 23 in the constitution.").

Okla. Const. Art. 23, § 7, provides:

> The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers' Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive, and the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions.

42. *Roberts v. Merrill*, 1963 OK 250, 386 P.2d 780, 783.

43. *Hughes Drilling Co. v. Crawford*, 1985 OK 16, 697 P.2d 525, 529, citing *Rios v. Nicor Drilling*, 1983 OK 74, 665 P.2d 1183.

44. 2014 OK 101, 341 P.3d 70.

45. 2014 OK 101, ¶ 3, 341 P.3d 70.

46. *Sizemore*, 2006 OK 36, ¶ 26,142 P.3d at 54.

47. *Meeks*, 2017 OK 17, ¶ 14, 392 P.3d 278, 285.

48. Okla. Const. Art. 23 § 7; *Rios v. Nicor Drilling*, 1983 OK 74, 665 P.2d 1183.

49. The 1950 amendment to Art. 23 ¶ 7 did not "abolish or abridge" a remedy, but substituted one remedy for another. *Roberts v. Merrill*, 1963 OK 250, 386 P.2d 780, 783.

50. Okla. Const. Art. 5 § 46 provides in part: " The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate...."

2018 OK 13

Oklahoma Association of Optometric Physicians and Dr. Michelle Welch Petitioners, v. Kiley Raper and Gwendolyn Caldwell Respondents.

No. 115,938. February 6, 2018

IN RE INITIATIVE PETITION NO. 415, STATE QUESTION NO. 793
ORIGINAL PROCEEDING TO DETERMINE THE VALIDITY OF INITIATIVE PETITION NO. 415, STATE QUESTION NO. 793

¶0 Initiative Petition No. 415, State Question No. 793, proposes to amend Article 20 of the Oklahoma Constitution by adding a new Section 3. The purpose of the amendment is to merge the rights and restrictions placed on optometrists and opticians, while eliminating restraints on the ability to practice their professions in retail mercantile establishments. A protest was filed contesting the validity of the initiative petition as unconstitutional logrolling in violation of the general subject requirement mandated in Okla. Const. art. 24, § 1.

ORIGINAL JURISDICTION ASSUMED
INITIATIVE PETITION NO. 415 STATE QUESTION NO. 793
DECLARED LEGALLY VALID

V. Glenn Coffee, Cara Rodriguez, Denise Lawson, GLENN COFFEE & ASSOCIATES, Oklahoma City, Oklahoma, for Petitioners.

Robert G. McCampbell, Travis V. Jett, GABLEGOTWALS, Oklahoma City, Oklahoma for Respondents.

Colbert, J.

¶1 The sole issue presented for consideration is whether Initiative Petition No. 415, State Question No. 793, satisfies the single subject

requirement of article 24, section 1, of the Oklahoma Constitution. We limit our inquiry to deciding the "challenges fundamental to the validity of the Petition as a whole." In re Initiative Petition No. 348, State Question No. 640, 1991 OK 110, ¶ 2, 820 P.2d 772, 774. In doing so, we reemphasize that it is the prerogative of the Oklahoma voters, not this Court, to determine the propriety of Initiative Petition No. 415. See Id. For the reasons expressed herein, we conclude that the proposed amendment embraces one general subject – the provision of optical care services within retail mercantile establishments – and therefore, complies with article 24, section 1, of the Oklahoma Constitution. In so holding, the proponents of the petition may proceed with the remaining statutory requirements.

I. BACKGROUND

A. The Current Law.

¶2 Current Oklahoma law prohibits any optometrist or optician from practicing their profession within a retail mercantile establishment. Okla. Stat. tit. 59, § 596.[1] The purpose of the prohibition is to "establish a minimum standard of sanitation, hygiene and professional surroundings." Okla. Admin. Code tit. 505:10-5-1. To this end, no optometrist may practice his or her profession within a room or part of a room occupied by a wholesale or retail mercantile establishment. Id. at 505:10-5-1 (4). In addition, all patient entrances for all optometric offices must open onto a "public street, hall, lobby or corridor." Id. at 505:10-5-1 (2). Further, the law directs the Oklahoma Board of Examiners for Optometry to prescribe such rules and regulations as necessary to effect the minimum health and safety standards and to determine what constitutes unprofessional or unethical actions in relation thereto. Okla. Stat. tit. 59, § 585 (A)(5).

B. The Challenged Measure.

¶3 On March 21, 2017, Kiley Raper and Gwendolyn Caldwell (Proponents) filed Initiative Petition No. 415, State Question No. 793 (Initiative Petition) with the Oklahoma Secretary of State. By initiative process, the Initiative Petition seeks to amend Article 20 of the Oklahoma Constitution by adding a new section. The proposed section, Section 3, changes existing law by permitting optometrists and opticians to practice their trades in retail mercantile establishments, such as a Wal-Mart or an enclosed shopping mall. The section purports to eliminate any location restraints on the two occupations by prohibiting laws that: (1) discriminate based on location or setting of the practice, (2) require an optometric office, within a retail mercantile establishment, to have an entrance opening onto a public street, hall, lobby or corridor, or (3) restrain, abridge or infringe on the ability of the retail mercantile establishment from selling, allowing the sale, or providing for the sale of optical goods and services, upon prescription, to the general public within the premises of the retail mercantile establishment. The proposed ballot title also preserves Legislative authority to "restrict optometrists from performing surgeries within retail mercantile establishments, limit the number of locations at which an optometrist may practice, maintain optometric licensing requirements, require optometric offices to be in a separate room of a retail mercantile establishment, and impose health and safety standards."[2]

¶4 Petitioners, Oklahoma Association of Optometric Physicians (OAOP) and Dr. Michelle Ward (collectively Opponents), filed an Application to Assume Original Jurisdiction, seeking review of the Initiative Petition's constitutionality under article 24, section 1, of the Oklahoma Constitution. Opponents allege that optometrists and opticians are two distinct professions, one a medical provider prescription writer; and the latter, a supplier/prescription filler. Because of the distinctions, Opponents contend that including both professions in one initiative petition that permits their respective professions to render services in retail shops violates the general subject rule and constitutes logrolling under article 24, section 1.

¶5 Proponents defend the measure, emphasizing the long-standing interrelationship between the two professions in the commercial context. Proponents' express objective is based on the idea that each step in the optical care delivery chain – eye examination and prescription (optometrist), and fitting for eye wear (optician) – can be accomplished in one convenient location: retail mercantile establishments. According to the Proponents, eye wear retailers and retail mercantile establishments should be able to compete with optometrists who can offer the convenience of one stop shopping for eye examination and purchase of eye wear. Thus, the effect and stated goal of the petition is to permit the expansion of optical care services into retail mercantile establishments.

II. DISCUSSION

¶6 "The first power reserved by the people is the initiative … " . Okla. Const. art. 5, § 2. Inherent, is "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Const. art. 5, § 1. When presented with a challenge to an initiative petition, this Court will assume original jurisdiction to determine the validity of the proposed initiative petition. In re Initiative Petition 403, State Question No. 779, 2016 OK 1, ¶ 3, 367 P.3d 472, 474. A proposed ballot initiative, then, will not be refused or declared invalid in advance of a vote of the people without a "clear or manifest" showing of unconstitutionality. Id. (citing In re Initiative Petition No. 358, State Question No. 658, 1994 OK 27, ¶ 7, 870 P.2d 782, 785). "Opponents bear the burden of demonstrating the proposed initiative petition presented in this case clearly and manifestly violates the Oklahoma Constitution." Id. (citing In re Initiative Petition No. 362, State Question No. 669, 1995 OK 77, ¶ 12, 899 P.2d 1145, 1151).

¶7 We recognize that the power of the people "to institute change through the initiative process is a fundamental characteristic [and entitlement] of Oklahoma government." Id. (citing In re Initiative Petition No. 360, State Question No. 662, 1994 OK 97, ¶ 9, 879 P.2d 810, 814). Accordingly, this Court will diligently protect that entitlement. Id. We have said,

> The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law. Because the right of the initiative is so precious, all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.

Id. (quoting In re Initiative Petition No. 382, State Question No. 729, 2006 OK 45, ¶ 3, 142 P.3d 400, 403 (internal citations omitted)). As a result, we limit consideration of the challenged provision accordingly.

A. ONE GENERAL SUBJECT RULE

¶8 The gravamen of Opponents' challenge is that Initiative Petition No. 415, State Question No. 793, embraces more than one general subject, in violation of article 24, section 1; and is thus, unconstitutional logrolling. That constitutional provision, in relevant part, states:

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

Okla. Const. art. 24, § 1.

¶9 The purpose of the one general subject rule, as set out in article 24, section 1, of the Oklahoma Constitution, is "to prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which is concealed or not readily understandable," … and to "afford the voters freedom of choice and prevent 'logrolling,' or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts." In re Initiative Petition No. 314, State Question No. 550, 1980 OK 174, ¶ 59, 625 P.2d 595, 603 (quoting Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911, 914 (1960)); See also In re Initiative Petition No. 403, ¶ 13, 367 P.3d at 477. "Logrolling" is defined as the "practice of ensuring the passage of a law by creating one choice in which a legislator or voter is forced to assent to an unfavorable provision to secure passage of a favorable one" or the converse. Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, ¶ 4, 302 P.3d 789, 792. In examining an anti-logrolling claim, we apply the germaneness test. Thomas v. Henry, 2011 OK 53, ¶ 26, 260 P.3d 1251, 1260. Our focus "is whether a voter (or legislator) is able to make a choice without being misled [or] forced to choose between two unrelated provisions contained in one measure." Id. That is, if it appears that the provisions are misleading or so unrelated that the voters would be faced with an "unpalatable all-or-nothing choice," then an unconstitutional logrolling has occurred Id.; Douglas, ¶ 6, 302 P.3d at 792. The purpose of this Court's examination is "not to hamper legislation but to prevent the legislature from making a bill 'veto proof' by combining two

totally unrelated subjects in one bill." Thomas, ¶ 26, 260 P.3d at 1260.

¶10 Opponents' summary contention is that, although both Optometrists and Opticians work in connection with the eyes, their roles are patently distinct – one being a medical professional and the other a trained supplier of optical goods. They assert that since the proposed measure removes any restrictions prohibiting the locations of both professions, it must be presented in two separate proposals. Opponents' claim is that the Initiative Petition is not a workable whole; but instead, two separate and distinct considerations in contravention of the one general subject rule. To support their Petition, Opponents point to Initiative Petition No. 344, State Question No. 630, 1990 OK 75, 797 P.2d 326, and In re Initiative Petition No. 314, 1980 OK 174, 625 P.2d 595. But, Opponents' argument is unavailing.

¶11 At the outset, we note that under existing law, most statutory sections governing each of the professions are codified in title 59 under separate chapters: Chapter 13 for optometrists and Chapter 24 for Sale of Optical Goods. See, Okla. State. tit. 59, §§ 581 et seq. and Okla. Stat. tit. 59, §§ 941 et seq., respectively. Yet, there exists some crossover in the statutes governing the two professions. See Okla. Stat. tit. 59, § 943.1-943.3 (rules governing both professions in relation to their responsibilities in prescribing and providing eyewear); Okla. Stat. tit. 59, § 596 (prohibits both optometrists and opticians from practicing in retail mercantile establishments); and Okla. Stat. tit. 59, § 942(B) (specifies that the optician fills the prescription for optical devices prescribed by the optometrist, but that the optometrist remains responsible for the full effect of the appliance). Clearly, a statutory and regulatory scheme exists which displays a natural interrelationship between the two professions. In any case, the main thrust of the current governing statutes and administrative rules is focused on delivering high quality visual care services while ensuring that the health and safety of the consuming public are protected. Okla. Stat. tit. 59, § 585 (A)(5).

¶12 Notwithstanding the obvious interrelationship between the two professions, Opponents urge us to apply the reasoning employed in Initiative Petition No. 344, 1990 OK 75, 797 P.2d 326. The proponents there attempted to repeal and replace Article VI of the Oklahoma Constitution in its entirety. The main thrust of the initiative petition was to redefine the executive branch. The proponents claimed that the initiative only implicated one general subject as all of the sections within the initiative related to the executive branch of State government. Id. Upon our examination, we determined that the initiative petition completely redefined the executive branch and addressed numerous subjects. At least twenty-six areas were implicated and identified by this Court. And, "[m]any of the changes made by the … [p]etition [were] not incidental or necessary to an overall design" of the initiative. Id. ¶ 6, 797 P.2d at 328-29. The subjects were too loosely connected, misleading, and included subject matters which were only tenuously related to the other topics involved. Thus, we held that the initiative under review violated the anti-logrolling provision because it simply did not give the voters a choice. Id. ¶ 9, 797 P.2d at 329.

¶13 This Court faced the same considerations in examining the initiative petition in In re Initiative Petition No. 314, 1980 OK 174, 625 P.2d 595. There, the proponents nominally claimed that the initiative encompassed the single subject of controlling alcoholic beverages within this State. Id. ¶ 37, 625 P.2d at 600. Again, after close examination, the Court identified up to twenty-one separate changes to the Constitution that would be affected should the initiative become law. The Court concluded that the subject areas were so separate and diverse that they must "fall as a whole." Id. ¶ 75, 625 P.2d at 607. No interdependence between the proposed sections existed, especially since the subjects were so diverse as to include permitting, franchising and liquor by the drink. Id. In order to pass constitutional muster, the Court determined that there needed to be at least three separate proposals to embrace all of the elements put forth in the initiative then under review. Id. ¶ 81, 625 P.2d at 608.

¶14 The takeaway of Initiative Petition No. 344, 1990 OK 75, 797 P.2d 326, and In re Initiative Petition No. 314, 1980 OK 174, 625 P.2d 595, is not that an initiative petition cannot contain multiple provisions. But, rather, the multiple provisions must be interrelated and interdependent, forming an interlocking package. In re Initiative Petition No. 403, ¶ 12, 367 P.3d at 476.

¶15 A recent case decided by this Court is more akin to the Initiative Petition advanced here. In In re Initiative Petition No. 403, 2016 OK 1, 367 P.3d 472, proponents of an initiative

petition sought to add a new article to the Oklahoma Constitution, Article 13-C, creating the Oklahoma Education Improvement Fund, to improve and create funding mechanisms for public education within the State. Id. ¶ 1, 367 P.3d at 473. The initiative included seven separate articles. Upon this Court's review, we determined that each of the articles were "reasonably interrelated and interdependent, forming an interlocking 'package'." Id. ¶ 12, 367 P.3d at 476 (quoting In re Initiative Petition No. 314, ¶ 67, 625 P.2d at 605). As the initiative was drafted so that each component was necessary to the accomplishment of one general design, we held that the initiative did not violate the anti-logrolling provision. Id.

