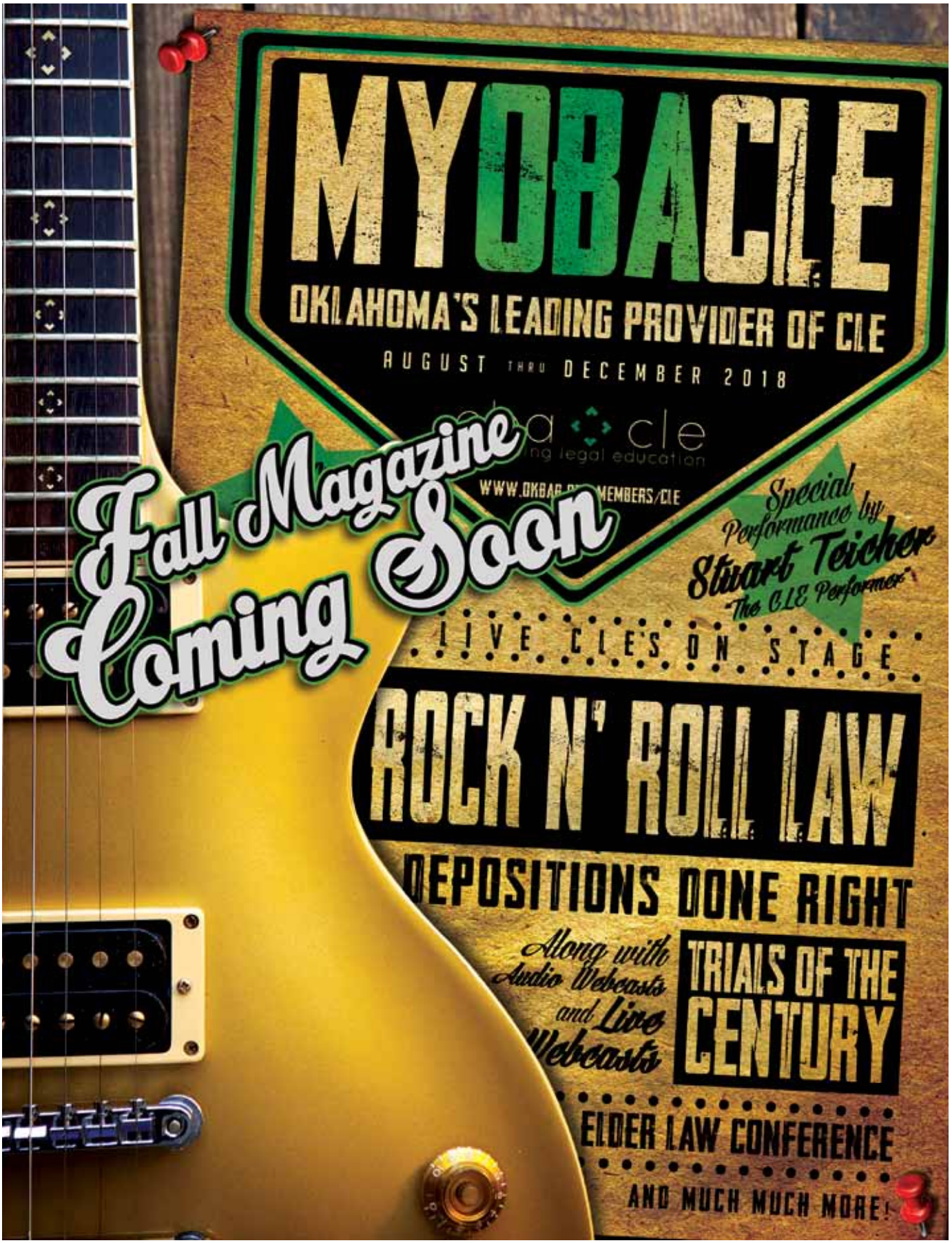
THE OKLAHOMA BAR
Journal
Volume 89 — No. 18 — 7/14/2018

Court Issue


MYOBACLE
OKLAHOMA'S LEADING PROVIDER OF CLE
AUGUST THRU DECEMBER 2018
Fall Magazine Coming Soon
Special Performance by Stuart Teicher The CLE Performer
LIVE CLE'S ON STAGE
ROCK N' ROLL LAW
DEPOSITIONS DONE RIGHT
Along with Audio Webcasts and Live Webcasts
TRIALS OF THE CENTURY
ELDER LAW CONFERENCE
AND MUCH MUCH MORE!

Oklahoma Bar Association 405-416-7000
Toll Free 800-522-8065
FAX 405-416-7001
Continuing Legal Education 405-416-7029
Ethics Counsel 405-416-7055
General Counsel 405-416-7007
Lawyers Helping Lawyers 800-364-7886
Mgmt. Assistance Program 405-416-7008
Mandatory CLE 405-416-7009
Board of Bar Examiners 405-416-7075
Oklahoma Bar Foundation 405-416-7070

www.okbar.org

THE OKLAHOMA BAR
Journal

Volume 89 – No. 18 – 7/14/2018

The Oklahoma Bar Journal (ISSN 0030-1655) is published three times a month in January, February, March, April, May, August, September, October November and December and bimonthly in June and July by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105. Periodicals postage paid at St. Joseph, Michigan.

Subscriptions $60 per year except for law students registered with the OBA and senior members who may subscribe for $30; all active members included in dues. Single copies: $3

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


Oklahoma Bar Association
AWARDS
Nominations due
July 27
Visit www.okbar.org/awards
for rules, tips, awards history and more!

OKLAHOMA BAR ASSOCIATION

table of contents

July 14, 2018 • Vol. 89 • No. 18

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Criminal Appeals

Index to Opinions of Court of Civil Appeals

Supreme Court Opinions

Manner and Form of Opinions in the Appellate Courts;
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

2018 OK 49

In re: Amendments to Rule 7.4, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A

SCAD-2018-35. June 11, 2018

ORDER

Rule 7.4 of the Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A, is hereby amended as shown with the 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 on June 11, 2018.

/s/Noma D. Gurich
VICE CHIEF JUSTICE

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

Combs, C.J., Colbert, Darby, JJ., dissent.

Exhibit "A"

Rules Governing Disciplinary Proceedings, Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.4 Conviction Becoming Final Without Appeal

If the conviction becomes final without appeal, the General Counsel of the Oklahoma Bar Association shall inform the Chief Justice and the Court ~~shall~~ may order the lawyer, within such time as the Court shall fix in the order, to show cause in writing why a final order of discipline should not be made. The written return of the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his conduct or by way of mitigating the discipline to be imposed upon him, submit a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting ~~his~~ the recommendation of discipline.

Exhibit "B"

Rules Governing Disciplinary Proceedings, Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.4 Conviction Becoming Final Without Appeal

If the conviction becomes final without appeal, the General Counsel of the Oklahoma Bar Association shall inform the Chief Justice and the Court may order the lawyer, within such time as the Court shall fix in the order, to show cause in writing why a final order of discipline should not be made. The written return of the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his conduct or by way of mitigating the discipline to be imposed upon him, submit a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting the recommendation of discipline.

2018 OK 50

In re: Amendments to Rule 7.7, Rules Governing Disciplinary Proceedings,

SCAD-2018-37. June 18, 2018

ORDER

Rule 7.7 of the Rules Governing Disciplinary Proceedings, is hereby amended as shown with the 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 on June 18th, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit A

§7.7. Disciplinary Action in Other Jurisdictions, as Basis for Discipline.

(a) It is the duty of a lawyer licensed in Oklahoma to notify the General Counsel whenever

discipline for lawyer misconduct has been imposed upon him/her in another jurisdiction, within twenty (20) days of the final order of discipline, and failure to report shall itself be grounds for discipline.

(b) When a lawyer ~~has been adjudged guilty of misconduct~~ is the subject of a final adjudication in a disciplinary proceeding, except contempt proceedings, ~~by the highest court of another State or by a Federal Court~~ in any other jurisdiction, the General Counsel of the Oklahoma Bar Association shall cause to be transmitted to the Chief Justice a certified copy of such adjudication within five (5) days of receiving such documents. The Chief Justice shall direct the lawyer to ~~appear before the Supreme Court at a time certain, not less than ten (10) days after mailing of notice, and show cause, if any he/she has, why he/she should not be disciplined~~ show cause in writing why a final order of discipline should not be made. A written response from the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his or her conduct, or by way of mitigating the discipline to be imposed upon him or her, submit a brief and/or any evidence tending to mitigate the severity of discipline. ~~The documents shall constitute the charge and shall be prima facie evidence the lawyer committed the acts therein described.~~ The lawyer may submit a certified copy of any transcripts of the evidence taken during disciplinary proceedings in the ~~trial tribunal of the~~ other jurisdiction to support his/her claim that the finding therein was not supported by the evidence or that it does not furnish sufficient grounds for discipline in Oklahoma. The General Counsel may respond by submission of a brief and/or any evidence supporting a recommendation of discipline.

(c) Certified copies of the documents shall constitute the charge and shall be prima facie evidence the lawyer committed the acts therein described.

(d) The Oklahoma Supreme Court may refer the matter for additional evidentiary hearing(s) before the Professional Responsibility Tribunal if the Court deems such hearing(s) necessary.

Exhibit B

§7.7. Disciplinary Action in Other Jurisdictions, as Basis for Discipline.

(a) It is the duty of a lawyer licensed in Oklahoma to notify the General Counsel whenever discipline for lawyer misconduct has been imposed upon him/her in another jurisdiction, within twenty (20) days of the final order of discipline, and failure to report shall itself be grounds for discipline.

(b) When a lawyer is the subject of a final adjudication in a disciplinary proceeding, except contempt proceedings, in any other jurisdiction, the General Counsel of the Oklahoma Bar Association shall cause to be transmitted to the Chief Justice a certified copy of such adjudication within five (5) days of receiving such documents. The Chief Justice shall direct the lawyer to show cause in writing why a final order of discipline should not be made. A written response from the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his or her conduct, or by way of mitigating the discipline to be imposed upon him or her, submit a brief and/or any evidence tending to mitigate the severity of discipline. The lawyer may submit a certified copy of any transcripts of the evidence taken during disciplinary proceedings in the other jurisdiction to support his/her claim that the finding therein was not supported by the evidence or that it does not furnish sufficient grounds for discipline in Oklahoma. The General Counsel may respond by submission of a brief and/or any evidence supporting a recommendation of discipline.

(c) Certified copies of the documents shall constitute the charge and shall be prima facie evidence the lawyer committed the acts therein described.

(d) The Oklahoma Supreme Court may refer the matter for additional evidentiary hearing(s) before the Professional Responsibility Tribunal if the Court deems such hearing(s) necessary.

2018 OK 55

OKLAHOMA'S CHILDREN, OUR FUTURE, INC.; THE OKLAHOMA EDUCATION ASSOCIATION; THE OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; THE COOPERATIVE COUNCIL FOR OKLAHOMA SCHOOL ADMINISTRATION; THE ORGANIZATION OF RURAL OKLAHOMA SCHOOLS; THE OKLAHOMA ASSOCIATION OF CAREER AND TECHNOLOGY EDUCATION; THE UNITED SUBURBAN SCHOOLS ASSOCIATION; OKLAHOMA PTA; THE TULSA CLASSROOM TEACHERS ASSOCIATION; DR. KEITH BALLARD; JOELY FLEGLER; and TERANNE

WILLIAMS, Petitioners/Protestants, v. DR. TOM COBURN, BROOKE MCGOWAN, and RONDA VUILLEMONT-SMITH, Respondents/Proponents.

No. 117,020. June 29, 2018

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

¶1 At worst, this is a close case. Both the Secretary of State and the Attorney General – two perfectly reasonable people with frontline responsibility to gauge the sufficiency of referendum petitions[1] – have examined this petition and concluded that it is sufficient and can go to the people.[2] If reasonable people can disagree as to the sufficiency of a petition, then the petition isn't *clearly* deficient; and if it isn't clearly deficient, we should err on the side of letting the people have their say – even if we might quibble with some of the drafting choices made by the proponents.

¶2 Unfortunately, the Court chooses to quibble. In lawyering this petition to death, the Court finds it deficient because (1) it contains a gist that the Court deems insufficient for reasons that have no connection to the actual purposes of a gist nor to the text of any statute or constitutional provision, and (2) the copy of the measure the proponents attached omits 21 characters of text out of approximately 80,000 – the entirely non-substantive, never-to-be-codified *section numbers*, at that. In doing so, the Court unnecessarily departs from our referendum petition precedents. I respectfully dissent.

I.

A.

¶3 Even assuming that we exercise valid authority when we put a gist under the judicial microscope,[3] the Court imposes a standard that will (1) require a gist that hopelessly confuses the average citizen as to what he is being asked to sign, and (2) effectively insulate revenue measures from the referendum process, in plain contravention of the Constitution's requirement that revenue measures always be subject to the will of the people.

¶4 This is so because the majority insists that the gist of this referendum be phrased in a way that matches the ballot question. In so doing, the Court ignores the fact that a gist and ballot question help a citizen answer two different questions, at two distinct points in time: (1) do I want this measure to be put to a vote of the people? and (2) do I want this measure to become law? Unlike an initiative petition, where the answer to each question will be the same – i.e., a voter who wants the initiative to be on the ballot will also be in favor of approving the initiative – in the referendum context, a voter who wants the question on the ballot will be a voter who does *not* want the measure to become law. A referendum like this one, after all, is an attempt to *undo* the effect of a legislative enactment. Thus, a requirement that the gist of a referendum be phrased the same as the eventual ballot question will mislead voters into signing a petition when it is against their interest to do so, and vice versa.

¶5 Take the gist mandated by today's decision. According to the Court, it must tell a potential signer of the petition that he is being asked to sign a petition proposing a measure to approve a variety of new taxes.[4] The working Oklahoman who has a clipboard shoved in his face on the way out of the grocery store will read the Court's proposed gist and think that – if he is in favor of these new taxes – he should sign this petition. But that voter would be 100% wrong. The taxes have already been enacted. The purpose of the referendum is to undo that status quo. Those in favor of the new taxes *do not want the referendum on the ballot.* They want to maintain the status quo, *and thus it is in their interest not to sign.*

¶6 The opposite is also true. A voter opposed to the new taxes will read the Court's proposed gist and think that he should *not* sign the petition because he does not want to approve any new taxes. This is particularly problematic because this effectively undermines the Constitution's clear mandate that revenue bills be subject to referendum.[5] I cannot fathom how proponents of a referendum to disapprove new taxes will ever be able to collect the thousands of signatures they need when they are forced to collect those signatures with a petition that tells potential signatories that the proposal is to "approve" those new taxes, rather than to tell them more accurately that the proposal is to *repeal* those new taxes by popular vote.

¶7 The proponents' gist describes their measure as one proposing to repeal HB 1010xx's new taxes, which is the only accurate way to describe what they propose to do:

> The Proposition is to repeal House Bill 1010XX which raised the gasoline taxes from 16 cents to 19 cents per gallon; raised the diesel fuel tax from 13 cents to 19 cents per gallon; raised the cigarette tax rate fifty (50) mills per cigarette; and raised the tax

> on the gross production of oil, gas, or oil and gas in the first 36 months of a well's production from 2% to 5%. This measure would restore those taxes to their original rates before House Bill 1010XX increased them when it was passed.[6]

Indeed, it is how *anyone* – save the members of the majority – would summarize this proposal.[7] That the Court nonetheless manages to deem this gist as *misleading* illustrates its fundamental misapprehension of the meaning and purpose of a "simple statement of the gist of the proposition" in the referendum petition context.[8]

¶8 The Court's misunderstanding of the role of a gist in a referendum, and subsequent insistence that a referendum's gist be phrased in a way that does not accurately describe what its proponents seek to accomplish, will do serious, long-lasting harm to the people's ability to exercise their referendum power – particularly with respect to revenue measures. This is not what the people intended when they reserved to themselves the referendum power, and it is not what the people intended when they mandated that revenue measures be subject to that referendum power.

B.

¶9 The majority also faults the gist for failing to mention the referendum's effect on the already-repealed hotel/motel occupancy tax. Despite the majority's refusal to say so,[9] the referendum won't affect that already-repealed portion of HB 1010xx,[10] so the proponents' decision not to mention that portion of the bill in the gist is not only reasonable, but also correct. Moreover, because the majority itself refuses to say what effect the referendum will have on that tax, I am baffled as to how we can insist that the proponents do what the Court will not.[11]

C.