¶16 This Court examined another multi-provision initiative petition in In re Initiative Petition No. 360, 1994 OK 97, 879 P.2d 810. There, we examined an initiative that imposed term limits on federally elected Oklahoma representatives serving in the United States Congress. The initiative involved two separate and distinct, yet related, occupations: U.S. Representatives and U.S. Senators. ¶ 3, 879 P.2d at 813. There, the opponents asserted that the proposal encompassed two separate subjects – namely, term limits for U.S. Representatives and term limits for U.S. Senators. ¶ 6, 879 P.2d at 813. In our reasoning, we acknowledged that the proposal could have been brought in two separate initiatives, but concluded that voters could reasonably recognize that the goal of the initiative, as a whole, was to limit the terms of congressional representatives, thereby making the use of two initiatives superfluous. ¶ 20, 879 P.2d at 817. We held that the one general subject rule had not been violated. Id. In that case, the sole purpose of the initiative was to limit the terms of service for federally elected representatives and the initiative accomplished that goal. ¶ 19, 879 P.2d at 817. There, the one general subject was term limits. ¶ 20, 879 P.2d at 817.

¶17 Turning to the challenged Initiative Petition here – the proposed measure impacts two separate professions, both relating to the provision of services for eye care health. Yet, each profession is reliant upon the other. One profession provides diagnostic and prescriptive services for correction of vision problems (optometrists); and, the other profession carries out and implements those prescribed solutions (opticians). Although the measure is comprised of multiple elements, it, nonetheless, creates a single general design that stands as a whole. The one general subject is the expansion of optical care delivery services located in retail mercantile establishments for two interrelated eye care professions. Like the initiatives examined in In re Initiative Petition No. 360 and In re Initiative Petition No. 403, it is reasonable to conclude that voters will recognize that the sole objective is to expand the eye health care delivery services available within the State. Should the Initiative Petition pass, both the diagnostic side (optometrists) and the eyewear delivery side (opticians), may deliver their respective services in retail or wholesale mercantile establishments. Whereas here – two separate and distinct, though interrelated occupations are impacted – we find that no unconstitutional logrolling has occurred. Therefore, we conclude that Initiative Petition No. 415, State Question 793, does not constitute logrolling in contravention of the one general subject requirement found within article 24, section 1, of the Oklahoma Constitution. Under the anti-logrolling provision, an initiative petition may only contain one general subject in order to pass constitutional muster. See In re Initiative Petition No. 314, 1980 OK 174, 625 P.2d 595. In the current case, we find that it does. We hold that the Initiative Petition affects only one general area, laws relating to the practice of optometrists and opticians within retail mercantile establishments.

B. PUBLIC POLICY – COMMERCIALISM – POLICE POWERS

¶18 Opponents finally urge that public policy and statutory restrictions against commercialism weigh against validation of Initiative Petition No. 415, State Question 793. Specifically, Opponents allege that the challenged measure would be in contravention of Okla. Stat. tit. 59, § 593 which states that:

> It is the public policy of the State of Oklahoma that optometrists rendering visual care to its citizens shall practice in an ethical, professional manner; that their practices be free from any appearance of commercialism; that the visual welfare of the patient be the prime consideration at all times; and that optometrists shall not be associated with any nonprofessional person or persons in any manner which might degrade or reduce the quality of visual care received by the citizens of this state.

Okla Stat. tit. 59, § 593. Opponents also cite Massengale v. Oklahoma Bd. of Exam'rs in Op-

tometry, 2001 OK 55, 29 P.3d 558, in support of the proposition that an arrangement or association between optometrists and opticians has the potential for leading to degradation of, or reduced quality of, visual care contrary to the requirements set out in section 593.

¶19 Opponents raise an extensive, yet hypothetical, argument against the proposed Initiative Petition based on the perceived taint of commercialism should the Initiative Petition pass. Nevertheless, this is beyond the scope of today's review.

¶20 Lastly, Opponents also infer that passage of the Initiative Petition will in some way hinder the State's right to exercise its police power to continue to regulate the occupations for the health and safety benefits of the public. Opponents argument is without foundation in this regard. The plain text of Initiative Petition No. 415, State Question 793, expressly reserves to the Legislature the authority to establish "health and safety standards for optical goods and services". The Massengale court also reaffirmed Legislative police powers for the purpose of safety regulation. ¶23, 29 P.3d at 568. Based on a reading of the Initiative Petition, optometrists and opticians remain subject to legislatively enacted laws and the governing bodies regulating their respective professions. This Court will not assume that either profession would be permitted to practice in an unsafe or unhealthy manner as a result of the voters' election to pass the Initiative Petition.

III. CONCLUSION

¶21 For the reasons discussed herein, we find that Initiative Petition No. 415, State Question 793, contains one general subject and does not constitute logrolling in violation of article 24, section 1, of the Oklahoma Constitution. In so holding, the proponents of the petition may proceed with the remaining statutory requirements.

ORIGINAL JURISDICTION ASSUMED
INITIATIVE PETITION NO. 415 STATE QUESTION NO. 793 DECLARED LEGALLY VALID

CONCUR: Gurich, V.C.J, Kauger, Edmondson, Colbert, Reif, and Wyrick, JJ.

NOT PARTICIPATING: Winchester, J.

DISSENT BY SEPARATE WRITING: Combs, C.J.

COMBS, C.J., dissenting:

¶1 Initiative Petition No. 415, State Question No. 793 constitutes unconstitutional logrolling in violation of Okla. Const. art. 24, § 1. It presents voters with an unpalatable all-or-nothing choice by simultaneously loosening restrictions on very different professions that have separate regulatory concerns. *See Thomas v. Henry*, 2011 OK 53, ¶26, 260 P.3d 1251 ("The question is not how similar two provisions in a proposed law are, but whether ... the provisions ... are so unrelated that many of those voting on the law would be faced with an unpalatable all-or-nothing choice."). If any one of the propositions in an initiative petition such as this is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted and the proposed amendment falls within the constitutional prohibition. *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶8, 797 P.2d 326; *In re Initiative Petition No. 314*, 1980 OK 174, ¶62, 625 P.2d 595.

¶2 Though the work of optometrists and opticians is related, insomuch as both professions are part of the eye care industry, they are still very different when it comes to role, practice and regulation. As Petitioners correctly point out, optometrists are medical professionals and opticians are trained suppliers of specialized goods. Optometrists are subject to strict licensing and regulation, in part focused on providing a safe and clean environment. *See* 59 O.S. 2011 § 585(A)(5); OAC 505:10-5-1. In the end, optometrists are held responsible for the devices furnished by opticians. *See* 59 O.S. 2011 § 942(B)(2). The differences between the two roles are fairly stark. In fact, the differences between the two are similar to the differences between dentists and denturists; differences which this Court has noted repeatedly over the past few decades. *Butler v. Bd. of Governors of Registered Dentists of Okla.*, 1980 OK 162, 619 P.2d 1262; *Berry v. Bd. of Governors of Registered Dentists of Okla.*, 1980 OK 45, 611 P.2d 628; *Bd. of Governors of Registered Dentists of Okla. v. Burk*, 1976 OK 70, 551 P.2d 1122.

¶3 Respondents and the majority both cite to *In re Initiative Petition No. 360, State Question No. 662*, 1994 OK 97, 879 P.2d 810, where this Court determined that a proposed amendment did not violate the constitution merely because it attempted to enact term limits on both Senators and Representatives, though each have distinct responsibilities. Those two jobs, though

having separate responsibilities, do not suffer from the same stark difference that is medical professional vs. craftsman and they do not have different impacts on public health. What matters is the choice forced upon the voter, and in this matter it is easy to see why a voter might reasonably favor looser regulation and expanded access to opticians but balk at the same changes being made to the profession of optometry. Respectfully, I must dissent.

Colbert, J.

1. Section 596 states:

> It shall be unlawful for any optometrist to render optometric care in any retail, mercantile establishment which sells merchandise to the general public; and it shall be unlawful for any person to display, dispense, sell, provide or otherwise purvey to the public, prescription eyeglasses, prescription lenses, frames or mountings for prescription lenses, within or on the premises of in any manner, any retail or mercantile establishment in which the majority of the establishment's income is not derived from the sale of such prescription optical goods and materials.

Okla. Stat. tit. 59, § 596.

2. The relevant text of the proposed ballot title and initiative petition are as follows:

PROPOSED BALLOT TITLE

This measure adds a new Section 3 to Article 20 of the Oklahoma Constitution. Under the new Section, no law shall infringe on optometrists' or opticians' ability to practice within a retail mercantile establishment, discriminate against optometrists or opticians based on the location of their practice, or require external entrances for optometric offices within retail mercantile establishments. No law shall infringe on retail mercantile establishments' ability to sell prescription optical goods and services. The Section allows the Legislature to restrict optometrists from performing surgeries within retail mercantile establishments, limit the number of locations at which an optometrist may practice, maintain optometric licensing requirements, require optometric offices to be in a separate room of a retail mercantile establishment, and impose health and safety standards. It does not prohibit optometrists and opticians from agreeing with retail mercantile establishments to limit their practice. Laws conflicting with this Section are void. The Section defines "laws," "optometrist," "optician," "optical goods and services," and "retail mercantile establishment."

Shall this proposal be approved by the people?

For the proposal – YES

Against the proposal – NO

A "YES" vote is a vote in favor of this measure. A "NO" vote is a vote against this measure.

INITIATIVE PETITION

To the Honorable Mary Fallin, Governor of Oklahoma:

We, the undersigned legal voters of the State of Oklahoma, respectfully order that the following proposed amendment to the Constitution shall be submitted to the legal voters of the State of Oklahoma for their approval or rejection at the regular general election, to be held on the 6th day of November, 2018, (or such earlier special election as may be called by the Governor) and each for himself says: I have personally signed this petition; I am a legal voter of the State of Oklahoma; my residence or post office are correctly written after my name. The time for filing this petition expires ninety days from _____. The question we herewith submit to our fellow voters is:

Shall the following proposed new Section 3 to Article 20 of the Constitution be approved?

BE IT ENACTED BY THE PEOPLE OF OKLAHOMA THAT A NEW SECTION 3 OF ARTICLE 20 OF THE OKLAHOMA CONSTITUTION BE APPROVED:

§ 3. RIGHT OF OPTOMETRISTS AND OPTICIANS TO PRACTICE IN RETAIL MERCANTILE ESTABLISHMENT

A. No law shall restrain, abridge or infringe on the ability of optometrists or opticians to practice their respective professions within a retail mercantile establishment.

B. No law shall discriminate against an optometrists or opticians based to [sic] the location and setting of their practice.

C. No law shall require an optometric office located within a retail mercantile establishment to have an entrance opening on a public street, hall, lobby, or corridor.

D. No law shall restrain, abridge or infringe on the ability of a retail mercantile establishment to sell, allow the sale, or provide for the sale of optical goods and services, upon prescription, to the general public within the premises of the retail mercantile establishment.

E. Notwithstanding the limitations of this section, the Legislature may, by statute:

1. limit or prohibit optometrists from performing laser or nonlaser surgical procedures within a retail mercantile establishment;
2. limit the number of office locations at which an optometrist may practice;
3. maintain licensing requirements for the practice of optometry, provided those requirements do not impose restrictions on the location where services are provided or otherwise conflict with subsections A – D of this section;
4. require that an optometric office, when located within a retail mercantile establishment, be located within a separate area or room of that establishment, provided that any such requirement must permit direct access to and from the optometric office from inside the retail mercantile establishment; or
5. impose minimum health and safety standards for optical goods and services, provided such standards do not discriminate against any provider of optical goods and services.

F. Nothing in this section or in Article 23, § 8 of this Constitution shall be construed as prohibiting optometrists or opticians from agreeing with a retail mercantile establishment to limit the scope of their practice.

G. This section shall become effective upon adoption, and laws in conflict with this section shall be deemed null and void. After this section is effective, an optometrist, optician, or retail mercantile establishment may bring a declaratory judgment action to determine whether this section affects the validity of a law.

H. As used in this section:

1. "Law" means any state or local law, including statutes, regulations, rules, ordinances, zoning provisions, and judicial decisions, either now in force or hereafter enacted or issued;
2. "Optometrist" means a person licensed in Oklahoma to practice optometry;
3. "Optician" means a person who fills prescriptions for ophthalmic lenses, including but not limited to spectacles and contact lenses, from licensed optometrists or ophthalmologists;
4. "Optical goods and services" means eyewear, including prescription spectacles and contact lenses, and all services associated with providing, modifying, and repairing such eyewear; and
5. "Retail mercantile establishment" means a business establishment selling merchandise to the general public.

February

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

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

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

19 **OBA Closed** – Presidents Day

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

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

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

OBA Immigration Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa R. Lujan 405-600-7272

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

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

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

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

March

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

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

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

6 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

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

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

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

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

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

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

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE *OKLAHOMA INDIGENT DEFENSE SYSTEM* BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2019 pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2019 (July 1, 2018 through June 30, 2019) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

ALFALFA, COMANCHE, COTTON, HUGHES, JEFFERSON, LEFLORE, MAJOR, MAYES, SEMINOLE, STEPHENS, WOODS

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2019 (July 1, 2018 through June 30, 2019). Offers may be submitted for complete coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 8, 2018.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2019 OFFER TO CONTRACT **TIME RECEIVED:**
_____ COUNTY / COUNTIES **DATE RECEIVED:**

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2019 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, March 8, 2018 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 9, 2018, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 9, 2018, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 16th, 2018**, at ***a place to be announced***.

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2019 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2014, FY-2015, FY-2016, FY-2017 and FY-2018 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2661.**

* * * * * * * * * * * *

REQUEST FOR OIDS FY-2019 OFFER-TO-CONTRACT PACKET

Name: _____ OBA #:_____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest _____

_____

_____

Professional Responsibility Tribunal Annual Report

January 1, 2017 – December 31, 2017
SCBD No. 6623

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitions for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint filed with the Chief Justice of the Supreme Court. Petitions for reinstatement are filed with the Clerk of the Supreme Court.

COMPOSITION AND APPOINTMENT

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 whom are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to Rule 4.2, RGDP, members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objective. They also elect a Chief Master and Vice-Chief Master, both of whom serve for a one-year term. PRT members receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2017 were: Angela Ailles Bahm, Oklahoma City; Murray E. Abowitz, Oklahoma City; Jeremy J. Beaver, McAlester; M. Joe Crosthwait, Jr., Midwest City; Thomas W. Gruber, Oklahoma City; John B. Heatly, Oklahoma City; Gerald L. Hilsher, Tulsa; Douglas Jackson, Enid; Susan B. Loving, Edmond; Kelli M. Masters, Oklahoma City; Jody R. Nathan, Tulsa; Mary Quinn-Cooper, Tulsa; Rodney D. Ring, Norman; Theodore P. Roberts, Norman; Michael E. Smith, Oklahoma City; Louis Don Smitherman, Oklahoma City; Neal E. Stauffer, Tulsa; Noel K. Tucker, Edmond; and Ken Williams, Jr., Tulsa.

The non-lawyer members who served during all or part of 2017 were: Nicole Beam, Edmond; Steven W. Beebe, Duncan; Matthew Burns, Edmond; Curtis Calvin, Oklahoma City; James W. Chappel, Norman; Christian C. Crawford, Stillwater; Linda C. Haneborg, Oklahoma City; Donald Lehman, Tulsa; Kirk V. Pittman, Seiling; and Clarence Warner, Norman.

The annual meeting was held on June 28, 2017, at the Oklahoma Bar Association offices. Agenda items included a presentation by Gina Hendryx, General Counsel[1] of the Oklahoma Bar Association, recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT. M. Joe Crosthwait Jr. was elected Chief Master

and Rodney D. Ring was elected Vice-Chief Master, each to serve a one-year term.

GOVERNANCE

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

ACTION TAKEN AFTER NOTICE RECEIVED

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three (3) PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitioners are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Presiding Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in *ex parte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

TRIAL PANEL REPORTS

After the conclusion of a hearing, the Trial Panel prepares a written report to the Oklahoma Supreme Court. The report includes findings of facts on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petitioner, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record, and proceedings should be imposed on the respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory. The Oklahoma Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Oklahoma Supreme Court is bound by neither the findings nor the recommendation of action, as its review of each proceeding is *de novo*.

ANNUAL REPORTS

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT oper-

ates from July 1 through June 30. However, annual reports are based on the calendar year. Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2017.

ACTIVITY IN 2017

At the beginning of the calendar year, six (6) disciplinary and two (2) reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered "pending" from the time the PRT *receives notice* of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the following: Five (5) Rule 6, RGDP matters; Eleven (11) Rule 7, RGDP matters; Six (6) Rule 8, RGDP matters; and Ten (10) Rule 11, RGDP reinstatement petitions. Trial Panels conducted a total of eleven (11) hearings; five (5) in disciplinary proceedings and six (6) in reinstatement proceedings.

On December 31, 2017, a total of 11 matters, six (6) disciplinary and five (5) reinstatement proceedings, were pending before the PRT.

CONCLUSION

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding, The members' commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 1st day of February, 2018.

PROFESSIONAL
RESPONSIBILITY TRIBUNAL

M. Joe Crosthwait Jr.,
Chief Master

1. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of welcoming members and to answer any questions of PRT members. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

Proceeding Type	Pending Jan. 1, 2017	New Matters In 2017	Hearings Held 2017	Trial Panel Reports Filed	Pending Dec. 31, 2017
Disciplinary	5	22**	5*	5	6
Reinstatement	2	10	6	5	5

** In 2017, five (5) disciplinary hearings were held over for a total of eight (8) days*

***Inlcudes cases filed but dismissed by Supreme Court prior to PRT involvement*

Court of Criminal Appeals Opinions

2018 OK CR 1

IN RE: REVISION OF PORTION OF THE RULES OF THE COURT OF CRIMINAL APPEALS

CASE NO. CCAD-2018-1. February 5, 2018

ORDER REVISING AND REPUBLISHING PORTION OF THE RULES OF THE COURT OF CRIMINAL APPEALS

¶1 We find that revision of Rule 5.2 and Rule 5.3(B) of the Rules for the Oklahoma Court of Criminal Appeals is necessary for the timely preparation of the record on appeal in post-conviction appeals. Pursuant to the provisions of Section 1051(b) of Title 22 of the Oklahoma Statutes, we hereby revise, adopt, promulgate and republish portions of the *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2018), as set forth as follows:

SECTION V. PROCEDURES FOR APPEALING FINAL JUDGMENT UNDER POST-CONVICTION PROCEDURE ACT

Rule 5.2 Appeal from Final Judgment

A. Final Judgment on Post-Conviction Application. The appeal to this Court under the Post-Conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the District Court in non-capital cases. *See Yingst v. State*, 1971 OK CR 35, ¶¶ 6-7, 480 P.2d 276, 277 ~~(Okl. Cr.1971)~~. For appeal out of time *see* Rule 2.1(E).

B. Stay of Execution of Judgment Pending Appeal. The District Court may stay the execution of its judgment upon the filing of a verified motion to stay execution of the judgment pending appeal within ten (10) days from the date of the entry of the judgment. If the motion is granted, the party granted the stay shall file a certified copy of the petition in error in the District Court within five (5) days after the filing of the petition in error in this Court to ensure the District Court is notified of the perfecting of the appeal. *See* Section 1087 of Title 22. For capital cases, *see* Section IX of these Rules and Section 1089 of Title 22.

C. Petition in Error, Briefs and Record.

(1) The party desiring to appeal from the final order of the District Court under Section V of these Rules MUST file a Notice of Post-Conviction Appeal with the Clerk of the District Court within ~~ten~~twenty (~~10~~20) days from the date the order is filed in the District Court. *See* Rule 9.7 for post-conviction procedures in capital cases. The filing of the Notice of Post-Conviction Appeal in the District Court is jurisdictional and failure to timely file constitutes waiver of the right to appeal.

(2) A petition in error and supporting brief, WITH A CERTIFIED COPY OF THE ORDER ATTACHED must be filed with the Clerk of this Court. The petition in error shall state the date and in what District Court the Notice of Post-Conviction Appeal was filed. If the post conviction appeal arises from a misdemeanor or regular felony conviction, the required documents must be filed within ~~thirty~~sixty (3~~6~~0) days from the date the final order of the District Court is filed with the Clerk of the District Court. If post-conviction application is from a capital conviction, the documents must be filed within the time set in Section 1089 of Title 22 and Rule 9.7.

(3) The brief shall not exceed thirty (30) typewritten 8-1/2 by 11-inch pages in length. *See* Rule 9.7 (A)(4) for page limits in capital cases.

(4) This Court may direct the other party to file an answer brief, if necessary. However, the respondent is not required to file an answer brief unless directed by the Court.

(5) Failure to file a petition in error, with a brief, within the time provided, is jurisdictional and shall constitute a waiver of right to appeal and a procedural bar for this Court to consider the appeal.

(6) The record on appeal of a denial of post-conviction relief shall be transmitted by the Clerk of the District Court in accordance with the procedure set forth in Rule 2.3(B), but within the time requirements set forth in Rule 5.3. The record to be compiled by the Clerk of the District Court and trans-

mitted to the Clerk of this Court is limited to the following:

(a) The Application for Post-Conviction Relief presented to the District Court and response, if filed by the State;

(b) The Findings of Fact and Conclusions of Law entered by the District Court, setting out the specific portions of the record and transcripts considered by the District Court in reaching its decision or setting forth whether the decision was based on the pleadings presented, and which includes a certificate of mailing. *See* Rule 5.3;

(c) The record of the evidentiary hearing conducted, if held;

(d) Supporting evidence presented to the District Court;

(e) Copies of those portions of the record and transcripts considered by the District Court in adjudicating the issues presented in the application for post-conviction relief as set forth in the findings of fact and conclusions of law entered by the District Court; and

(f) A certified copy of the Notice of Post-Conviction Appeal filed in the trial court.

PROVIDED HOWEVER, in capital cases the clerk of the District Court shall file the records as required by this Court in accordance with Section 1089 of Title 22 and Section IX, if this Court directs an evidentiary hearing to be held.

(7) Rule 3.11 applies to any request to supplement the record in an appeal of a denial of post-conviction relief in non-capital cases, to include allegations of ineffective assistance of appellate counsel.

(8) The party filing the petition in error shall be known as the petitioner. The party against whom the appeal is taken shall be known as the respondent.

(9) The Notice of Post-Conviction Appeal Form required by Rule 5.2(C)(1) shall be in substantial compliance with the following language:

The Petitioner gives notice of intent to appeal the order granting/denying application for post-conviction relief entered in the District Court of _____ County, on the _____ day of _____, 20__, arising from District Court Case No. _____. The Petitioner requests the preparation of the record on appeal as required by Rule 5.2(C)(6).

(10) Form 13.4, Section XIII, shall not be utilized in appeals from a granting/denial of post-conviction relief and the Clerk of the District Court shall not be required to accept for filing or act upon any pleading which does not comply with Rule 5.2 (C)(6) and (9).

Rule 5.3 Duties of Court Clerks and Court Reporters

A. The court clerk shall on the same day that the order granting or denying post-conviction relief is filed in the District Court, mail to petitioner or counsel of record for the post-conviction proceedings, a file-stamped certified copy of the order of the District Court setting out findings of fact and conclusions of law granting or denying the application. The Court Clerk shall include a certificate of mailing with the order, which shall also be made a part of the record of the case.

B. 1. Upon receipt of the Notice of Post-conviction Appeal, the Clerk of the District Court shall compile two certified copies of the record on appeal as defined by Rule 5.2(C)(6), and ensure the Notice of Completion of record is filed with this Court within thirty (30) days of the filing of the ~~order granting or denying post-conviction relief~~ Notice of Post-conviction Appeal, unless an extension is requested by the court clerk and granted by this Court.

2. When an evidentiary hearing is held in a non-capital case pursuant to Section 1084 of Title 22 and a Notice of Post-conviction Appeal is filed with the court clerk and served on the court reporter within ~~ten~~ twenty (~~10~~20) days of the filing of the order granting or denying post-conviction relief, the court clerk and court reporter shall ensure the record and transcript of the proceedings on the application are completed and Notice of Completion of Record is filed with this Court within thirty (30) days of the filing of the ~~order~~Notice of Post-conviction Appeal. Except for the specific time requirements of this Rule, the provisions of Rule 2.3(B) apply.

¶2 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that these corrections shall become effective on the date of this order.

¶3 **IT IS SO ORDERED**.

¶4 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 5th day of February, 2018.

/s/ GARY L. LUMPKIN,
Presiding Judge

/s/ DAVID B. LEWIS,
Vice Presiding Judge

/s/ ROBERT L. HUDSON, Judge

/s/ DANA KUEHN, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John Hadden
Clerk

Applicants for February 2018 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given Feb. 27-28, 2018.

The Board of Bar Examiners requests that members examine this list and bring to the Board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

Volney Joseph Kambon Cothran
Sheila Ann Cunningham
Andy Nash Ferguson
Kristin Nicole Hutton
Carrie L. Kincade
Valerie Marie Salem
Victoria Le Tran
Rachel Nicole Voss

NORMAN

Shawn Ward Ceyler
Joshua Joe Conaway
Justin Blake Conway
Andrew Heath Garrett
Andrea Morgan Golden
Joshua William Harrison
Kelbie RaeAnn Kennedy
Zachary Paul Lewis
Jaron Tyler Moore
Jeremy Eugene Otis
John Phillip Sartin III
Matthew Ryan Selander

OKLAHOMA CITY

Blythe Rachel Bradley
Nana Abram Dankwa
Jonathan Michael Hall
Jared A. King
John Thomas-Hohn Knapp
Landon Scott Lester
Lisa Leigh Lopez
Donald Cyril Macarthy
Noelle Cherie Moorad
Bryan Ashton Don Muse
Hunter Christian Musser
Morgen DeAnna Potts
Kristen Annette Prater
Tyler Ray Pruitt
Audrey Camille Talley

TULSA

Erik Sven Anderson
Jerry Dace Arnold
Christopher Maxwell Deane
Elizabeth Mary Edwards
Sherry Lynn Erb
Amy Lynn Faltisko
Joseph Cain Geresi
Drew Wortham Gilbert
Marco Antonio Hernandez Jr.
Andrew John Hofland
Todd Alan Jamieson
Henry Herman Klaus
Tiffany Michelle Lemons
Lori Lee Lindsey
Dimitrios H. Panagopoulos
Kylie Danielle Ray
Andrea Claire Rogers
Paige Elizabeth Vitale

OTHER OKLAHOMA CITIES AND TOWNS

Alexander Joseph Albert, Elk City
Leah Nicole Asbury, Spavinaw
Matthew Ray Bray, Muldrow
Jacklyn Frances Capite, Jenks
Steven Chance Clinkenbeard, Fort Gibson
Tyler DeWayne Davis, Purcell
William Richard Frank, Moore
Tasha Renee Fridia, Moore
Stacy Nichole Fuller, Owasso
Alexander Scott Hall, Moore
Caleb Alexander Harlin, Muskogee
Mackenzie Dawn Jacobson, Claremore
Diamond Johnson, Lawton
Rebecca Lynn Kirk, Pawhuska
John Kavanagh Kristjansson, Owasso
Michael William Mathis, Guthrie
Donald Robert McConnell, Wynnewood
Walter James Morris II, Stratford

Misty Marie Neal, Lawton
Eric Scott Nickel, Broken Arrow
Juan Miguel Pedroza, Bixby
Nocona Louise Pewewardy, Lawton
Matthew Carson Porter, Bethany
Courtney Paige Rainbolt, Broken Arrow
Amity Eileen Ritze, Broken Arrow
Trent Allen Robinson, Owasso
Dalton Bryant Rudd, Davis
Dakota Lynn Semrad, Enid
Jordan Marie Soto, Blanchard
Shannon Lynn Stone, Mounds
Andrew Todd Swann, Moore
Brandon Jacob Williamson, Yukon
Clifford Allan Wright Jr., Vian

OUT OF STATE

Candace Lee Carter, Shady Shores, TX
Kenia Ines Castillo, Naples, FL
Peter C. Chemmalakuzhy, Roanoke, TX
Cody Glyn Cook, Terrell, TX
Wesley Edward Davis, Lewisville, TX
Vassiliki Economedies Farrior, Bethesda, MD
Charles Robert Haskell, Miami, FL
Patrick Sean Hawkins, Brazoria, TX
John Marshall Homra, Jackson, TN
Johnnie Jonathan James III, Gastonia, NC
Bryce Robert Lindgren, Goddard, KS
Janet Carol Love, St. Louis, MO
Joseph Peter Mandala, Sherman, TX
Riley Wade Pagett, Washington, D.C.
Elizabeth Gean Roberts, Fort Smith, AR
Jeffrey Bruce Roderick, Cambridge, MA

Court of Civil Appeals Opinions

2018 OK CIV APP 6

IN THE MATTER OF IW, MM, Jr., And NK, Adjudicated Deprived Juveniles, MICHAEL LANCE McAFEE, Appellant, vs. STATE OF OKLAHOMA, Appellee.

Case No. 115,997. December 29, 2017

APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE DAWSON R. ENGLE, TRIAL JUDGE

REVERSED

W. S. Haselwood, HASELWOOD & WEBB, Shawnee, Oklahoma, for Appellant

Richard Smotherman, DISTRICT 23 DISTRICT ATTORNEY, Rebecca Bauer, ASSISTANT DISTRICT ATTORNEY, Shawnee, Oklahoma, for Appellee

JERRY L. GOODMAN, JUDGE:

¶1 Michael Lance McAfee (Father) appeals an April 6, 2017, order terminating his parental rights to his minor children, IW, MM, Jr., and NK. Based upon our review of the record and applicable law, we reverse the order under review.