¶10 The majority next faults the gist for noting that HB 1010xx "raised the cigarette tax rate fifty (50) mills per cigarette,"[12] without specifying that the tax on "little cigars" was raised to the same rate.[13] The proponents correctly point out that little cigars make up only a sliver of the cigarette market, so the change of the rate on little cigars creates only a tiny fraction of the revenue generated by HB 1010xx – about 0.2% to be precise[14] – and thus it is precisely the sort of minor provision that needn't be in the gist. A gist of something, after all, is only its "main point" or the "pith of the matter,"[15] and the minuscule little cigar tax is hardly the "main point" of HB1010xx.[16]

¶11 But even accepting the majority's premise as true, that the little cigar tax is at the heart of this referendum such that a voter needs to know about this tax when being asked to sign this referendum petition, the referendum petition *does* put the voter on notice of this tax. As required by law,[17] the referendum petition contains a complete version of HB 1010xx's title, which includes a statement that "little cigars be taxed in the same rate and manner as cigarettes."[18] And if a potential signer of the petition wants even more detail than that, he or she can flip to the attached copy of HB 1010xx with the full provisions relating to little cigars.[19]

¶12 To say, as the majority does, that because something is in the measure, it must also be in the gist – or worse yet, because something is in the *title* of the measure, it must also be in the gist – is to render the gist requirement meaningless.[20] If everything that was in the title had to be in the gist, what's the point of requiring inclusion of the title? And the full text of the measure? A "simple statement of the gist" must, as a matter of logic and grammar, include *less* than what is in the title and text of the measure. This is inherent not only in the plain meaning of the term "gist," but also in the related provisions of law requiring inclusion of the title of the measure and its full text.

II

¶13 The Court also invalidates this referendum because the petition includes a copy of HB 1010xx that omits 21 of the bill's approximately 80,000 characters of text. Given that this omission prompts the Court to prevent the people of this state from voting on an enormously important policy question, one might assume that these 21 characters make up some critically important provision of this measure. One would be wrong. The 21 characters are the *section numbers,* which aren't part of the substantive law, which won't be codified,[21] and which in no way affect the reader's ability to understand the measure.[22]

¶14 Until now, we have *always* reviewed referendum petitions for substantial compliance,[23] and merely omitting 21 unimportant characters of text out of 80,000 is undoubtedly the sort of "technical" or "clerical" error that does not violate the substantial compliance standard.[24] Implicitly acknowledging as much, the

Court resorts to changing the standard to one that it believes the petition cannot satisfy: "strict compliance."[25] In so doing, the Court disregards both statute and its own precedents, and does so unnecessarily.[26]

¶15 First, the law requires us to evaluate the "exact copy" requirement in title 34, section 1 of the Oklahoma Statutes by the same standard we use to evaluate every other procedural requirement in title 34: substantial compliance. Both sections 1 and 24 of title 34 tell us to do so,[27] and we have accordingly previously held that "substantial compliance" is how we evaluate compliance with the "exact copy" requirement.[28]

¶16 In *In re Referendum Petition No. 1968-1 of City of Norman*, the proponents attached a photocopy of the text of the measure, but reduced the size to where the words appeared in 4-point font – something about like this.[29] The petition was challenged on the grounds that this shrunken copy of the measure was not an "exact copy of the title and text of the measure."[30] In rejecting that claim, this Court said the following:

> Certainly the reading of the ordinance as presented in the petition is tedious. Yet it is legible. We are unable to agree with the appellants' contention that a writing which is tiresome to read is ipso facto fraudulent, corruptive or deceptive. The issue is one of first impression and no standard for the size of type has heretofore been enunciated. The duty devolving upon the correlative legislative branch of government under Const. Art. 5 § 8 causes this court to feel reluctant to adjudicate invalidity of this referendum petition on technical grounds, as technical errors are to be disregarded if the intended purpose can be attained. 34 O.S.1961, § 24. Ruth v. Peshek, 153 Okl. 147, 5 P.2d 108. We must however, in conformance with the intent of the legislature, state that a 4 point type borders on the unreadable by those with some defect in eyesight and strains the visual acuity of the normal, and while not reversible error in the present case, it is discouraged.[31]

In other words, the Court (1) held that section 24's substantial compliance standard applied to section 1's new "exact copy" requirement, (2) acknowledged that Article V, Section 8 of the Oklahoma Constitution gave the Legislature only a limited role in policing referendum petitions and accordingly prevented the Court from invalidating a petition on "technical" grounds, and (3) held that a problem with the copy that made it "tedious" and "bordering on the unreadable" to some was not reason enough to invalidate the petition.

¶17 This petition should receive the same treatment, but it doesn't. The Court invalidates the petition because in its view omission of the measure's section numbers makes "internal navigation of the bill . . . excessively cumbersome"[32] – *precisely* the reasoning that the Court expressly rejected in the 1970 case. As we said there, the fact that something is copied in such a way as to make its reading "tedious," "tiresome," or " cumbersome" does not make it invalid. But the Court abandons this precedent with nary a mention, so we are left guessing why stare decisis was ignored in a case involving stare decisis of the strongest sort.[33]

¶18 Second, the Court's justifications for its brand new interpretations of sections 1 and 24 are unpersuasive. The Court first points to the fact that the Legislature added the "exact copy" language on the heels of one of our decisions as evidence that the Legislature intended to change the standard of review.[34] As explained above, though, we had an opportunity to interpret the new "exact copy" language before today in *In re Referendum Petition No. 1968-1 of City of Norman*, and concluded there that the standard of review for that requirement was still substantial compliance.[35]

¶19 But even if you ignore our precedent in *In re Referendum Petition No. 1968-1 of City of Norman*, the issue in that earlier case, *In re Referendum Petition No. 130*, was not whether the copy attached to the petition was sufficient or "exact" enough to satisfy the statutes. Rather, the question there was whether the statute required any copy at all.[36] We held in that case that no copy was required under the statute because there was no language to that effect in 1960.[37] But in 1961 the Legislature added language to require such a copy while leaving the language establishing the substantial-compliance standard in both sections 1 and 24 intact.[38] Accordingly, while I agree that, when the Legislature amended section 1 in 1961, it intended to change the state of the law with respect to what must be attached, I disagree that that amendment effected any change to the standard by which we measure compliance with that new requirement – as evidenced by the Court's decision in *In re Referendum Petition No. 1968-1 of City of Norman*.

¶20 The Court also invokes the "specific versus general" canon to conclude that the conflict

between section 1's "exact copy" requirement and section 24's "substantial compliance" requirement should be resolved in favor of section 1, as that is the provision that specifically pertains to copies of the text of the measure.[39] There is no such conflict, however. Section 1 provides proponents with procedural requirements; it says, in relevant part, that they are to insert in the petition an exact copy of the text of the measure. Section 24, meanwhile, provides this Court with the standard by which to measure compliance with those procedural requirements; it says that we are to search for only substantial compliance and that we are to "disregard[]" clerical and technical errors. Only if section 1 required one standard and section 24 required another, would there be any need for us to resolve a conflict. But there is no conflict between these provisions; there is in fact harmony in that both endorse substantial compliance as the relevant standard – section 24 plainly saying so, and section 1 prefacing its procedural requirements with: "The referendum petition shall be *substantially* as follows …." There is, quite simply, nothing in title 34 – or our cases interpreting it – to suggest that the law requires anything more than substantial compliance.

¶21 Applying that venerable standard to this petition, the copy the proponents attached to this petition is more than sufficient. The function of inserting a copy of the text of the measure is to inform the people of the substance of the law being referred to them – to allow those most curious of signatories to know exactly what they're being asked to sign so that they may make an intelligent decision about whether to do so.[40] Here, the proponents inserted every word of the law proposed in HB 1010xx; they didn't change a single punctuation mark. Nor did they rearrange any parts of the law; they left the order of each section exactly the same. The only things missing from what they inserted, when compared to the Bill itself, are the page numbers of the bill, the signature blocks at the end, and the section numbers. Mind, however, that when we say "section numbers," what we mean is just the number itself. For example, the first section of the Bill reads:

> SECTION 1. NEW LAW A new section of law not to be codified in the Oklahoma Statutes reads as follows:
>
> The provisions of this measure are enacted pursuant to the authority provided in Section 57 of Article V of the Oklahoma Constitution for a general revenue bill.[41]

The first section in the copy attached to the petition reads:

> SECTION . NEW LAW A new section of law not to be codified in the Oklahoma Statutes reads as follows:
>
> The provisions of this measure are enacted pursuant to the authority provided in Section 57 of Article V of the Oklahoma Constitution for a general revenue bill.[42]

No one would say that the difference between these two texts hampers their ability to understand the proposed law. In fact, if I hadn't told you there was a difference, would you have even noticed?

¶22 To be sure, this petition may not comport with "best practice"[43]; but that shouldn't (and before now, wouldn't) make it insufficient. So long as a potential signatory can understand the nature and effect of the law from what he or she has been provided, then what has been provided should suffice. I have faith that the people of Oklahoma are more than capable of understanding the impact of this law after reading this petition, and thus – according to the law and our prior cases interpreting it – this petition should survive.

* * *

¶23 This referendum petition may well be imperfect – its ballot title will need correcting if it ever gets to that point, and the failure to include a copy of HB 1010xx containing section numbers was a regrettable oversight – but our Constitution doesn't require these things to be perfect.[44] It couldn't, because democracy is inherently imperfect. The cure for democracy's imperfections, however, is more democracy, not less. Accordingly, we should let the voters decide this one – it's their State, after all.[45]

¶24 I respectfully dissent.