BACKGROUND

¶2 The minor children, who are of Indian descent, were removed from the biological mother's home in October of 2012 due to alcohol abuse.[1] Father, who resides in Kansas, stipulated to a deprived petition for failure to protect in December of 2012.

¶3 An individualized service plan (ISP) was adopted on January 9, 2013, requiring Father to complete a family functional assessment, complete a domestic violence inventory, visit the minor children, provide the Department of Human Services (DHS) a list of appropriate caregivers for the minor children, sign releases, and contact the caseworker at least monthly.

¶4 After Father made significant progress on his ISP, DHS recommended trial reunification. In May of 2015, the minor children were placed with Father in Kansas. However, in October of 2015, reunification was terminated after Father spanked MM, leaving significant bruising. Father was charged with domestic battery, ultimately pleading no contest.

¶5 State filed a motion to terminate Father's parental rights on September 16, 2016, pursuant to 10A O.S.2011, § 1-4-904(B)(5), alleging Father had failed to correct the conditions which led to the minor children's deprived status. A jury trial was held on March 20-21, 2017. At the conclusion of the trial, the jury found the allegations of the petition to terminate Father's parental rights were true and that termination was in the best interests of the minor children. The trial court subsequently entered an order terminating Father's parental rights. Father appeals.

STANDARD OF REVIEW

¶6 As a general rule, before parental rights may be severed, State must prove its case by clear-and-convincing evidence. *In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082. "Clear and convincing evidence" is defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *In re C.G.*, 1981 OK 131, ¶17 fn.12, 637 P.2d 66, 71 fn.12. Where an Indian child is involved, as in the present case, however, "the proceedings must comply with the provisions of both the federal ICWA, 25 U.S.C.A. 1901 through 25 U.S.C.A. 1963, and its Oklahoma counterpart, the Oklahoma ICWA, 10 O.S. 40 through 10 O.S. 40.9, *In re T.L.*, 2003 OK CIV APP 49, ¶ 11, 71 P.3d 43, 46 (cited with approval in *In re HMW*, 2013 OK 44, ¶ 6, 304, P.3d 738, 740). "[I]n cases under the State and Federal Indian Child Welfare Acts, the State must prove beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child." *In re HMW*, 2013 OK 44, at ¶ 6, 304 P.3d at 740.

¶7 Pursuant to the federal ICWA:

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

result in serious emotional or physical damage to the child.

25 U.S.C.A. § 1912(f).

¶8 Appellate review of the evidence is thus directed toward assuring the evidence adduced by State, if believed, would support a conclusion by any rational trier of the facts that State's evidence demonstrated beyond a reasonable doubt that continued custody by Father would result in serious damage "to [the children]." *T.L.*, 2003 OK CIV APP 49, at ¶ 12, 71 P.3d at 47. However, the "beyond a reasonable doubt" standard only applies to the factual determination required by 25 U.S.C.A. § 1912(f) to be made in ICWA termination cases, *i.e.*, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," whereas the lesser standard of "clear and convincing" evidence, the state-law mandated burden of proof, is applicable to all other state law requirements for termination. *In re Adoption of R.L.A.*, 2006 OK CIV APP 138, 147 P.3d 306; *In re J.S.*, 2008 OK CIV APP 15, ¶ 4, 177 P.3d 590 (agreed with in *In re Adoption of G.D.J.*, 2011 OK 77, ¶ 37 fn.25, 261 P.3d 1159, 1169 fn.25).

ANALYSIS

¶9 On appeal, Father contends State failed to introduce testimony from a qualified expert witness as required under the Indian Child Welfare Act (ICWA). Father asserts State's witness, Timothy Oliver with the Kickapoo Tribe of Kansas, was unqualified because he was the social worker regularly assigned to the case, citing 25 C.F.R. § 23-122.

¶10 Title 25 U.S.C.A. § 1912(f) requires State to present the testimony of a qualified expert witness. The record provides Oliver is employed by the Kickapoo Tribe of Kansas as the social services director. He is an elder in the Kickapoo Tribe of Kansas and can speak to the customs and practices of the tribe. He is a licensed social worker in the State of Kansas. Oliver testified he was not the primary caseworker for this case.

¶11 We find no error by the trial court's decision finding Oliver was qualified as an expert for purposes of the ICWA.

¶12 Father further contends State did not establish beyond a reasonable doubt with expert testimony that continued custody of the minor children by Father would result in serious emotional or physical damage, as required by § 1912(f). Father asserts Oliver only vaguely testified to physical or emotional harm to the minor children. State disagrees, asserting Oliver's testimony along with the child welfare worker's testimony, sufficiently established State's burden of proof.

¶13 Title 25 U.S.C.A. § 1912(f) provides:

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

The Guidelines for the Bureau of Indian Affairs provides: "the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding," and "the causal relationship between the conditions that exist and the damage that is likely to result." *See* Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, D.3(c), 44 Fed. Reg. 67584, 67593 (November, 26, 1979) (BIA Guideline D.3 [c]). This evidence must include expert witness testimony. *See* 25 U.S.C.A. § 1912(f).

¶14 With respect to IW, Oliver testified that he "think[s] she would" suffer serious emotional or physical damage if returned to Father. Regarding MM, Oliver merely stated he was very concerned about him and that he's scared, particularly about these proceedings. Oliver never affirmatively testified that MM would suffer serious emotional or physical harm if returned to Father. With respect to NK, Oliver stated "I'm really unsure on that one. ... I really am. I'm just really unsure." Finally, on cross examination, Oliver acknowledged that he had not been in the home in two years so he could not really say whether the children would suffer serious emotional or physical damage if returned to Father.

¶15 Angela Dockrey, a permanency planning worker with DHS, testified she did not believe the minor children could be returned to Father's home safely. She stated the children had a strained relationship with Father. In addition, she believed Father did not know how to

handle MM's behavioral issues or know how to discipline him appropriately.

¶16 We find State failed to present evidence through the testimony of a qualified expert affirmatively showing beyond a reasonable doubt that the continued custody of the minor children by Father was likely to result in serious emotional or physical damage to the children, a showing required by § 1912(f). The Court recognizes that "ICWA does not require that the experts' testimony provide the sole basis for the court's conclusion that continued custody will likely result in serious emotional or physical damage; ICWA simply requires that the testimony support that conclusion." *Brenda O. v. Arizona Dep't of Econ. Sec.*, 244 P.3d 574, 579 (Ariz. Ct. App. 2010) (quoting *E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002)). The testimony of the qualified expert witness constitutes some of the evidence on which a decision regarding the likelihood of damage should be made. *See Marcia V v. State of Alaska*, 201 P.3 d 496, 508 (Alaska 2009). The expert testimony need not be the sole basis for finding that the continued custody of the child by the parent is likely to result in serious emotional or physical damage, *but the expert's testimony must support that finding. Id*. (Emphasis added). We agree.

¶17 We emphasize that State in this case must meet a heightened burden of proof beyond a reasonable doubt. Although Father's assault on MM is very serious, there is a total lack of expert witness testimony to support a conclusion beyond a reasonable doubt that continued custody of the minor children by Father is likely to result in serious emotional or physical damage. Testimony as to possibilities such as "think[s]" or "I'm really unsure" does not rise to the required level of probability.

¶18 Accordingly, State failed to present evidence through the testimony of a qualified expert affirmatively showing beyond a reasonable doubt that the continued custody of the minor children by Father is likely to result in serious emotional or physical damage to the children, a showing required by 25 U.S.C.A. § 1912(f). Because State did not meet its burden of proof imposed by ICWA, the order terminating the parental rights of Father must be reversed.

¶19 **REVERSED**.

FISCHER, P.J., concurs, and RAPP, J., concurs specially.

RAPP, J., concurring specially:

The reversal in this case does not necessarily require that the deprived children's case should be dismissed or that Father should have custody of the Children.

JERRY L. GOODMAN, JUDGE:

1. The biological mother is not a party to this appeal.

2018 OK CIV APP 7

SEQUEL YOUTH & FAMILY SERVICES LLC and TRAVELERS INDEMNITY CO. OF AMERICA, Petitioners, vs. MARCELLA AYISI and THE OKLAHOMA WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 116,109. January 4, 2018

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

HONORABLE MICHAEL T. EGAN, ADMINISTRATIVE LAW JUDGE

VACATED AND REMANDED FOR FURTHER PROCEEDINGS

Mia C. Rops, DAVID KLOSTERBOER & ASSOCIATES, Oklahoma City, Oklahoma, for Petitioners

Bob Burke, Oklahoma City, Oklahoma, and Jeffrey M. Cooper, Oklahoma City, Oklahoma, for Respondent

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Petitioners (collectively, Employer) seek review of an order of the Workers' Compensation Commission affirming the order of the Administrative Law Judge (ALJ) who found Marcella Ayisi (Claimant) sustained compensable injuries to both of her knees arising out of the course and scope of her employment. Based on our review, we vacate and remand for further proceedings.

BACKGROUND

¶2 Claimant filed a Form 3 alleging she sustained injuries to both knees as a result of an accident that occurred while working as a residential counselor for Employer. She alleged she fell while assisting a resident on August 26, 2015, landing directly on both knees. At trial, Claimant testified she worked with special needs children for Employer and that the fall occurred when she tripped over a child's foot

and onto "a concrete floor with ceramic tile on top of it." She testified "[t]he total impact was on my knees," and testified she heard and felt a "snap." Claimant's fall was witnessed by her supervisor who helped Claimant afterward.

¶3 Claimant testified she was not having any problems with her knees prior to the accident, though she testified she had knee surgery performed on her right knee – a "right knee arthroscopic procedure" – in the year 2000. Claimant testified she was released "full duty" soon after that surgery, and she testified she had been working for sixteen years prior to the fall and had never been placed on any form of restrictions for her right knee. She further testified she had not been prescribed any medication or therapy for either knee prior to the fall, and she testified that, regarding her left knee, she had never received any prior treatment.

¶4 Claimant testified that now, i.e., following the August 26, 2015 incident, she has "excruciating pain all the time" in addition to "swelling." She testified she has had to "compensate with [her] left knee," but that her "left knee is almost as bad as the right knee[.]" She testified she is "limited in so much of [her] mobility" and has not been able to return to work in any capacity.

¶5 Employer stated at trial that it "specifically denies that [Claimant] sustained any compensable injury under the [Administrative Workers' Compensation Act (AWCA)]." Employer explained: "More specifically, we are denying that [Claimant] has an injury that was solely caused by her accident." Employer stated: "we are alleging that [Claimant's] current condition … not only wasn't caused by her accident, but is specifically excluded under Section 2(9)(b)(5)" of the AWCA because "[t]he only diagnosis in any medical record is osteoarthritis." Employer asserted osteoarthritis is "excluded as a compensable injury under 2(9)(b)(5)." Employer also asserted, in the alternative, that there is no "objective medical evidence that [Claimant] has a compensable injury" as "defined by 2(31)(a)" of the AWCA; that the accident is not the major cause of Claimant's injuries; and that "at least with regard[] to the right knee, [Claimant] has a preexisting condition. She had a prior surgery. [But] … there is no evidence at all to support a significant or identifiable aggravation of that right knee condition."

¶6 In the order filed in December 2016, the ALJ found Claimant sustained compensable injuries to both of her knees arising out of the course and scope of her employment, and ordered Employer to provide Claimant with reasonable and necessary medical treatment. The ALJ's order notes that in the January 2016 medical report of Dr. Kevin Hargrove, he diagnosed Claimant

> as having osteoarthritis in both knees but also said that there had been an exacerbation as a result of the fall. He also stated: "These knees are advancing gradually toward the need for arthroplasty. However, this patient has been informed that her problem is currently an exacerbation of her pre-existing problem."

¶7 The ALJ's order further notes that an independent medical examiner – Dr. Paul Maitino – was appointed by the Commission

> to address several issues, including the specific diagnosis of the Claimant's current condition and whether it was caused by Claimant's work related accident and whether Claimant has a significant and identifiable aggravation of a preexisting condition.
>
> Dr. Maitino's report … gave a very clear diagnosis: significant and identifiable aggravation of preexisting osteoarthritis in both knees with valgus deformity…. [In his deposition he] testified that the preexisting condition was Grade IV arthritis. On cross examination, he said that her meniscal tear was due to her arthritic condition. Later he said that none of the findings were based on an acute injury. When asked to identify what the aggravation of her right knee was, he stated that her pain was the only identifiable aggravatio.

The ALJ's order also notes that there "is a dispute as to whether [Claimant] had complaints about her knees before the fall. She denied any such complaints but Dr. Hargrove's records indicate that she had popping in both knees with squatting and climbing stairs before she sustained the fall[.]"

¶8 The ALJ's order states that "[o]ne way for the Claimant to recover benefits is found in 85A [O.S.] § 2(9)(b)(6) which allows an exception when the Claimant can show an identifiable and significant aggravation of a 'pre-existing condition.'" The order notes that "[t]he consensus of

all the doctors involved is that the Claimant has a significant pre-existing condition (osteoarthritis)." However, the ALJ determined that, regarding Claimant's right knee, Claimant "has shown an identifiable and significant aggravation of that condition" as a result of the fall. In addition to the evidence discussed earlier in the ALJ's order, the ALJ pointed out that the medical notes of the physician's assistant at the clinic Claimant visited on the date of the fall state that Claimant "had contusions on both knees." The ALJ also noted that Dr. Hargrove's initial report "found osteoarthritis of both knees but also found an exacerbation as a result of the fall."

¶9 Regarding Claimant's left knee, the ALJ found that

> [b]ecause of the limited definition of "Pre-existing condition" found in 85A § 2(36)[,] [Claimant] does not need to show an identifiable and significant aggravation of a pre-existing condition as to her left knee. No evidence was provided that the Claimant ever received or had treatment recommended for her left knee, so there is no requirement to show a significant and identifiable aggravation of a pre-existing condition. The Commission finds that Claimant is entitled to treatment for the left knee ….

¶10 Employer appealed the ALJ's order to the Commission En Banc. The Commission found the ALJ's "decision was supported by a preponderance of the credible evidence and correctly applied the law and, therefore, was neither against the clear weight of the evidence, nor contrary to law," and affirmed. From the order of the Commission affirming the decision of the ALJ, Employer seeks review.

STANDARD OF REVIEW

¶11 The date of injury in this case is in August 2015. Therefore, the Administrative Workers' Compensation Act, 85A O.S. Supp. 2014 §§ 1 through 125, governs this case.[1] Pertinent to this case, the AWCA provides that this Court "may modify, reverse, remand for rehearing, or set aside" a judgment, decision, or award of the Commission if it is: "4. Affected by … error of law[.]" 85A O.S. Supp. 2014 § 78(C). In particular, the issue presented on appeal is one of statutory construction. "Statutory construction presents a question of law. Questions of law are reviewed by a *de novo* standard. Under this standard, we have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal ruling." *Robison Med. Res. Grp. v. True,* 2015 OK CIV APP 94, ¶ 12, 362 P.3d 1155 (citation omitted). *See also Maxwell v. Sprint PCS,* 2016 OK 41, ¶ 4, 369 P.3d 1079.

ANALYSIS

¶12 Title 85A O.S. Supp. 2014 § 2 provides in pertinent part as follows:

> 9. a. "Compensable injury" means damage or harm to the physical structure of the body … caused solely as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment….
>
> ….
>
> b. "Compensable injury" does not include:
>
> …
>
> (5) any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis, or
>
> (6) any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment.

¶13 In *Estenson Logistics v. Hopson*, 2015 OK CIV APP 71, 357 P.3d 486, a separate division of this Court stated that a claimant's "degenerative joint disease in his left hip" was compensable if the claimant "show[ed] that there was physical damage or harm caused by an on-the-job accident and that his treating physician confirmed an identifiable and significant aggravation." *Id*. ¶ 10. Thus, the *Hopson* Court, in effect, read subsections 2(9)(b)(5) and (6) together such that the claimant's degenerative joint disease constituted a "preexisting condition" subject to the exception set forth in § 2(9)(b)(6).

¶14 It is not clear, however, that the Legislature intended that all degenerative conditions, such as the degenerative joint disease in Hopson and the osteoarthritis in the present case,[2] should be treated as preexisting conditions under § 2(9)(b)(6) and, as a consequence, be

compensable when (and only when) "the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment." In the past – i.e., under both the Workers' Compensation Code (the Code) and the Workers' Compensation Act (the WCA)[3] – such conditions were excluded if they were the result of "the ordinary, gradual deterioration or progressive degeneration caused by the aging process," but compensable if "the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence[.]" *See* 85 O.S. Supp. 2010 § 3(13)(d); 85 O.S. 2011 § 308(10)(c). The corresponding language in the AWCA is substantially similar to that found in the Code and the WCA except that the major cause language has been removed. However, as discussed at greater length further below, legislative silence is rarely to be taken as clear legislative intent to abrogate an established construction.

¶15 Moreover, the term "preexisting condition" has a limited definition in the AWCA – it "means any illness, injury, disease, or other physical or mental condition, whether or not work-related, for which medical advice, diagnosis, care or treatment was recommended or received preceding the date of injury[.]" 85A O.S. Supp. 2014 § 2(36). The facts of the present case bring into clear relief an absurd consequence that results from automatically treating osteoarthritis under § 2(9)(b)(6). Here, one of Claimant's knees received medical care preceding the date of injury; the other did not. Thus, the ALJ applied the "identifiable and significant aggravation" test to Claimant's right knee, the knee that had received prior treatment, but, regarding her left knee, stated, as quoted at greater length above: "Because of the limited definition of "Preexisting condition" … [Claimant] does not need to show an identifiable and significant aggravation … as to her left knee…. The Commission finds that Claimant is entitled to treatment for the left knee …." Having concluded Claimant's left knee did not constitute a preexisting condition as defined in the AWCA, the ALJ was apparently left without any standard by which to judge the compensability of that injury, yet found it to be compensable.

¶16 Employer argues the ALJ should have determined Claimant was simply without any remedy; that is, because at least some of Claimant's degeneration or deterioration existed prior to the fall, the legislative intent is to bar her from any compensation, regardless of the extent of the degeneration or deterioration caused by the work-related incident. We conclude, however, that neither Employer's interpretation, nor the ALJ's interpretation, is consistent with the legislative intent.

¶17 "The primary goal of statutory construction is to ascertain and follow legislative intent." *Legarde-Bober v. Okla. State Univ.*, 2016 OK 78, ¶ 11, 378 P.3d 562. "It is a well-settled rule of statutory construction that where a matter is addressed by two statutes, one specific and one general, the specific statute controls." *Sprowles v. Thompson*, 2010 OK CIV APP 80, ¶ 21, 239 P.3d 981 (citation omitted). That is, a "specific statute, which clearly includes the matter in controversy and prescribes a different rule, governs over the general statute." *Hall v. Globe Life & Acc. Ins. Co. of Okla.*, 1999 OK 89, ¶ 5, 998 P.2d 603 (citation omitted). Subsection 2(9)(b)(5) specifically addresses osteoarthritis. Moreover, and as indicated above, the prior version of what is now § 2(9)(b)(5) also excluded deterioration and degeneration caused by the aging process, but allowed compensation if the employment was the major cause of the deterioration or degeneration. Thus, a different rule, at least in the prior version, was prescribed for determining the compensability of conditions like osteoarthritis – i.e., the test to be applied was whether the employment was the major cause of the degeneration or deterioration, not whether "the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment," as set forth under § 2(9)(b)(6).

¶18 "Unless a contrary intent clearly appears or is plainly expressed, the terms of amendatory acts retaining the same or substantially similar language as the provisions formerly in force **will be accorded the identical construction to that placed upon them by preexisting case law.**" *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 6, 369 P.3d 1079 (emphasis in original) (footnote omitted). The exclusion set forth in the Code and WCA, though less verbose, contained substantially similar language: i.e., "'Compensable injury' shall not include the ordinary, gradual deterioration or progressive degeneration caused by the aging process[.]" 85 O.S. 2011 § 308(10)(c). Comparing this language to that found in § 2(9)(b)(5) of the AWCA, one finds the same core, causative phrase – i.e., degeneration "resulting from the natural results of aging" is excluded. We dis-

agree with Employer that the legislative intent of this provision is to bar *all* degeneration or deterioration, whether resulting from the natural results of aging or from the employment. But we also disagree with the ALJ's interpretation which renders this provision without any meaning or effect such that all preexisting conditions, even those specifically enumerated in § 2(9)(b)(5), are compensable only under the test set forth in § 2(9)(b)(6).[4]

¶19 It is true that the exclusion in the Code and WCA, quoted above, immediately sets forth the following exception: "unless the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence," and that the current version of the exclusion found in the AWCA does not contain this language. However, as stated above, legislative silence is rarely to be construed as an indication on the part of the Legislature to depart from the earlier version and its established interpretation in prior case law.

> Legislative familiarity with extant judicial construction of statutes is presumed. Unless a contrary intent *clearly appears or is plainly expressed*, the terms of amendatory acts retaining the same or substantially similar language as the provisions formerly in force will be accorded the identical construction to that placed upon them by preexisting case law.

Special Indem. Fund v. Figgins, 1992 OK 59, ¶ 8, 831 P.2d 1379 (emphasis added) (footnote omitted). "Legislative silence on a well-established point of law is not indicative of the abrogation of prior law. Repeals by implication are not favored." *Robison Med. Res. Grp. v. True,* 2015 OK CIV APP 94, ¶ 26, 362 P.3d 1155 (citation omitted).

¶20 The current version of this exclusion – § 2(9)(b)(5) – no longer contains any mention of the "major cause" test used, in past cases,[5] to differentiate those degenerative conditions which are not compensable because they are the natural result of aging from those which are compensable because they are the result of the employment. However, given the substantially similar language involved, we conclude the mere legislative silence as to the appropriate test does not suffice to signal the abrogation of that test.

¶21 As indicated above, Employer's position is that the legislative intent of § 2(9)(b)(5) is to render all bodily degeneration or deterioration non-compensable if at least a portion of that degeneration or deterioration resulted from the natural results of aging rather than solely from the employment. For example, as argued by Employer at trial, "we are denying that [Claimant] has an injury that was solely caused by her accident." Such an interpretation would result in denying compensability to workers with even the slightest pre-injury joint degeneration or deterioration resulting from natural aging. Such an interpretation finds support in a plain, but out-of-context, reading of the new definition of compensable injury. Compensable injury is now defined in the AWCA, in pertinent part, as "damage or harm to the physical structure of the body … *caused solely* as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment." 85A O.S. Supp. 2014 § 2(9)(a) (emphasis added). The Code and WCA, by contrast, defined compensable injury as "any injury … which arises out of and in the course of employment if such employment was the *major cause* of the specific injury or illness." 85 O.S. 2011 § 308(10)(a) & Supp. 2010 § 3(13)(a) (emphasis added). However, while the meaning of the new phrase – "caused solely" – may seem plain when viewed in isolation, such a plain reading turns out to be untenable in light of the statute as a whole. *See Dep't of Revenue of Oregon v. ACF Indus., Inc*., 510 U.S. 332, 343 (1994) (While the meaning of a phrase may seem plain "when viewed in isolation," such a reading will not be adopted if "untenable in light of [the statute] as a whole.") (citations omitted).

¶22 As explained by the Oklahoma Supreme Court, "Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Okla. Pub. Employees Ass'n v. State ex rel. Okla. Office of Pers. Mgmt*., 2011 OK 68, ¶ 11, 267 P.3d 838 (per curiam) (footnotes omitted). Moreover, "[t]his court will not assume that the Legislature has done a vain and useless act. Rather it must interpret legislation so as to give effect to every word and sentence." *Hill v. Bd. of Educ*., 1997 OK 111, ¶ 12, 944 P.2d 930 (citations omitted). "[A]n inept or incorrect choice of words" will not be "applied or construed in a manner to defeat the real or obvious purpose of a legislative enactment." *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 5, 829 P.2d 15 (citation omitted). *See also Anderson v. Eichner,* 1994 OK 136, ¶ 15 n.31, 890 P.2d 1329 ("This Court will not assume

that the legislature has done a vain or useless act; it must interpret legislation so as to give effect to every word and sentence rather than rendering some provisions nugatory.") (citations omitted).

¶23 Section 2 of the AWCA provides:

> 27. "Major cause" means more than fifty percent (50%) of the resulting injury, disease or illness. A finding of major cause *shall be established* by a preponderance of the evidence. A finding that the workplace was not a major cause of the injury, disease or illness shall not adversely affect the exclusive remedy provisions of this act and shall not create a separate cause of action outside this act[.]

(Emphasis added.) If possible, an interpretation of the "caused solely" language found in § 2(9)(a) which, among other things, gives effect to this major cause provision and harmonizes it with other provisions in the act, which avoids rendering § 2(9)(b)(5) a vain and useless provision, and which avoids serious constitutional pitfalls,[6] will be adopted. In the context of the present case involving osteoarthritis, we conclude it is the legislative intent that osteoarthritis resulting from the natural results of aging is not compensable unless the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence.

¶24 Therefore, we conclude the ALJ erred in applying the standard set forth in § 2(9)(b)(6), and we vacate the Commission's order affirming the order of the ALJ. We remand this case to the ALJ for further proceedings.

CONCLUSION

¶25 "The primary goal of statutory construction is to ascertain and follow legislative intent." *Legarde-Bober*, 2016 OK 78, ¶ 11. "Unless a contrary intent clearly appears or is plainly expressed, the terms of amendatory acts retaining the same or substantially similar language as the provisions formerly in force will be accorded the identical construction to that placed upon them by preexisting case law." *Maxwell*, 2016 OK 41, ¶ 6. "Legislative silence on a well-established point of law is not indicative of the abrogation of prior law. Repeals by implication are not favored." *True*, 2015 OK CIV APP 94, ¶ 26. "Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Okla. Pub. Employees Ass'n*, 2011 OK 68, ¶ 11.

¶26 Section 2(9)(b)(5) of the AWCA, when compared to the Code and the WCA, no longer contains any mention of the "major cause" test used, in past cases, to differentiate those degenerative conditions which are not compensable because they are the natural result of aging from those which are compensable because they are the result of the employment. However, the language of § 2(9)(b)(5) of the AWCA is substantially similar to the language found in the corresponding provisions in the Code and WCA. Moreover, the language of the major cause subsection of § 2 of the AWCA states, among other things, that "[a] finding of major cause shall be established by a preponderance of the evidence," and dictates that the exclusive remedy provisions apply even where a finding is made "that the workplace was not a major cause of the injury, disease or illness[.]" We conclude the mere legislative silence as to the major cause test in § 2(9)(b)(5) does not suffice to signal the abrogation of that test.

¶27 Thus, we conclude it is the legislative intent that, in this case, Claimant's osteoarthritis, if resulting from the natural results of aging, is not compensable unless it is found that the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence. This same test applies to both of Claimant's knees. Any other interpretation would result in absurd consequences and vain and useless provisions, and would fail to effectuate the legislative intent. Consequently, we vacate the Commission's order affirming the order of the ALJ, and we remand this case to the ALJ for further proceedings consistent with this Opinion.

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

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. The AWCA provides that it "shall apply only to claims for injuries and death based on accidents which occur on or after the effective date of this act." § 3(B). The effective date of the AWCA is February 1, 2014. *See also Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111 ("In the realm of workers' compensation, the law in effect at the time of the injury controls both the award of benefits and the appellate standard of review.") (citations omitted).

2. We note that "degenerative joint disease" appears to simply be another name for osteoarthritis. That is, osteoarthritis "is caused by damage or breakdown of joint cartilage between bones," and "[i]t is sometimes called degenerative joint disease or 'wear and tear' arthritis. It most frequently occurs in the hands, hips, and knees…. [T]he

cartilage and bones within a joint begin to break down." CDC, Osteoarthritis, www.cdc.gov. *See also* MedicineNet, Degenerative joint disease, www.medicinenet.com ("Degenerative joint disease: Also known as osteoarthritis"); Mayo Clinic, Osteoarthritis, www.mayoclinic.org. osteoarthritis (Osteoarthritis "is the most common form of arthritis …. It occurs when the protective cartilage on the ends of your bones wears down over time.").

3. The Code applies to cases in which the alleged injury occurred prior to the effective date – February 1, 2014 – of the AWCA, and the WCA applies to cases in which the alleged injury occurred prior to the enactment of the Code in 2011.

4. As indicated above, the ALJ's interpretation also leaves work-related degeneration or deterioration, which is combined with some degree of age-related degeneration or deterioration, without any compensability standard if the condition was untreated and undiagnosed prior to the on-the-job accident and is not a "preexisting condition" under the AWCA.

5. *See, generally, Rural Waste Mgmt. & Indem. Ins. Co. of N. Am. v. Mock*, 2012 OK 101, 292 P.3d 24; *Bed Bath & Beyond, Inc. v. Bonat*, 2008 OK 47, 186 P.3d 952; *Berg v. Parker Drilling Co.*, 2004 OK 72, 98 P.3d 1099. *See also 1st Staffing Grp. USA v. Brawley*, 2013 OK CIV APP 26, ¶ 26, 298 P.3d 1195 ("Medical opinions supporting employment as the major cause of occupational disease or age-related deterioration or degeneration, must be supported by objective medical evidence.") (emphasis added) (quoting Rule 20(c), Rules of the Workers' Compensation Court, 85 O.S. Supp. 2006, ch. 4, app.).