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

1. 34 O.S.Supp.2017 § 8(B) ("It shall be the duty of the Secretary of State to cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency of the petition . . . ."); *see id*. § 9(C) – (D) (charging the Attorney General with the responsibility of reviewing proposed ballot titles for "legal correctness").

2. Okla. Sec'y of State, Notice of the Filing of State Question 799, Referendum Petition 25, App., Doc. 9, pp.1-3 ("NOTICE is also hereby given that State Question 799, Referendum Petition 25 is SUFFICIENT for filing with the Office of the Oklahoma Secretary of State."); Br. of the State of Oklahoma 15 (urging the Court to deny the protests so as "not [to] allow citizens seeking to petition their government for redress

through referendum to 'be throttled with technicalities.'" (quoting *Caruth v. State ex rel. Tobin*, 1923 OK 980, ¶ 13, 223 P. 186, 190)).

3. *See Okla. Indep. Petroleum Ass'n v. Potts*, 2018 OK 24, ¶¶ 6 – 10, 414 P.3d 351, 362 – 64 (Wyrick, J., concurring specially) (arguing that nothing in our Constitution or statutes authorizes our judge-made gist jurisprudence).

4. *See* Majority Op. ¶ 40.

5. Okla. Const. art. V, § 33(D) (prohibiting the Legislature from enacting revenue bills as emergency measures, and thereby excluding revenue bills from the exception to the referendum power in Article V, Section 2 for "laws necessary for the immediate preservation of the public peace, health, or safety").

6. Signature Sheet for State Question 799, Referendum Petition 25, App., Doc. 1, p.39.

7. All one need do is look at how news professionals – whose very job it is to summarize information for public consumption – describe the proposal. *See, e.g., Kimberly Querry, Oklahoma Supreme Court Decides Petition to Repeal Tax Hikes Is Invalid*, KFOR (June 22, 2018), https://kfor.com/2018/06/22/oklahoma-supreme-court-decides-petition-to-repeal-tax-hikes-is-invalid/ (describing the petition as a "petition to repeal tax hikes"); *Petition to Repeal Tax Hikes Will Not Be on Ballot,* Edmond Sun (June 22, 2018), http://www.edmondsun.com/ news/petition-to-repeal-tax-hikes-will-not-be-on-ballot/article_be604da2-7636-11e8-8c6d-ff335341 548d.html (same); Tim Talley, *Oklahoma Supreme Court Voids Challenge to Teacher Pay Tax*, Associated Press (June 22, 2018), https://www.apnews.com/465a14a23e4a496ba3f37833d931fef6 (describing the petition as "an initiative petition that would overturn a package of tax hikes"); Emily Wendler, *Anxiety About Teacher Pay-Raises Grows as Tax Repeal Effort Builds and Legal Questions Mount,* State Impact Oklahoma (June 14, 2018), https://stateimpact.npr.org/oklahoma/2018/06/14/anxiety-about-teacher-pay-raises-grows-as-tax-repeal-effort-builds-and-legal-questions-mount/(describing the petition as a "tax repeal effort"); Chris Casteel, *Court Hears Challenges to Anti-Tax Campaign*, Oklahoman, June 12, 2018, at 1A (repeatedly describing the petition as a "repeal" of "recent tax hikes," of a "tax package," or of a "tax bill"); Barbara Hoberock, *Supreme Court Hears Tax Repeal Arguments*, Tulsa World, June 12, 2018, at A1 (explaining the petition "ask[s] voters to repeal House Bill 1010xx"); Trevor Brown & Jennifer Palmer, *Q&A: What You Need to Know About Challenge to Tax Rollback Petition*, Oklahoma Watch (June 11, 2018), http://oklahomawatch.org/2018/06/11/lawsuit-against-tax-rollback-petition-explained/(describing the petition as a "tax rollback petition").

8. 34 O.S.2011 § 3.

9. *See* Majority Op. ¶¶ 27-34.

10. Even if approved, the referendum cannot "re-animate" the hotel tax, because it has already been repealed. A referendum cannot enact new law; it can merely approve or disapprove the effectiveness of already-enacted legislation. Because of the repeal, "re-animation" of the hotel tax would require the enactment of *new* law, which – if attempted through direct democracy – can only be done through initiative petition.

11. Br. of the State of Oklahoma 7 – 8. The majority also suggests that the proponents should have excluded the hotel/motel tax sections from their referendum. They certainly could have, but there is nothing in the law requiring them to do so. Moreover, the proponents have a good reason for including it in their referendum because, despite its repeal, disapproval of HB 1010xx through referendum makes it significantly more difficult for any initiative petition to seek re-enactment of the repealed provisions. Okla. Const. art. V, § 6 ("Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters."). Thus, inclusion of the hotel/motel tax provisions serves a purpose for these proponents, and we have no constitutional or statutory basis upon which to fault their decision to seek a referendum on all of HB 1010xx, rather than merely part of it.

12. Signature Sheet for State Question 799, Referendum Petition 25, App., Doc. 1, p.39.

13. *See* Webster's New International Dictionary 485 (2d ed. 1959) (defining "cigarette" as "[l]iterally, a little cigar").

14. Okla. Tax Comm'n, Fiscal Impact Statement for HB 1010xx, at 1-2 (March 27, 2018), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20SUPPORT%20DOCUMENTS/impact%20statements/fiscal/senate/HB1010XX%20ENG%20FI.PDF (calculating the expected additional revenue from the "little cigar" tax to be $954,000 out of an expected $474,696,000 from HB 1010xx as a whole).

15. Webster's New International Dictionary, *supra* note 13, at 1060 (defining "gist" as "[t]he main point, or material part . . . ; the pith of the matter").

16. Again, one need only look to how others have summarized the petition to understand that the hotel/motel and little cigar taxes are ancillary details that reasonable people readily omit from their descriptions of the proposal. Kimberly Querry, *Leaders Release Statements About Oklahoma Supreme Court's Tax Repeal Decision*, KFOR (June 22, 2018), https://kfor.com/2018/06/22/leaders-release-statements-about-oklahoma-supreme-courts-tax-repeal-decision/ (describing HB 1010xx as a bill that "raises taxes on cigarettes, motor fuels and some oil and gas production"); Wendler, *supra* note 7 (describing HB 1010xx as a "$430 million tax package, which includes tax increases on cigarettes, gasoline and oil and gas production"); Brown & Palmer, *supra* note 7 (stating the bill contained "tax increases on cigarettes, motor fuel and oil and gas production"); *Oklahoma High Court Mulls Challenge to Tax for Teacher Pay*, Associated Press (June 11, 2018), https://www.apnews.com/03f0755bd82e42469ba2d4ed93ac9f78 (describing the bill as "tax hikes on cigarettes, fuel and energy production"); Sean Murphy, *Teachers' Group Seeks to Stop Oklahoma Anti-Tax Question*, US News (May 14, 2018), https://www.usnews.com/news/best-states/oklahoma/articles/2018-05-14/teachers-group-seeks-to-stop-oklahoma-anti-tax-question (describing the bill as "tax hikes on cigarettes, motor fuel and energy production"); Samuel Hardiman, *Anti-Tax Petitioners, Teachers Organize for Fight*, Tulsa World, May 10, 2018, at A3 (explaining that HB 1010xx "imposes an additional $1-per-pack cigarette tax, raises the gross production tax on new horizontal oil and gas wells from 2 percent to 5 percent, and raises fuel taxes by 3 cents per gallon on gasoline and 6 cents per gallon on diesel."); William W. Savage III, *Teacher: Veto Referendum 'Feels Like an Attack on Public Education'*, NonDoc (May 1, 2018), https://nondoc.com/2018/05/01/veto-referendum-being-filed-hb-1010xx/ (explaining that HB 1010xx "raised the gross production tax incentive rate on oil and gas production from 2 percent to 5 percent, implemented a new $1-per-pack tax on cigarettes and raised the tax on gasoline $0.03 and the tax on diesel fuel $0.06.").

17. 34 O.S.Supp.2017 § 1.

18. State Question 799, Referendum Petition 25, App., Doc. 1, p.1.

19. *See id*. at pp.4 – 7.

20. *See* Majority Op. ¶ 21 (noting that the referendum petition mentions the little cigar tax but concluding that the gist is deficient because it and the petition "do not match").

21. For example, if you visit the Court's website and look up the codified versions of the statutes enacted by HB 1010xx, you will find that section numbers are omitted. *See, e.g.*, 68 O.S. 302-7 (effective July 19, 2018) (found at: http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=482824) (containing the codified text of HB 1010xx's "Section 2" but omitting the non-codified portions, which include any reference to "Section 2"). I certainly don't think the Court is trying to "mislead" anyone by omitting the section numbers. Rather, they are omitted because they are not part of the substantive law.

22. You'd be hard-pressed to derive any substantive meaning from the bill's section numbers. All of the law's substance – all of its impact on daily life – lies in the words that come after the section number. For example, it doesn't mean anything for the cigarette tax to be at "Section .."; "Section 2."; or Section 222 of this Bill. What matters to the signatories and to the future voters is that "there is hereby levied upon the sale, use, gift, possession or consumption of cigarettes . . . a tax at the rate of fifty (50) mills per cigarette." HB 1010xx, § 2(A), 56th Leg., 2d Extra. Sess. (Okla. 2017); State Question 799, Referendum Petition 25, App., Doc. 1, p.3. It's that information that the people want and need in order to make an informed decision about whether to join in this petition, and it is that information that was provided here. Thus, again, because I think the purposes of the statute requiring the attachment of an "exact copy of the text of the measure" are satisfied by the copy of the text inserted in this petition, I see no reason to invalidate the entire referendum on a hyper-technicality.

23. 34 O.S.Supp.2017 § 1 ("The referendum petition shall be substantially as follows: . . . The question we herewith submit to our fellow voters is: Shall the following bill of the legislature (or ordinance or resolution – local legislation) be approved? (Insert here an exact copy of the text of the measure.)"); 34 O.S.2011 § 24 ("The procedure herein prescribed is not mandatory, but if substantially followed will be sufficient. If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded.").

24. 34 O.S.2011 § 24.

25. Majority Op. ¶ 54.

26. Given its invalidation of the petition on other grounds, the Court had no reason to reach the "exact copy" question.

27. *See supra* note 23.

28. *See In re Referendum Petition No. 1968-1 of City of Norman*, 1970 OK 143, ¶ 5, 475 P.2d 381, 383 (citing 34 O.S.1961 § 24).

29. *Id.* ¶ 4, 475 P.2d at 383.

30. When the exact copy requirement was first added to section 1, it required an "exact copy of the title and text of the measure." Act of May 17, 1961, tit. 34, § 1, 1961 O.S.L. 263, 264 (codified at 34 O.S.1961 § 1). Section 1 was amended in 2015 to read "exact copy of the text of the

measure." Act of April 28, 2015, ch. 193, § 1, 2015 O.S.L. 635, 635 (codified at 34 O.S.Supp.2017 § 1).

31. *In re Referendum Petition No. 1968-1 of City of Norman*, 1970 OK 143, ¶ 5, 475 P.2d at 383.

32. Majority Op. ¶ 54. HB 1010xx contains sixteen sections. One doesn't need to know the section numbers in order to understand the bill, but in any event, I am confident that the average voter can count to sixteen. So I disagree with the premise that failure to include section numbers makes the bill "excessively cumbersome" to navigate.

33. *See* Bryan A. Garner et al., The Law of Judicial Precedents 333 (2016) (explaining that "[s]tare decisis applies with special force to questions of statutory construction. Although courts have power to overrule their decisions and change their interpretations, they do so only for the most compelling reasons – but almost never when the previous decision . . . has long been acquiesced in"). This is so because unlike constitutional interpretation, if a court erroneously interprets a statute, the Legislature is free to correct the error by amending the statute. When the Legislature does not, it is said to have acquiesced in the Court's interpretation of its statute. "Hence courts generally won't depart from a settled judicial interpretation of a statute even if the earlier holding is of questionable validity." *Id*. at 335 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-37 (1977), for the proposition that "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change th[e] Court's interpretation of its legislation . . . , even if the Court were persuaded" that the earlier decision was wrong, and citing *Hill v. Atlantic & North Carolina Railroad*, 55 S.E. 854, 868 (N.C. 1906), for the proposition that "an authoritative judicial construction put upon a statute has the force of law by becoming, as it were, a part of the statute itself").

34. Majority Op. ¶¶ 46-47 (discussing *In re Referendum Petition No. 130, State Question No. 395*, 1960 OK 185, 354 P.2d 400).

35. *See supra* ¶¶ 16-17 (discussing *In re Referendum Petition No. 1968-1 of City of Norman*,1970 OK 143, ¶¶ 4-5, 475 P.2d at 383).

36. *In re Referendum Petition No. 130*, 1960 OK 185, ¶¶ 7, 10-11, 354 P.2d at 403-04.

37. *Id*. ¶ 8, 354 P.2d at 403.

38. Act of May 17, 1961, tit. 34, § 1, 1961 O.S.L. 263, 263 – 64.

39. Majority Op. ¶ 49.

40. *See Townsend v. McDonald*, 42 S.W.2d 410, 412 (Ark. 1931) (explaining the purpose of Arkansas's precursor statute as follows:

> The purpose of the section with regard to petitions for initiative measures is clear. The people could not intelligently act on an initiative measure, unless a copy of the measure itself was before them. The same reasoning would obtain in cases of a measure referred to the people. A full and correct copy of the measure attached to the petition would enable the signer thereto to act intelligently in the premises. Of course, he would not be required to read the measure, but it would be his duty to inform himself of its contents, and this would be a certain way for the signer to know that a different petition would not be presented from that signed by him. The signer would know that he was signing the measure passed by the Legislature, and was not taking the opinion of any one else as to the meaning of it.

41. Act of March 29, 2018, ch. 8XX, § 1, 2017 O.S.L. 1643, 1643.

42. State Question 799, Referendum Petition 25, App., Doc. 1, p.3.

43. Majority Op. ¶ 52 n.12.

44. Remember, the Legislature's only power with regard to referendum and initiative petitions is the power to make laws to "prevent corruption in making, procuring, and submitting initiative and referendum petitions." Okla. Const. art. V, § 8. All other powers relating to referendum and initiative petitions are reserved to the People. Okla. Const. art. V, § 1 ("The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.").

45. "The ultimate rulers of our democracy are not a President and Senators and Congressmen and Government officials, but the voters of this country." Franklin D. Roosevelt, Address at Marietta, Ohio (July 8, 1938) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=15672).

2018 OK 59

E.L. HALL, d/b/a HALL FAMILY PRODUCTION, Plaintiff/Appellant, v. MICHAEL STEPHEN GALMOR a/k/a STEVE GALMOR, d/b/a MSG OIL AND GAS, and the ESTATE OF PAUL STUMBAUGH, Defendants/Appellees.

No. 115,078. June 26, 2018

CORRECTION ORDER

This Court's opinion filed on June 26, 2018, is hereby corrected by changing the name of one of the Appellant's attorneys (appearing between ¶0 and ¶1), so that it reads "Amy N. Wilson" instead of "Amy N. Nelson."

In all other respects, the June 26, 2018, opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT ON THIS 26th DAY OF JUNE, 2018

/s/ Douglas L. Combs
CHIEF JUSTICE

2018 OK 60

TULSA ADJUSTMENT BUREAU, INC., Plaintiff/Appellee, v. SEAN CALNAN, Defendant/Appellant.

No. 116,839. June 26, 2018

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

HONORABLE KIRSTEN E. PACE, SPECIAL JUDGE

¶0 Defendant Sean Calnan received medical treatment from a healthcare provider in 2012. Nearly three-and-a-half years later, the healthcare provider assigned Calnan's account to Plaintiff Tulsa Adjustment Bureau, Inc. (TAB). TAB made efforts to collect the debt from Calnan and eventually filed suit against him. Within a few weeks of receiving summons, however, Calnan paid the debt in full. Calnan then answered, asserting the affirmative defense of "payment" and a counterclaim that TAB allegedly violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq*. The parties then filed competing motions for summary judgment. The trial court eventually entered judgment in favor of TAB and awarded costs and attorney fees under 12 O.S. § 936. Pursuant to Rule 1.36 of the Oklahoma Supreme Court Rules, Calnan now seeks accelerated review of the trial court's entry of summary judgment. We previously retained the appeal, and now hold as follows:

JUDGMENT OF THE DISTRICT COURT REVERSED; REMANDED FOR FURTHER PROCEEDINGS

Randall E. Long, RHODES, HIERONYMUS, JONES, TUCKER & GABLE, Tulsa, Oklahoma, for Appellant.