6. "If there are two possible interpretations[,] one of which would hold the statute unconstitutional, the construction must be applied which renders it constitutional." *Application of Okla. Capitol Imp. Auth.*, 1998 OK 25, ¶ 8, 958 P.2d 759 (footnote omitted). The Oklahoma Supreme Court has made clear in reviewing decisions of the Commission that, for example,

> [t]he due process clause of the Oklahoma Constitution protects "citizens from arbitrary and unreasonable action by the state." *City of Edmond v. Wakefield*, 1975 OK 96, ¶ 6, 537 P.2d 1211, 1213. "[S]tate statutes which attempt to take away vested property interest, or work an arbitrary forfeiture of property rights are unconstitutional as violations of due process." *Id.* (internal citations omitted).

Maxwell v. Sprint PCS, 2016 OK 41, ¶ 22, 369 P.3d 1079. In addition, where a law "singles out less than an entire class of similarly affected persons or things for different treatment, it is a special law," which is constitutional only if it "is so substantially related to a valid legislative objective that it will survive the constitutional challenge." *Vasquez v. Dillard's, Inc.*, 2016 OK 89, ¶ 12, 381 P.3d 768 (footnote omitted). A reading of § 2(9)(a) which denies compensation, for example, to a worker who sustained a work-related injury to a body part solely on the basis that that worker had an age-related degeneration or deterioration, however slight, to that body part prior to the injury would immediately raise constitutional concerns stemming from the arbitrary and unreasonable denial of a remedy to a large class of injuries. But this is not the only available reading of § 2(9)(a) and, as stated above, to arrive at such a reading requires, among other things, taking a provision out of context and failing to ascertain legislative intent "from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Okla. Pub. Employees Ass'n*, 2011 OK 68, ¶ 11.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, January 18, 2018

F-2016-1061 — Randall Edward Harris, Appellant, was tried by jury for the crimes of Eluding an Officer After Conviction of Two or More Felonies and Driving without a License in Case No. CF-BCF-2016-86 in the District Court of Creek County. The jury returned a verdict of guilty and recommended as punishment 15 years imprisonment for Eluding and a $100.00 fine for Driving without a License. The trial court sentenced accordingly. From this judgment and sentence Randall Edward Harris has perfected his appeal. AFFIRMED; Appellant's Application to Supplement Appeal Record or in the alternative Remand for Evidentiary Hearing on Sixth Amendment Claims DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2016-193 — Draquan Jeffrey Cotton, Appellant, was tried by jury for the crime of Attempted Robbery with a Weapon, After Two Prior Felony convictions, in Case No. CF-2013-1297, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment. The Honorable Tracy Schumacher, District Judge, sentenced accordingly. From this judgment and sentence Draquan Jeffrey Cotton has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs in Part/Dissents in Part; Rowland, J., Concurs.

F-2016-349 — Robert Joseph Stillwagon, Appellant, was tried by jury in Case No. CF-2014-6107, in the District Court of Oklahoma County, for the crime of Counts 1 and 2: Indecent or Lewd Acts with a Child Under the Age of 12; Counts 3-7 and 9: Indecent or Lewd Acts with a Child Under the Age of 16; and Count 8: Attempted Rape. Stillwagon was convicted on Counts 3 through 8 and acquitted on Counts 1, 2 and 9. The jury recommended the following sentences: Counts 3 through 7 – four (4) years imprisonment on each count; and Count 8 – five (5) years imprisonment. The Honorable Cindy H. Truong, District Judge, sentenced Stillwagon in accordance with the jury's verdicts and ordered the terms of confinement for all counts to run consecutively. From this judgment and sentence Robert Joseph Stillwagon has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Recused.

C-2017-312 — Petitioner Paul Matthew Maney entered a blind plea of guilty in the District Court of Oklahoma County, Case No. CF-2015-8461, to one count of Drug Trafficking, After Former Conviction of a Felony. The Honorable Ray C. Elliott accepted Maney's plea and sentenced him to twenty-five (25) years imprisonment followed by nine months to one year of post-imprisonment supervision. Judge Elliott also imposed a twenty-five thousand dollar ($25,000.00) fine and ordered all but fifty dollars ($50.00) suspended. He awarded Petitioner credit for time served. Petitioner filed a timely *pro se* Motion to Withdraw Plea that was denied. Petitioner appeals the denial of his motion. The Petitioner of the Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. The case is REMANDED to the district court with instructions to amend the Judgment and Sentence to reflect that Petitioner's sentence was enhanced with one prior conviction. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recuse.

Thursday, January 25, 2018

M-2017-63 — Following a jury trial on December 8, 2016, Appellant Kevin R. Short was found guilty of Verbal Abuse by a Caretaker in Tulsa County District Case No. CF-2015-3195. Appellant was convicted and sentenced to two weeks imprisonment and a One Thousand Dollar fine. Appellant appeals from the Judgment and Sentence imposed. The Judgment and Sentence of the trial court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

C-2016-1116 — Christopher David Mitchell, Petitioner, entered a blind plea of guilty in

Case No. CF-2016-2571, in the District Court of Tulsa County, before the Honorable William D. LaFortune, District Judge, to Count 1: Second Degree Felony Murder; Count 2: Leaving the Scene of a Collision Involving Injury; and Count 3: Driving Under the Influence of Alcohol (Misdemeanor). Judge LaFortune accepted Appellant's plea and passed sentencing pending the completion and filing of a presentence investigation report. On October 27, 2016, Judge LaFortune sentenced Petitioner to life imprisonment on Count 1 and one year in the county jail on Count 3, with credit for time served. The Court further ordered both sentences to be served concurrently. Judge LaFortune dismissed Count 2, finding that it merged into Count 1 as the underlying felony supporting the Count 1 felony murder conviction. On November 3, 2016, Petitioner filed a pro se motion to withdraw his plea. After a hearing on Petitioner's motion to withdraw, Judge LaFortune denied the motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2016-912 — Dennis Keith Camren, Appellant, appeals from the revocation of five years of his suspended sentence in Case No. CF-2008-379 in the District Court of Ottawa County, by the Honorable Robert E. Reavis, II, Associate District Judge. AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

C-2017-402 — Christy Adelle Goff, Petitioner, entered a negotiated plea to the crimes of Driving a Motor Vehicle While Under the Influence of Alcohol, Second Offense (Count 1), and Transporting Opened Container of Beer (Misdemeanor) (Count 2) in Case No. CF-2015-52 in the District Court of Jefferson County. The Honorable Dennis L. Gay, Associate District Judge, accepted the guilty plea, deferred the imposition of sentence, and ordered Petitioner to participate in drug court. Petitioner was later arrested and charged with another felony crime of driving under the influence of alcohol in 2016, resulting in her termination from the drug court and acceleration of her deferred sentence in this case. Pursuant to the terms of her plea agreement in the event of her failure to complete drug court, the trial court sentenced Petitioner to ten (10) years imprisonment and a $500.00 fine in Count 1, and a $100.00 fine in Count 2. Petitioner timely filed a motion to withdraw her guilty plea, which the trial court denied after evidentiary hearing. Petitioner now seeks the writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, January 18, 2018

115,384 — Dianna K. Shannon, Appellee, vs. Michael W. Shannon, Appellant. Appeal from the District Court of Cimarron County, Oklahoma. Honorable Ronald Kincannon, Judge. Former husband, Michael Shannon, appeals the trial court's September 2016 order approving the former wife's, Dianna Shannon, motion asking for approval of two Qualified Domestic Relations Orders (QDROs) the former wife sought in an effort to enforce the terms of a 1999 divorce decree in which Dianna Shannon was awarded one fourth (1/4) of Michael Shannon's pensions accumulated during the parties' marriage from August 30, 1975 through November 18, 1999. On August 5, 2015, Wife filed a motion to settle QDROs and a request for retirement payment arrearages. Husband responded with a motion for summary judgment asserting the property division in the 1999 decree was no longer enforceable due to application of 12 O.S. §735 and 12 O.S. §95. Husband began drawing upon the firefighter's pension in 2006 and as of the hearing in 2015, Husband had not yet begun to draw upon the pension benefits under the municipal retirement fund. A hearing was held on October 22, 2015 on Wife's motion to settle the QDROs and Husband's responding summary judgment motion. Husband's motion for summary judgment was denied. Wife's QDRO motion was granted in part and denied in part. The QDROs were approved and by separate order each was entered by the trial court. The trial court implemented a "catch up provision" with respect to the firefighter's fund that has been paying benefits since 2006. Husband's appeal concerns an issue of law, whether a QDRO can be filed fifteen years after the entry of the divorce decree that awarded the pension benefits to the former spouse of the donor employee. As a result, this court will review the trial court's decision upon this question of law under a *de novo* standard of review.

Jackson v. Jackson, 2002 OK 25, ¶2, 45 P.3d 418, 421-22. Husband asserts Oklahoma's dormancy statute, 12 O.S. Supp.2002 §735, or 12 O.S. §95 cut off Wife's ability to enforce the terms of the 1999 decree. Husband asserts the issue of whether or not the dormancy statute or a statute of limitations presents a time-bar to the filing of a QDRO is an issue of first impression. Examination of Oklahoma legal authority did not reveal a judicial opinion in which an Oklahoma court has barred the filing of a QDRO due to application of §735 or §95. Further, in examining 11 O.S. 2001 §48-103 and 11 O.S. Supp.2010 §49-126, which outline the requirements for the pensions at issue in this case, neither statute imposes a time limit by which the party seeking the division of pension benefits must obtain the QDRO or seek approval of the QDRO from the district court. Although neither §735 nor §95 was specifically addressed in *Galarza v. Galarz*a, 2011 OK CIV APP 86, 259 P.3d 893, *cert. denied*, the appellate court affirmed the trial court's result, permitting the wife's motion seeking the QDRO almost ten years after the divorce decree. This result does not support Husband's argument that either §735 or §95 apply with respect to filing a motion to enter a QDRO more than five years after the divorce decree in which the pension allocation was made. Husband has urged the appellate court to apply a Kansas Court of Appeals case, *Larimore v. Larimore*, 362 P.3d 843 (Kan.Ct.App. 2015), which found the wife's entitlement to a portion of her former husband's retirement pension was extinguished under the Kansas dormancy statute. Husband also urges this court to consider a Wisconsin case, *Johnson v. Masters*, 830 N.W.2d 647 (Wis. 2013), in which the Wisconsin Supreme Court applied the statute of repose to determine whether the retirement system was authorized to accept a QDRO sought years after the entry of the divorce decree. We have not found an Oklahoma Supreme Court pronouncement applying the dormancy statute in the manner the Kansas court did in *Larimore*, nor have we found Oklahoma authority applying a statute of repose as was done in Wisconsin. Existing jurisprudence, such as *Galarza*, and the retirement statutes applicable in this case (11 O.S. 2001 §48-103 and 11 O.S. Supp.2010 §49-126) indicate at present Oklahoma courts are not applying §735 or §95 in order to time bar the filing of a QDRO. The order of the trial court upon Wife's motion to settle the QDROs is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,387 — In the Matter of L.E.P., a Minor Child: Corrina Alvarez, Appellant, vs. Patricia Perry, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Classco, Judge. Appellant, Corinna Alvarez, is the paternal grandmother of L.E.P. (hereinafter L.P.), born in October 2010. Alvarez seeks review of the trial court's order which determined the best interests of L.P. would be served by permitting the adoption of L.P. by the maternal grandmother without the natural Father's consent and its determination that the best interests of the child would not be served by permitting visitation of the child with Alvarez, the paternal grandmother. Appellant contacted the maternal grandmother (Appellee) in an effort to meet L.P. Ultimately, the maternal grandmother was not amenable to L.P. meeting Appellant; the maternal grandmother testified she was not aware if Appellant was actually L.P.'s grandmother, as there was no paternity test in place. The maternal grandmother was also concerned Appellant was in contact with the natural parents who were not part of the child's life, and the maternal grandmother believed L.P. was very sensitive to disruptions in her environment and it would not be beneficial to introduce a new family member. On August 20, 2015, the maternal grandmother sought adoption of L.P. Aaron Alvarez was determined to be the natural Father as per the results of a 2015 paternity test. In February 2016, the maternal grandmother amended her petition, seeking adoption of L.P. without the consent of the natural Father. Appellant was permitted to file her request for grandparent visitation in the adoption proceeding. The adoption without consent hearing was held on April 20, 2016 and the best interests portion of the hearing was held on August 29, 2016. The appealed from order, in which Appellant's request for grandparent visitation was denied, was issued on September 15, 2016. Custody and visitation, including grandparent visitation, are matters of equity and directed to the sound discretion of the trial court. *Kahre v. Kahre*, 1995 OK 133, ¶ 19, 916 P.2d 1355, 1360. Appellant asserts in her first proposition the trial court erred in failing to find the maternal grandmother thwarted Appellant's relationship with the child against the child's best interests. The considerations of the child's temperament and the unknown paternity of the father at the time of Appellant's initial inquiry support the maternal