J. Andrew Enlow, Tulsa, Oklahoma, for Appellee.

Wyrick, J.:

¶1 This Court has said before that "without some judgment or judicial decree that has changed the relationship between the parties so that defendant is judicially required to do something, i.e., some enforceable judgment, plaintiffs cannot be said to be the successful or prevailing parties entitled to an award of attorney fees."[1] Moreover, we have said that, on a claim in which damages are a necessary element, a plaintiff cannot be said to have *prevailed* on that claim unless he or she has been awarded some modicum of monetary relief.[2]

¶2 In this case, Plaintiff TAB sued Defendant Sean Calnan to collect payment on some outstanding medical bills. TAB brought two theories of recovery in its petition, both of which assert that Calnan was provided medical services for which he had not yet fully paid, and both of which prayed that Calnan be ordered to pay the remaining balance for those services – $626.15.[3] Accordingly, both of TAB's claims were premised on the existence of monetary harm.

¶3 But shortly after Calnan was served a copy of that petition, Calnan paid his debt in full.[4] Accordingly, when TAB later moved for summary judgment on its claims, there was nothing left for the Court to do – no "judgment" or "judicial decree" was necessary to make the Defendant pay the money; Mr. Calnan had already done that. Indeed, the only order that "has changed the relationship between the parties so that defendant is judicially required to do something" is the district court's order telling Calnan to pay for TAB's attorney fees, citing 12 O.S. § 936 for support.[5]

¶4 While TAB's claims in this case may very well be fee-bearing under section 936, TAB cannot be labeled the "prevailing party." To qualify as such, the statute requires TAB to have prevailed on those fee-bearing claims, meaning that TAB must first have obtained a judgment in its favor on those claims before it could be eligible for an attorney-fee award.[6] And just as we said before, because TAB's claims rely on the existence of monetary harm, the fact that Calnan has already remedied that harm means that TAB cannot possibly prevail on those claims. Indeed, because TAB continued to press its claims past the point at which they had been paid, it is Calnan who is entitled to judgment as a matter of law.[7]

¶5 Summary judgment is not warranted, however, on Calnan's counterclaim for violation of the Fair Debt Collection Practices Act.[8] We agree with Calnan that factual issues exist that preclude the entry of judgment at this time.

¶6 Based on the foregoing, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

Kauger, Winchester, Edmondson, Colbert, Reif, Wyrick, and Darby, JJ., concur.

Combs, C.J., and Gurich, V.C.J., concur in the result.

Wyrick, J.:

1. *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶ 23, 77 P.3d 1042, 1053.

2. *See id*. ¶ 17, 77 P.3d at 1051; *Sloan v. Owen*, 1977 OK 239, ¶ 7, 579 P.2d 812, 814; *cf. Tibbetts*, 2003 OK 72, ¶¶ 11-13, 77 P.3d at 1049-50 (holding that, in that case – where only money damages were sought but no monetary relief was awarded – "the only reasonable fee . . . is no fee at all").

3. TAB's first claim is for "Services Rendered/Open Account/Account Stated," in which it is alleged that Calnan owes the sum of $626.15; the first claim concludes with a "pray[er] for judgment against Defendant, in the sum of $626.15." TAB's second claim is for "Quantum Meruit/Quasi Contract," in which it is alleged that Calnan has unjustly benefited from the services rendered; the second claim also ends with a "pray[er] for judgment against Defendant, in the sum of $626.15." ROA, Doc. 1, Pl.'s Pet. at 1-2.

4. ROA, Doc. 4, Pl.'s Mot. for Summ. J. & Br. in Support Thereof at Ex. D (an affidavit from TAB's president stating: "[T]he principal balance stated in TAB's petition was true and correct at the time this suit was filed but Defendant paid the principal amount April 27, 2016, in full . . . . [T]he balance has been adjusted.").

5. *See* ROA, Doc. 12, Decision on Mots. for Summ. J. at 2; ROA, Doc. 13, Final J. & Order Assessing Costs & Attorney's Fees at 1. Section 936 states, in relevant part:

> A. In any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

12 O.S.Supp.2016 § 936(A).

6. *See Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 2007 OK 50, ¶ 17, 164 P.3d 1063, 1069 ("'[P]revailing party,' as a legal term of art, means the successful party who has been awarded some relief on the merits of his or her claim." (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)).

7. To avoid such a result, plaintiffs in a similar situation have two options available. First, they may choose to accept full payment of their claims (as TAB did here) and dismiss the action, in which case plaintiffs will avoid a judgment against them but will forfeit the opportunity to seek a fee award. Or, second, they may reject payment and seek to have the same awarded by judicial decision, in which case – should the plaintiffs prevail – they will be entitled to seek a fee award.

8. 15 U.S.C. §§ 1692-1692p (2012).

ADA LOIS SIPUEL FISHER

DIVERSITY AWARDS

Nominations due July 31

Send to diversityawards@okbar.org

The Ada Lois Sipuel Fisher Diversity Awards categories are members of the judiciary, licensed attorneys and entities that have championed the cause of diversity. All nominations must be received by Tuesday, July 31.

For additional information, contact OBA Diversity Committee Chair Telana McCullough at 405-267-0672 or visit www.okbar.org/news/Recent/2018/2018diversityawards.

2018 OK CR 22

DARREN THOMAS TERRELL, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-294. June 28, 2018

OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant, Darren Thomas Terrell, was tried by jury and convicted of Unlawful Distribution of a Controlled Dangerous Substance Within 2,000 Feet of a Park or School (Methamphetamine) (Count 1) (63 O.S.Supp.2012, § 2-401(F)) and Conspiracy to Deliver a Controlled Dangerous Substance (Methamphetamine) (Count 2) (63 O.S.2011, § 2-408) After Former Conviction of Two or More Felonies in the District Court of Beckham County, Case Number CF-2016-30. The jury recommended as punishment imprisonment for eighteen (18) years in each count. The trial court sentenced accordingly, granted Appellant credit for time served, ordered the sentences to run concurrently, and imposed a period of post-imprisonment supervision. It is from these judgments and sentences that Appellant appeals.

FACTS

¶2 Appellant conspired with Brian Maher to deliver Methamphetamine to a confidential informant working for the District 2 Drug Task Force. On October 13, 2015, Appellant delivered Methamphetamine to the confidential informant during a controlled-buy wherein the informant wore an audio/video recording device.

DISCUSSION

¶3 In his sole proposition of error, Appellant contends that the jury was improperly exposed to evidence and argument telling the jurors that Appellant had previously received suspended sentences. He concedes that he waived appellate review of his claim for all but plain error when he failed to challenge the evidence and argument below. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *See Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. Under this test, an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id*.

¶4 The record shows that during the second stage of the trial, the prosecutor introduced an exhibit detailing Appellant's six prior felony convictions. This exhibit showed that several of Appellant's prior sentences had been suspended in whole or in part, and in some instances, revoked for violations of the terms of suspension. Then in closing argument the prosecutor referenced Appellant's prior convictions and sentences, specifically mentioned the suspended sentences, and argued "He's been given chance after chance after chance."

¶5 Appellant claims that the references to suspended sentences in the exhibit and the prosecutor's argument violated the holding in *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931. Prior to *Hunter,* this Court had recognized that jurors were not to speculate on pardon or parole, thus, the parties were prohibited from making an unmistakable comment on pardon or parole. *See Martin v. State*, 1983 OK CR 168, ¶ 22, 674 P.2d 37, 41–42; *Starr v. State*, 1979 OK CR 126, ¶¶ 12-13, 602 P.2d 1046, 1049; *Satterlee v. State*, 1976 OK CR 88, ¶ 26, 549 P.2d 104, 111; *Bell v. State*, 1962 OK CR 160, ¶ 18, 381 P.2d 167, 173. Without discussion or analysis, *Hunter* expanded this rule to prohibit both the introduction of judgment and sentence documents reflecting receipt of a suspended sentence and explicit references to probation in opening or closing argument. *Hunter*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933-34. However, the introduction of the judgment and sentence is a proper part of the proof of a former felony conviction. *Camp v. State*, 1983 OK CR 74, ¶¶ 2–3, 664 P.2d 1052, 1053–54. Thus, we were forced in *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512, to draw a distinction between unmistakable comments upon probation or parole and the instance where the judgment and sentence documents simply reflect receipt of a deferred or suspended sentence.

¶6 Today, we recognize that the rule announced in *Hunter* is simply unworkable. Ju-

rors are free to consider the relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence and any acceleration or revocation of such a sentence. *See Honeycutt v. State*, 1967 OK CR 154, ¶¶ 18–20, 432 P.2d 124, 128 (finding proof of suspension of sentence by trial court proper proof of former felony conviction). The receipt of a probationary term may be viewed as supporting both greater and lesser punishment depending on the facts of the case. The jury as a whole can make this determination.

¶7 Similarly, counsel should be permitted to discuss the relevant proof of prior conviction in closing argument. This Court has long recognized that both parties are afforded wide latitude to discuss the evidence, including reasonable inferences therefrom, and make recommendation as to punishment in the second stage of a trial. *See Hooks v. State*, 2001 OK CR 1, ¶ 40, 19 P.3d 294, 314 (recognizing parties' wide latitude to discuss evidence and reasonable inferences from evidence in second stage closing argument); *Jones v. State*, 1988 OK CR 267, ¶ 9, 764 P.2d 914, 917 (prosecutor's recommendation of life imprisonment found proper where no unmistakable reference to possibility of parole); *Van White v. State*, 1999 OK CR 10, ¶ 69, 990 P.2d 253, 272 ("[P]rosecution may recommend the punishment to be given."); *Mahorney v. State,* 1983 OK CR 71, ¶ 17, 664 P.2d 1042, 1047 ("On numerous occasions this Court has upheld cases where the prosecutor has recommended sentences to the jury."). Since the jury is free to consider the relevant proof of a prior conviction, both parties are afforded wide latitude to discuss this evidence and make recommendation as to punishment in the second stage of a trial. As *Hunter* is inconsistent with both of these lines of cases, it must be and is overruled.

¶8 However, the balance against a prosecutor's misuse of this type of evidence is already found within our existing case law. All evidence may be excluded if its relevance is substantially outweighed by the dangers outlined in 12 O.S.2011, § 2403. *Goode v. State,* 2010 OK CR 10, ¶ 57, 236 P.3d 671, 682. Prosecutors do not have free rein to comment on the prior receipt of the suspension of a sentence. This Court has found that blatant appeals to sympathy, sentiment, or prejudice are improper. *Ashton v. State,* 2017 OK CR 15, ¶ 51, 400 P.3d 887, 900. Similarly, prosecutorial argument invoking societal alarm is improper, *i.e.*, calling for the jury to make an example out of the defendant to deter other potential criminals. *McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34. This Court will monitor closing arguments in cases brought before it and will not hesitate to properly address error where a prosecutor offends these standards.

¶9 Applying this analysis to the present case, we find that the evidence and argument was proper. Giving the documents within the exhibit their maximum probative value and minimum prejudicial effect, we find that the probative value of the documents was not substantially outweighed by the danger of unfair prejudice. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310. The prosecutor's "chance after chance" argument properly commented on the evidence and did not invoke societal alarm, sympathy, sentiment or prejudice. As such, we find that error, plain or otherwise, did not occur. This Proposition is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY

THE HONORABLE F. DOUGLAS HAUGHT, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Ryan Don Recker, Recker & Recker, P.C., P.O. Box 888, Weatherford, OK 73096, Counsel for Defendant

Michael A. Abel, Lynn Lawrence, Assistant District Attorneys, P.O. Box 507, Sayre, OK 73662, Counsel for the State

APPEARANCES ON APPEAL

Robert W. Jackson, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Tessa L. Henry, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Dissent

HUDSON, J.: Specially Concurs
KUEHN, J.: Concurring in Result
ROWLAND, J.: Concurs

LEWIS, VICE PRESIDING JUDGE, DISSENTING:

¶1 Today's majority discards as "unworkable" a case-law rule that imposed modest limitations on the prosecution's ability to use prior suspended sentences as aggravating evidence in jury sentencing proceedings. As the opinion shows, the rule has proved "unworkable" for the Court just to the extent that prosecutors have frequently ignored it and the Court has no future intention to enforce it.

¶2 The majority yet insists that it has not given free rein to prosecutors, limiting such evidence to the general rules of relevance, and prohibiting "blatant appeals to sympathy, sentiment, or prejudice," "invoking societal alarm," and "calling for the jury to make an example out of the defendant" in sentencing stage arguments.

¶3 *Hunter* and subsequent cases had already struck a practical, relevance-based balance, allowing evidence of suspended sentences to be admitted in judgment and sentence documents, so long as the prosecutor "did not mention the suspended sentences . . . or otherwise draw the jury's attention to them" in argument. *See, e.g., Mitchell v. State*, 2016 OK CR 21, ¶ 30, 387 P.3d 934, 945 (finding error, but neither plain error nor prejudice, from evidence indicating a suspended sentence).

¶4 The Court in *Hunter* seemed to recognize, at least implicitly, that the typical "chance after chance" arguments, using suspended sentences as aggravating evidence, suggest a false narrative that the defendant has abused some great kindness in the past and thus deserves a much longer sentence. Recidivist defendants are certainly blameworthy for their commission of new crimes, but prior suspended sentences are often a by-product of the complex realities of sentencing. Leniency is often incidental in the mutually convenient terms of a plea bargain.

¶5 Such arguments therefore often *do* violate basic principles of relevance and fairness. They *do* play upon everyday prejudices of lay jurors about plea-bargaining and probation. They *do* urge jurors to deal more harshly with the defendant because of prior suspended sentences, regardless of the complex realities behind them. The Court today approves such arguments; and under this more "workable" rule, we shall see more of them in the future. I respectfully dissent.

HUDSON, J., SPECIALLY CONCURS

¶1 I applaud Judge Lumpkin's clear and concise recitation of the history behind today's decision and his analysis of the unworkable rule that evolved from *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931. This case confirms my view that juries get it right more often than not. Far from being inflamed by the truthful information presented on the face of the judgment and sentence documents admitted to prove Appellant's six (6) prior felony convictions and the prosecutor's comment on same, the jury struck a balanced approach in recommending sentences based on the facts of the charged offenses in this case and Appellant's previous history.

KUEHN, JUDGE, CONCURRING IN RESULT:

¶1 I agree with the Court that the *Hunter* case is unworkable, but disagree with the logic behind that conclusion and the proposed outcome after allowing the inclusion of probation language on a Judgment and Sentence for the jury to consider.

¶2 Currently, it is error to admit a Judgment and Sentence, or any other document, which informs jurors that the defendant previously received suspended/deferred sentences. *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933; *see also Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512 (admission of document showing previous suspended sentence is not, in itself, plain error). Whether that error rises to the level of plain error, or if the error was preserved below, whether it requires relief, depends on various factors. Certainly, as in *Hunter,* relief is required where the prosecutor explicitly calls the jury's attention to the suspended sentence, or otherwise explicitly and unmistakably refers to probation, suspended or deferred sentences. *Stewart*, 2016 OK CR 9, ¶ 18, 372 P.3d at 512; *Hunter,* 2009 OK CR 17, ¶ 10, 208 P.3d at 933-34. However, on appeal, the Court has consistently had to weigh prosecutors' statements contemplating the "totality of the circumstances" test from *Hunter*. In doing so, the line a prosecutor must cross for the error to be harmful has become undefinable and nonexistent. This is why *Hunter* is unworkable.

¶3 I am disturbed by the frequency of cases before this Court in which Judgment and Sentence documents are improperly redacted or not redacted at all. The current law is clear. Attorneys have an obligation to review all documents submitted to prove an allegation of prior convictions, before their admission – whether or not the documents are contested or admitted by stipulation. The law regarding mention of suspended/deferred sentences and probation is long standing and unambiguous: it is error. It should be routine for the attorneys and the judge in any case to ensure that the law is followed.

¶4 As I say, this is the current law. The prohibition against mentioning probation, parole, etc., was intended to prevent jurors from allowing information about the actual sentence served on previous convictions to improperly influence their consideration of the sentence they should impose. The length of time a defendant actually served for previous convictions has no probative value in a current case. *Martin v. State*, 1983 OK CR 168, ¶ 22, 674 P.2d 37, 41-42. For this reason, it is not error to introduce a Judgment and Sentence which merely states the term of years a defendant received on a prior conviction, where there is no reference to probation or parole. *Stewart v. State,* 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512. This is the case even if jurors could infer, from the dates and imprisonment imposed, that a defendant did not serve his full sentence for the prior offense. *Mathis v. State*, 2012 OK CR 1, ¶ 31, 271 P.3d 67, 78. Since *Hunter,* this Court has, in practice, refused to grant relief where a Judgment and Sentence contains improper reference to probation, parole, etc., unless the prosecutor unmistakably draws the jury's attention to the improper information. *Stewart,* 2016 OK CR 9, ¶¶ 17-18, 372 P.3d at 512.

¶5 Given the apparent difficulty parties have in following the rule at issue here, I believe the purposes behind it may be better served by a modification of this doctrine. The evil we seek to avoid is jurors' use of irrelevant information in sentencing determinations. Following *Stewart,* I would find it is not error to admit, for purposes of proving an allegation of prior convictions, Judgment and Sentence documents, which may refer to suspended or deferred sentences. In order to ensure jurors do not use this information improperly, they must be properly instructed. Jurors already receive instruction on the use of prior convictions to determine punishment. I propose we add to that instruction the following language:

> If you find the defendant has [a] prior conviction[s], you must not consider the type of sentence imposed in [that] [those] case[s] in determining the punishment in the present case. You must not let your decision on punishment be influenced by the type of sentence (*i.e.*, deferred or suspended sentence) the defendant previously received or the term of years previously imposed.