grandmother's decision to decline Appellant's request to see the child. Appellant's second proposition of error argues the absence of a prior existing relationship between Appellant and L.P. has been due to the efforts of the maternal grandmother to isolate L.P. from Appellant, making it impossible for Appellant to comply with key components of the grandparent visitation statute, 43 O.S. Supp.2009 §109.4, which require the court to consider the existing relationship between the grandparent and the child. Appellant argues there should be an exception in the statute when the relationship with the child has been foreclosed, but Appellant does not present any Oklahoma authority indicating such an exception exists under Oklahoma law. Appellant's third proposition argues neither she nor her son, the natural Father, received proper notice of the child's birth. Appellant is not able to pursue any notice claims that belong to her son. With respect to Appellant's assertion that she herself was denied proper notice of L.P.'s birth, Appellant states in her appellate brief that she "does not suggest she was entitled to notice of the child's birth." As Appellant does not claim any legal authority under which she is entitled to notice of the child's birth in this case, we do not find error in the alleged failure to receive that to which she is not legally entitled. Appellant's fourth proposition of error on appeal asserts the trial court did not properly consider application of 43 O.S. § 109.4(A)(1)(c)(4). Based on the record provided, we do not find the record supports Appellant's assertion the trial court failed to properly apply § 109.4(A)(1)(c)(4). Appellant's final proposition of error alleges the trial court acted against the clear weight of the evidence in denying her request for grandparental visitation. We agree Appellant presented considerable evidence in favor of her request for grandparent visitation, but the trial court was faced with competing evidence and competing considerations and chose to deny Appellant visitation with L.P. Though another court may have examined the evidence and reached a different conclusion, we do not find the trial court acted against the clear weight of the evidence in this case. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,810 — In the Matter of the Adoption of P.T.T. and H.R.T., Minor Children: Karen Marie Wood-Taylor and Dawn Marie Wood-Taylor, Appellants, vs. Julie Joe Eldredge, Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Bob W. Hughey, Judge. In this adoption without consent proceeding, Appellants, Karen Marie Wood-Taylor and Dawn Marie Wood-Taylor, appeal from the trial court's order denying their petition for a final decree of adoption. Karen is the biological mother of P.T.T. and H.R.T., minor children. Karen and her spouse by civil marriage, Dawn, petitioned the trial court to enter a final decree of adoption permitting Dawn to adopt the minor children without the consent of Appellee, Julie Jo Eldredge. Julie is the former spouse of Karen by civil marriage, Julie assumed parental responsibility for the children before and after the marriage, and she was adjudged, in *Eldredge v. Taylor*, 2014 OK 92, 330 P.3d 888, to be the *de facto* parent of the children. After conducting the "best interests" hearing, the trial court issued a lengthy memorandum opinion containing findings of fact and conclusions of law and held Appellants failed to meet their burden of showing with clear and convincing evidence that the adoption is in children's best interests. Based on this finding, the trial court denied Appellants' petition for the final decree of adoption. We hold the weight of the evidence supports the trial court's finding that Appellants failed to meet their burden of showing the children's best interests would be served by granting the adoption. The trial court's order denying the adoption is AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,057 — Rural Water District No. 1, Comanche County, Oklahoma, an agency and legally constituted authority of the State of Oklahoma; and Rural Water District No. 3, Comanche County, Oklahoma, an agency and legally constituted authority of the State of Oklahoma, Plaintiffs/Appellants, and Rural Water District No. 2, Comanche County, Oklahoma, an agency and legally constituted authority of the State of Oklahoma; and Pecan Valley Waterworks Association, L.L.C., Plaintiffs, vs. City of Lawton, an Oklahoma Municipality, Defendant/Appellee. Appeal from the District Court of Comanche County, Oklahoma. Honorable Emmit Tayloe, Judge. Plaintiffs/Appellants Rural Water District No. 1, Comanche County, Oklahoma, and Rural Water District No. 3, Comanche County, Oklahoma, (collectively, Plaintiffs) are appealing from the Journal Entry of Judgment granting summary judgment in favor of Defendant/Appellee City of Lawton (City). After *de novo* review, we hold the material facts are not in dispute and City is entitled to judgment as a matter of law on Plaintiffs' breach of

contract claim. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,246 — William D. Cawood, Leska Gilbert, and Timothy Desmond Mendell, Individually and as Co-Personal Representatives of the Estate of Earla Jean Cawood, Deceased, Plaintiffs/Appellants, vs. Chad G. Thompson, M.D., Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. In this medical negligence action, Plaintiffs/Appellants, William D. Cawood, Leska Gilbert and Timothy Desmond Mendell, Individually and as Co-Personal Representatives of the Estate of Earla Jean Cawood, deceased, appeal from the trial court's order striking the testimony of their medical expert witness and granting summary judgment to Defendant/Appellee, Chad G. Thompson, M.D. Plaintiffs sued Thompson for negligently placing a Percutaneous Endoscopic Gastrostomy feeding tube (PEG tube) into Earla Jean Cawood's stomach without proper suturing or anchoring mechanisms. Plaintiffs alleged Thompson's failure to use additional anchoring mechanisms, such as a suture, and his failure to perform diagnostic imaging studies, to ensure proper placement of the PEG tube, caused the PEG tube to fall out of decedent's abdomen and contributed to her death. Defendant moved to strike Plaintiffs' medical expert witness, a rheumatologist, under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Defendant claimed Plaintiffs' expert was not qualified to render expert opinion testimony regarding the standard of care for the placement of a PEG tube by an interventional radiologist nor was he qualified to render an opinion as to whether Thompson negligently caused or contributed to decedent's injury. The trial court granted Defendant's motion to strike Plaintiffs' expert witness because Dr. Blaschke's "testimony fails to meet *Daubert* causation and negligence principles and thresholds." The trial court also found Plaintiffs' expert "failed to establish a case of negligence against Dr. Thompson regardless of whether he met *Daubert* criteria." After *de novo* review of the record, we cannot find the trial court abused its discretion when it struck Plaintiffs' expert witness. Accordingly, the trial court's order striking Dr. Blaschke as an expert witness and its order granting summary judgment to Thompson is AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,505 — W. Ray Pelfrey, Plaintiff/Appellant, vs. Shelly L. Harrison-Bowen, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard C. Ogden, Judge. Plaintiff/Appellant, W. Ray Pelfrey, appeals from the trial court's grant of summary judgment to Defendant/Appellee, Shelly L. Harrison-Bowen, in this quiet title action. This case centers on the ownership of a house in northwest Oklahoma City. Plaintiff asserted in his petition that he is the record title holder of the subject property in which the defendants claimed an adverse interest. In response, Defendant moved for summary judgment as agent and attorney in fact for another of the named defendants. Defendant's motion for summary judgment, along with attached supporting documentation, showed defendants are the heirs of Mark E. Harrison. In 2004, Harrison entered into a contract to purchase the subject property from Jordan Properties LLC, which executed a quit claim deed in favor of Harrison. After a fire severely damaged the house in 2009, Harrison paid off his loan to Jordan Properties with insurance proceeds. In September 2012, Jordan Properties, as grantor, purported to transfer ownership of the subject property by quit claim deed to Harrison's girlfriend. Harrison died on November 25, 2012. The girlfriend purported to transfer the property to Plaintiff, who then filed this action. Title to the subject property was quieted in defendants. In this case, the defendants' evidentiary material showed their predecessor in title, Harrison, acquired the subject property from Jordan Properties years before Jordan Properties *purported* to transfer the property to Plaintiff's predecessor. Having previously sold the property to Harrison, Jordan Properties had nothing to convey to Harrison's girlfriend. Consequently, Plaintiff acquired nothing from the girlfriend. Defendant's evidence further showed Plaintiff knew about the defendants' claims to the subject property when he allegedly purchased it. Upon *de novo* review, we conclude there exists no disputed issue of material fact and that the defendants were entitled to summary judgment as a matter of law. Accordingly, the judgment of the trial court is AFFIRMED. Opinion by Bell, P.J.; Joplin, J., concurs; Buettner, J., specially concurs.

Friday, January 26, 2018

116,242 — Aberlardo Fuentes and Armando Rubio-Saucillo, Plaintiffs/Appellants. vs. Northwestern Electric Cooperative, Inc., an Okla-

homa Utility Cooperative; Nidoma, Inc., a domestic corporation; and David Scott, d/b/a Scott Construction; and David Scott Construction, LLC, Defendants/Appellees, and Travelers Indemnity Company of Connecticut, as subrogee of FM Brothers Construction Company, Intervenor. Appeal from the District Court of Woodward County, Oklahoma. Honorable Justin P. Eilers, Judge. Plaintiffs/Appellants Aberlardo Fuentes and Armando Rubio-Saucillo (collectively, "Workers"), appeal from the October 3, 2016 Journal Entry of Judgment entered in favor of Defendant/Appellee Nidoma, Inc., based on the trial court's finding that Workers' exclusive remedy for their injuries lay in the Workers' Compensation Court. Workers were injured while working on a construction project for which Nidoma was the general contractor and Workers were employed by a subcontractor. The undisputed material facts show Nidoma was Workers' statutory employer and therefore Workers' tort claims against Nidoma were barred by the exclusive remedy doctrine. Nidoma 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)
Friday, January 12, 2018

115,599 — Iberiabank Mortgage Company, (successor by substitution for Wells Fargo Bank, NA), Plaintiff/Appellee, v. Sigurd Sigurdsson and Tanya M. Sigurdsson, Defendants, John Doe, Jane Doe and the Anderson Family Trust, Defendants/Appellants, The Lakes at Indian Springs I Homeowners Association, Inc., Intervenor and Cross-Claim Defendant, Travis Anderson, Intervenor and Cross-Claim Plaintiff/Appellant, Translink, Inc., Cross-Claim Defendant. Appeal from an Order of the District Court of Tulsa, Hon. Carlos Chappelle (Deceased), Trial Judge, Hon. Caroline Wall (by Re-Assignment), Trial Judge. The trial court defendant, Anderson Family Trust ("Trust"), and the trial court intervenor-cross-plaintiff, Travis Anderson ("Anderson"), appeal a judgment in favor of the plaintiff Iberiabank Mortgage Company ("IMC") providing for a foreclosure of a real estate mortgage. This judgment also dismissed without prejudice Anderson's cross-claim against the trial court defendants, Sigurd Sigurdsson, Tanya M. Sigurdsson, (collectively "Sigurdssons"), and trial court cross-defendant, Translink, Inc. ("Translink"). The judgment also granted sanctions against Anderson and the Trust. Matters covered by the judgment involving additional defendants are not the subject of this appeal. Anderson and the Trust have not demonstrated any legal basis to reverse the trial court's judgment granting foreclosure, whether as a summary judgment or as a sanction under District Court Rule 5. Dismissal without prejudice of Anderson's and the Trust cross-claims does not involve IMC or any prejudice to Anderson and the Trust. In any event Anderson and the Trust have not presented legal authority demonstrating error. The judgment of the trial court is affirmed pursuant to the provisions of Okla.Sup.Ct.R. 1.202(b), (d) and (3), 12 O.S. Supp. 2017, ch. 15 app. 1. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, P.J., and Goodman, J., concur.

Wednesday, January 24, 2018

116,506 — Real Estate Advisors, Inc., Plaintiff/Appellee, v. Paris Plaza 66, L.L.C., Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. The defendant, Paris Plaza 60, LLC ("Paris Plaza"), appeals an Order granting summary judgment to the plaintiff, Real Estate Advisors, Inc. ("REA"). Here, the underlying action is to vacate default judgments. The facts submitted by the parties stand undisputed in the Record. The Record shows, without dispute, that everything that led to the entry of default judgments against Paris Plaza was caused by the fault of Attorney Parker and his complete failure to represent Paris Plaza in this action. Second, there is no irregularity as proper procedures were followed leading to the entry of the judgments. Third, there is no showing of any fault on the part of Paris Plaza or that Paris Plaza did anything to contribute to its problem. The Oklahoma Supreme Court has ruled that negligence of a party's attorney is not ground to vacate a judgment on the ground of unavoidable casualty or misfortune. The rationale is that the negligence of the attorney (an agent) is imputed to the client. However, the theory of imputing negligence has limitations. In the present case, there is more than simple negligence on the part of Attorney Parker. In addition, the facts show that Attorney Parker effectively abandoned his client, Paris Plaza. Therefore, after review of the record, this Court concludes that the acts of commission and omission on the part of Attorney Parker leading to entry of the judgments cannot be imputed to Paris Plaza. First, neither a principal-agent nor a joint enterprise relation-

ship in fact existed between Paris Plaza and Attorney Parker due to Attorney Parker's abandonment of his client. Second, all of the facts and circumstances of this case weigh in favor of Paris Plaza having its day in court. This Court holds that the trial court erred in granting summary judgment to REA. In light of the fact that there are no issues of fact regarding whether the judgments should be set aside, this Court further concludes that judgment should be rendered for Paris Plaza vacating the default judgment in this case. Therefore, the summary judgment of the trial court is reversed and the case is remanded with instructions to enter judgment for Paris Plaza vacating the default judgment filed and dated March 5, 2014 and the judgment filed and dated April 2, 2014. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, P.J., and Goodman, J., concur.

Friday, January 26, 2018

115,342 — Amanda Sue Morgan, now Tran, Plaintiff/Appellant v. MOOG Inc. and Curlin Medical, Inc., Defendants/Appellees, and JPS Surgical, Inc., an Oklahoma corporation; Orthopedic Resources, Inc., an Oklahoma corporation; DJO, Incorporated, a foreign corporation; and I-Flow Corporation, a foreign corporation, Defendants. Appeal from an order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Jduge, denying Appellant's motion for leave to amend her petition and motion to vacate an earlier order granting Defendants' motion for summary judgment. We find the trial court did not abuse its discretion in denying Appellant's motion for leave to amend her petition or her motion to vacate the order granting Defendants summary judgment based on undue delay, and we affirm the trial court's orders. AFFIRMED. Substitute Opinion on Rehearing from the Corut of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

(Division No. 3)
Friday, January 19, 2018

115,599 — (Comp. w/116,267, 116,504) Moore Primary Care, Inc., Randall Carter, P.A., Maryam Butler, P.A., Petitioners/Appellants, 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. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Lori Walkley, Trial Judge. Petitioners/Appellants, Moore Primary Care, Inc., Randall Carter, P.A., and Maryam Butler, P.A., seek review of the trial court's order granting the motions to dismiss the petition filed by the Respondents/Defendants, Oklahoma Health Care Authority, Oklahoma Health Care Authority Board, Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority, and Telligen, Inc. We reverse in part, holding that the petition properly states a justiciable claim for declaratory relief under the Oklahoma Administrative Procedures Act, 75 O.S. 2011 §306. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,315 — Prairie Oil & Gas, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellant, vs. Stamp Brothers Oil and Gas, LLC, an Oklahoma Limited Liability Company, Lunar Petroleum, LLC, a Texas Limited Liability Company, Fairmount Land and Minerals, LLC, a Texas Limited Liability Company, Keystone Energy, LLC, an Oklahoma Limited Liability Company, Grant Oil & Gas, LLC, an Oklahoma Limited Liability Company, Advocate Oil and Gas, LLC, a Texas Limited Liability Company, David F. Sims, as Trustee of the David F. Sims Survivors Trust A (50%) and The Marilyn W. Sims GST Exempt Family Trust (50%), Walter L. Farrington, III, an individual, Thunder Energy, LLC, an Oklahoma Limited Liability Company, Continental Exploration, LLC, a Texas Limited Liability Company, Bank7, an Oklahoma Chartered Bank, McClure Creek E&P, a Texas Limited Liability Company, and Scoop I, L.P., an Oklahoma Limited Partnership, Defendants/Appellees. Appeal from the District Court of Grady County, Oklahoma. Honorable John E. Herndon, Judge. Plaintiff/Appellant Prairie Oil and Gas, LLC (Prairie) appeals from summary judgment entered in favor of the above-named Defendants/Appellees (collectively, Defendants) in Prairie's action to quiet title to eighty acres of mineral interests. Prairie also appeals from the court's denial of its motions for new trial and to vacate judgment. Prairie contends it owns the mineral interests because its seller had been deeded the minerals by his mother prior to her death. Defendants claim they each own part of the mineral interests because their sellers inherited the mineral interests through probate. After *de novo* review, we find the probate order allow-

ing final accounting is controlling, but genuine issues of material fact exist concerning the probate court's ruling. Accordingly, we REVERSE AND REMAND FOR FURTHER PROCEEDINGS. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

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. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Trial Judge. Petitioner/Appellant, Mary Kathryn Mercer, D.O. (Provider) seeks review of the trial court's order granting the motions to dismiss the petition filed by the Respondents/Defendants, Oklahoma Health Care Authority, Oklahoma Health Care Authority Board, Rebecca Pasternik-Ikard, Administrator of the Oklahoma Health Care Authority, and Telligen, Inc. We AFFIRM because Provider failed to exhaust her administrative remedies. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

Friday, January 26, 2018

114,728 — In Re the Marriage of Smith: Kent Joseph Smith, II, Petitioner/Appellee, vs. Tiffany Hill-Smith, Respondent/Appellant. Appeal from the District Court of Logan County, Oklahoma. Honorable Susan C. Worthington, Trial Judge. Respondent/Appellant Tiffany Hill-Smith (Mother) appeals from a decree of dissolution of marriage awarding Petitioner/Appellee Kent Joseph Smith, II (Father) sole legal custody of the parties' three minor children with equal visitation between the two parties. Mother contends that it was an abuse of discretion for the trial court to follow the recommendations of the guardian ad litem. In reviewing the evidence, we agree that awarding Father sole custody was appropriate and not an abuse of discretion. Ample evidence exists in the record to support the conclusion that Father is the party more likely to be cooperative, encourage communication and visitation, and facilitate the minor children's relationship with Mother. We therefore AFFIRM the trial court's order. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

115,310 — Kinslow Family Limited Partnership, an Oklahoma Limited Partnership, Plaintiff/Appellee, vs. William Sanders, an Individual, and GBR Cattle Company, LLC, an Oklahoma Limited Liability Company, Defendants/Appellants. Appeal from the District Court of Seminole County District Court. Honorable Timothy L. Olsen, Trial Judge. Defendants/Appellants, William Brian Sanders and GBR Cattle Company, LLC (collectively Sanders), seek review of the trial court's judgment permanently enjoining Sanders from barring or obstructing the access of Plaintiff/Appellee, Kinslow Family Limited Partnership (Kinslow) to the subject property along a section line road in Seminole County, Oklahoma, and finding Sanders in contempt for violating the court's temporary injunction. The judgment denied Kinslow's claim for damages. Sanders also seeks review of the trial court's orders denying his motion to dismiss and application for attorney fees. We affirm because a landowner is entitled to use a section line road to access the abutting property. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

115,566 — (Cons. w/115,569) James D. Casebeer, Petitioner, vs. Tulsa Fire Department and The Workers' Compensation Court of Existing Claims, Respondents, and City of Tulsa (Own Risk #10435), Insurance Carrier. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. SUSTAINED. Petitioner James D. Casebeer (Claimant) and Respondents the Tulsa Fire Department and City of Tulsa (collectively Employer) seek review of an order of a three-judge panel of the Workers' Compensation Court of Existing Claims (WCCEC). The panel affirmed the lower court's order denying Claimant's request for a change of condition for the worse to his left hip, denied Employer's motion to terminate pain management for the left hip, and approved additional medical treatment for the left hip in the form of aquatic therapy and injections. The panel's order is neither contrary to law nor against the clear weight of the evidence. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

(Division No. 4)
Tuesday, January 16, 2018

115,534 — B.S., a Minor, by Rick Syzemore, Her Parent and Next Friend, Plaintiff/Appellee, vs. C.H., a Minor, by Jesse Hoskins, Her Parent and Next Friend, Defendant/Appellant. Proceeding to review a judgment of the District Court of Blaine County, Hon. Mark A. Moore, Trial Judge. Defendant appeals the trial court's

refusal to award fees pursuant to 12 O.S. Supp. 2013 § 2011.1 after Plaintiff voluntarily dismissed her claim after pre-trial. On review, we affirm the decision of the district court. The matter is complicated by the fact that the Legislature has enacted two statutes that may be applicable in this situation, 23 O.S.2011 § 103 and 12 O.S. Supp. 2013 § 2011.1. Plaintiff's petition raised claims of assault, battery and intentional infliction of emotional distress. Plaintiff's case appears to fall under 23 O.S.2011 § 103, and § 103 is clear that the triggering event for a fee claim is *adjudication on the merits*. Further, even if personal injury claims fall under § 2011.1 instead, we agree with *Elliott v. McCaleb,* 2006 OK CIV APP 87, ¶ 11, 139 P.3d 253, that a § 2011.1 fee is also available only after an adjudication on the merits. We find no record that any adjudication on the merits occurred in this case. We therefore conclude that fees were not available to Plaintiff in this case under either statute, and we affirm the district court's decision on that basis. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., concurs, and Wiseman, J., concurs in result.

Monday, January 22, 2018

115,474 — Jon Christian, Petitioner/Appellee, v. Daisy Christian, Respondent/Appellant. Appeal from an Order of the District Court of Stephens County, Hon. Dennis L. Gay, Trial Judge, denying Wife's Motion for New Trial following her divorce from Husband Jon Christian. Upon review of the record and the issues preserved for review on appeal, we find no abuse of discretion by the trial court and no reversible error occurred. The trial court's denial of Wife's Motion for New Trial/Motion for Reconsideration was correct and is affirmed. However, upon remand, the trial court may make whatever orders necessary to facilitate the retrieval of any items of personal property belonging to Wife which remain in Husband's possession, if any. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,831 — Judy Knight, an individual, Plaintiff/Appellant, v. Phoenix Central, Inc., an Oklahoma corporation, Plaintiff, vs. Ward and Glass, et al., an Oklahoma corporation, and Stanley Ward, and John or Jane Does 1-10, individuals or corporations, Defendants/Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Tracy Schumacher, Trial Judge. This Court accedes to Appellees' concession that the trial court's order of dismissal, based as it was on the operation of the constitutionally-invalid provisions of 12 O.S.2011, § 19, "was improvidently issued" and therefore "this matter should be returned to the trial court for further proceedings… ." REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, January 24, 2018

116,268 — Oana Mischiu, Plaintiff/Appellant, vs. Thomas Elmer Wiley, Defendant/Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Dana Lynn Kuehn Trial Judge. Appellant Dr. Oana Mischiu appeals the district court's summary judgment in favor of Appellee Dr. Thomas Elmer Wiley. Both parties are physicians. In November 2015, Appellant filed a petition alleging that Appellee, who is Appellant's ex-husband, made numerous false and defamatory statements regarding Appellant's care of the couple's children to the California Medical Board, and the Palo Alto Medical Foundation. The district court found that the statute of limitations on Appellant's claim began to run in April of 2013, when Appellant was aware that the complaints had been made. This case presents an unusual situation, because the California Medical Board will not release details of a complaint to a target doctor until it has made a formal decision to investigate. Because of this rule, we determine that the accrual date of Appellant's defamation claims regarding the complaint to the Medical Board is December 2014, when the actual details of Appellee's statements to the Board could first be obtained by Appellant, not April of 2013, when the complaint was first known of. Hence, Appellant's claims are not clearly barred by the statute of limitations. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

115,707 — Jamie L. Paris, Plaintiff/Appellee, vs. Chad D. Gomez, Defendant/Appellant. Proceeding to review a judgment of the District Court of Bryan County, Hon. Joe C. Taylor, Trial Judge. Chad D. Gomez appeals a decision of the district court granting a protective order to Jamie L. Paris. On review, we affirm the decision of the trial court, but remand this mat-

ter for correction of the court's order to reflect that the finding was one of "harassment" and not "domestic abuse" or "stalking." AFFIRMED, REMANDED FOR NUNC PRO TUNC ORDER. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., and Wiseman, J., concur.

116,182 — Payless Divorce Service of Oklahoma, Inc., Plaintiff/Appellant, vs. Daniel Wiafe d/b/a Oklahoma Divorce Center and Nevadadivorcecenter.com, Defendant/Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge. Payless Divorce Service of Oklahoma (Payless), appeals a decision of the district court granting summary judgment to Daniel Wiafe d/b/a Oklahoma Divorce Center and Nevadadivorcecenter.com (collectively Wiafe) on the grounds of mootness. The parties are "non-lawyer divorce service" firms that provide paperwork and typing services to assist pro se parties in filing for divorce. Payless alleged that Wiafe had violated the Oklahoma Deceptive Trade Practices Act by "misrepresenting that his company is a Tulsa company by listing a bogus local address and by listing a bogus local telephone number" and sought to enjoin Wiafe from using the "metatag" "payless" on his website. We find no case in either Oklahoma or foreign law, however, finding a deceptive trade practice under the circumstances presented here. Further, Wiafe no longer operates the subject website. We therefore affirm the decision of the district court in this matter. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, V.C.J.; Barnes, P.J., concurs and Wiseman, J., concurs in result.

Friday, January 26, 2018

116,342 — Mid-Del Support Employees Association, Plaintiff/Appellee, v. Independent School District No. I-52 of Oklahoma County, Oklahoma, a/k/a MidDel Public Schools, Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parish, Trial Judge, granting Mid-Del Support Employees Association's (Association) motion for summary judgment and denying School District's cross motion for summary judgment. The issue before the trial court was whether School District had violated the parties' negotiated agreement by not providing support employees with holiday pay for six holidays. We find the trial court correctly granted Association's motion for summary judgment, finding School District had failed to pay support employees holiday pay as required by the negotiated agreement, thereby violating the contract. The order is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Monday, January 29, 2018

115,998 — Kent G. Savage, Plaintiff/Appellant, v. Jeffrey Troutt, Tami Grogan, Dan Grogan, Carol Montalvo, Kenya Ares-Vales, Jason Bryant, Buddy Honaker, Mark Knutson, Defendants/Appellees. Appeal from an Order of the District Court of Alfalfa County, Hon. Loren E. Angle, Trial Judge. The pro se plaintiff, Kent G. Savage (Savage) appeals an order overruling his motion to reconsider the trial court's dismissal of his action against Jeffrey Troutt (Troutt), Tami Grogan (T. Grogan), Dan Grogan (D. Grogan), Carol Montalvo (Montalvo), Kenya Ares-Vales (Ares-Vales), Jason Bryant (Bryant), Buddy Honaker (Honaker), and Mark Knutson (Knutson). Savage is an inmate in custody of the Oklahoma Department of Corrections (DOC). The circumstances of his claims occurred while he was incarcerated at the James Crabtree Correctional Center (JCCC). He has since been relocated. The defendants are employees of DOC in various capacities. Savage's petition states a personal claim against Troutt for damages for denial of medical care. Savage's claim for actual provision of specific medical care is moot because he is no longer incarcerated in the facility where his claim arose. With the exception of Savage's claim against Troutt, all of Savages' remaining claims against individual defendants are barred by sovereign immunity. Therefore, the judgment of the trial court is affirmed in part and reversed in part and remanded for further proceedings. The judgment provision that this action count as a strike is vacated. VACATED IN PART, AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Divison No. 1)
Wednesday, January 17, 2018

114,933 — In the Marriage of: Christopher Wayne Myers, Petitioner/Appellee, vs. Cassidy Ann Myers, Respondent/Appellant. Appellant's Petition for Rehearing, filed January 9, 2018, is *DENIED*.

(Divison No. 1)
Wednesday, January 24, 2018

115,341 (Companion with Case No. 115,747 — Heritage Trust Company and Dan Webb, Co-Trustees of the William B. Cunningham 1991 Revocable Trust, Plaintiffs/Appellees, vs. Timothy L. Freeman, an individual, Defendant/Appellant. Appellee's Petition for Rehearing is hereby *DENIED*.

(Divison No. 3)
Friday, January 26, 2018

113,976 — In Re: The Henry S. Frazer Trust established July 18, 2007, Margaret L. Frazer, Plaintiff/Appellee, vs. Bonnie M. Bratcher, Linda C. Brown, and Heritage Trust Company, Co-Trustees of The Henry S. Frazer Trust, Defendants/Co-Appellants. Defendants/Co-Appellants' Petition for Rehearing filed January 2, 2018 is *DENIED*.

(Divison No. 4)
Tuesday, January 16, 2018

115,930 — Rolled Alloys, Inc., Travelers Property Casualty Co. of America, Petitioners, vs. Donald Wilson, and The Workers' Compensation Commission, Respondents. Petitioners' Petition for Rehearing is hereby *DENIED*.

Wednesday, January 24, 2018

116,159 — Kenda Miller, Plaintiff/Appellant, vs. State of Oklahoma ex rel. State Board of Education, Defendant/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

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Oklahoma Bar Center - Live Webcast Available

Clients with high-conflict personality disorders or traits need more structure, encouragement and positive skills to use during the mediation process. However, the same approach can be used with all clients. This full-day training will present the steps of *New Ways for Mediation*, a simple, but highly-structured method which teaches and reinforces client skills including asking questions, making agendas, making proposals and responding appropriately. This training will include an explanation of the process, video examples and practice exercises.

Early registration by Friday, February 23, 2018, is $150 for all ADR Section Members; $200 for non-members. Registrations received after February 23rd will increase $25 an additional $25 for walk-ins. Law students may attend for free but must register by calling Renee at 405-416-7029 or emailing ReneeM@okbar.org. Registration includes continental breakfast and a networking lunch. To receive a $10 discount on in-person programs register online at www.okbar.org/members/CLE. Registration for the live webcast for all members is $200. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

FEATURED TRAINER: Bill Eddy, LCSW, Esq.

William A. ("Bill") Eddy is an attorney, therapist, mediator, and the President of the High Conflict Institute based in San Diego, California. As a family law attorney in California he has represented clients in family court and provided mediation services for the past 25 years. Prior to that, he provided psychotherapy for 12 years to children, adults, couples and families in psychiatric hospitals and outpatient clinics as a Licensed Clinical Social Worker. He is presently the Senior Family Mediator at the National Conflict Resolution Center in San Diego, California. He has also mediated personal injury and business disputes.

LEARNING OBJECTIVES

After this training participants will be able to: **1)** Describe the basic conflict dynamics of five "high-conflict" personality disorders; **2)** Apply *EAR Statements* in the face of client anxiety and anger; **3**) Describe the proposal-focused structure and rationale of *New Ways for Mediation*; **4)** Guide clients in a 3-step process of making and responding to proposals; and, **5)** Manage high-conflict client resistance to final resolution of their conflict.

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A 2-PART LIVE WEBCAST

TAX CUTS AND JOBS ACT OF 2017

FOR INDIVIDUALS
FEBRUARY 14, NOON - 1 P.M.

FOR BUSINESSES
FEBRUARY 28, NOON - 1 P.M.

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

PROGRAM PRESENTERS:
Donna Jackson, CPA, JD, LLM
A. Daniel Woska, JD, LLM

President Trump signed the Tax Cuts and Jobs Act of 2017 on December 22, 2017. This is a two-part webcast series.

The first webcast on Wednesday, February 14, 2018 will discuss the act as it relates to individuals, and part two webcast on Wednesday, February 28, 2018, will discuss the act as it relates to businesses.

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