In proposing this change, I emphasize that our current prohibition against prosecutors using that information to argue a defendant deserves a longer sentence in his or her current case, must remain in effect. Prosecutors must not call jurors' attention to this information or encourage them to use it against the defendant, as that will be error. *Stewart,* 2016 OK CR 9, ¶ 18, 372 P.3d at 512.

¶6 I understand the Court's reasoning behind a jury considering the terms, along with the parties commenting on the evidence in examinations and closing arguments. The reasoning is sound, but the result will be chaos. I am not arguing that probation should or should not be admitted as evidence in a trial. But, until thoughtful consideration has been given to all aspects of what procedure must be changed, the discussion of such terms is inappropriate.

¶7 Now, as written, with the process of allowing comment on the probation terms, the Court goes back to the same balancing test that was the problem in *Hunter*.[1] Not only will the balancing be more difficult, but the scope of what can be tolerated in the courtroom is vague and broad as outlined by the Court. What does "wide latitude to discuss this evidence" mean? What does "properly address" error when a prosecutor "offends" mean? I cannot imagine what trials will entail with this open invitation to argue. This Court on appeal could be reviewing a prosecutor describing free chances, details of what a deferred or suspended sentence mean, and how the defendant got a good deal. And what of the defense? In order to rebut the "wide latitude" of the State, the defense will want to present evidence of why the plea was a probationary term, what the defendant had to complete in order to finish probation, how the defendant completed the probation, etc. The second stage will become an aggravation and mitigation spectacle

leaving the unguided trial judge with no choice but to sit back and watch the show. The Court is stirring up a hornet's nest without more guidance to the parties and the trial courts.

¶8 In this case, using my proposed analysis, admission of the documents was not error. The prosecutor should not have commented on them and clearly went too far under *Stewart* and *Hunter*. However, Appellant had six felony convictions, and his sentences were relatively lenient. Under these circumstances the error in argument neither resulted in a miscarriage of justice nor constituted a substantial violation of a constitutional or statutory right. 20 O.S.2011, § 3001.1. For this reason, I concur in result.

KUEHN, J.

1. "History does not repeat itself but it rhymes." Attributed to Mark Twain.

2. Merriam-Websters Dictionary defines "wide latitude" as, "freedom of action or choice." Freedom to explore legal probationary terms and what facts are behind them is a dangerous freedom to grant either party without guidance. As noted by Thomas Jefferson in a letter to James Madison on January 30, 1787, "The mass of mankind under [freedom] enjoys a precious degree of liberty and happiness. It has its evils too: the principal of which is the turbulence to which it is subject."

2018 OK CR 24

IMMANUEL GERALD DEAN MITCHELL, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-50. June 28, 2018

OPINION

ROWLAND, JUDGE:

¶1 Appellant Immanuel Gerald Dean Mitchell appeals his Judgment and Sentence from the District Court of Pottawatomie County, Case No. CF-2015-435, for Murder in the First Degree – Felony Murder (Count 1) in violation of 21 O.S.Supp.2012, § 701.7(B) and Conspiracy to Commit Robbery with a Dangerous Weapon (Count 2) in violation of 21 O.S.2011, § 421.[1] The Honorable John Canavan, Jr. presided over Mitchell's jury trial and sentenced him in accordance with the jury's verdict to life imprisonment on Count 1 and eight years imprisonment on Count 2.[2] Judge Canavan ordered Mitchell's sentences to run consecutively. Mitchell raises the following issues:

I whether the district court's failure to hold a hearing on the admissibility of the alleged co-conspirators' statements violated his rights to a fair trial and due process of law;

II. whether the State presented sufficient evidence to corroborate the testimony of his accomplices;

III. whether the evidence was sufficient to sustain his convictions;

IV. whether Instruction Number 1-8A, OUJI-CR(2d) improperly shifted the burden of proof;

V. whether the prosecutor's statement during jury selection concerning parole eligibility was error;

VI. whether the district court erred by not removing *sua sponte* two prospective jurors for cause;

VII. whether his jury panel was tainted;

VIII. whether prosecutorial misconduct deprived him of a fair trial;

IX. whether the district court erred in admitting text messages between the members of the conspiracy;

X. whether he was denied a fair trial because of ineffective assistance of counsel; and

XI. whether cumulative error deprived him of a fair trial.

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

Background

¶3 Early on the morning of May 4, 2015, officers with the Shawnee Police Department responded to a 911 call from a citizen stating that a red car had crashed through her fence and into a tree in her backyard. Inside this car, the officers found John Columbus unresponsive and slumped over in the driver's seat with a fatal bullet wound to his back.

¶4 The evidence showed that Columbus had driven to that neighborhood to sell marijuana to Ramie Brown, who had arranged to meet him at Mitchell's house. Little did Columbus know that Brown and Austin Olinger had devised a scheme to rob him of his marijuana, or that they would soon involve Mitchell, Cody Taylor, and Kiwane Hobia in their criminal conspiracy. The plan was for Brown to get into the car with Columbus to make the purchase and, when Columbus produced the marijuana, to grab it and flee. Needing a ride to Mitchell's house, Olinger called Taylor who arrived in his white Chevrolet Trailblazer and

he drove Brown and Olinger to Mitchell's, the designated meeting place.

¶5 When Columbus arrived at Mitchell's house, Brown got into Columbus' car as planned and the two drove away. When Brown asked where they were going, Columbus explained that he did not have the marijuana with him and that they were heading to his house to get it. Brown then informed Columbus that he did not have the purchase money with him and the two of them returned to Mitchell's house. Brown got out and told Olinger, Mitchell, and Hobia that Columbus wanted his money up front, prompting a change of plan. Brown rejoined Columbus and Olinger, Mitchell and Hobia also got into Columbus' car. Columbus followed Olinger's directions, believing he was going to where the money was. Columbus parked in a nearby parking lot as directed and guns were pointed at his and Brown's heads. Brown testified that Mitchell was the one pointing a gun at Columbus and that he instructed Columbus not to move. Brown exited the car and ran, but before he was out of the parking lot, he heard a gunshot. He turned in time to see Mitchell standing outside the car behind the driver's side door with a pistol in his hand. The conspirators all scattered on foot.

¶6 Taylor, who had stayed behind at Mitchell's house, picked up a somewhat excited Olinger and Hobia, who were out of breath and barely talking. Olinger directed Taylor to the crime scene parking lot where he got out and grabbed a gun holster lying by the curb before the three returned to Mitchell's house. Mitchell was at his house and out of breath like he had been running. Mitchell asked Taylor to go for cigarettes. Olinger went with Taylor, but the two were pulled over by police on their way back from the store. The officers noted a strong odor of marijuana coming from inside Taylor's Trailblazer. A search of the Trailblazer uncovered the gun holster Olinger retrieved from the parking lot and two loaded handguns as well as a bag of marijuana in Olinger's pocket.

¶7 Brown was arrested the next day and Mitchell was apprehended a couple of weeks later. Both Brown and Taylor testified against Mitchell at trial. In addition to this accomplice testimony, the State presented evidence that connected Mitchell to the murder weapon as well as text messages that showed Mitchell was an active participant in the commission of the robbery that resulted in Columbus' death.

1. *Harjo* Hearing

¶8 Mitchell contends his convictions must be reversed because the district court failed to hold an *in camera* hearing, pursuant to *Harjo v. State*, 1990 OK CR 53, 797 P.2d 338, to determine the existence of a conspiracy before admitting his co-conspirator's statements. Review is for plain error only because Mitchell did not request a *Harjo* hearing below or challenge the admission of his co-conspirator's testimony on this basis at trial. This claim is without merit.

¶9 Under the plain error test, the burden is on Mitchell to show the existence of an actual, obvious error that affected his substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Simpson v. State,* 1994 OK CR 40, ¶¶ 10 & 30, 876 P.2d 690, 694 & 700-01. This Court will correct plain error only if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represented a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶10 Mitchell challenges the in-court direct testimony of his co-conspirator, Ramie Brown.[3] Independent evidence establishing the existence of a conspiracy is not necessary where co-conspirator statements are admitted through direct trial testimony subject to cross-examination, because the direct testimony of the co-conspirator is not hearsay. *Hackney v. State,* 1994 OK CR 29, ¶ 4, 874 P.2d 810, 813; *Johns v. State*, 1987 OK CR 178, ¶¶ 7-8, 742 P.2d 1142, 1146. Consequently, a co-conspirator may testify concerning his own participation and his observation of other co-conspirators' conduct. *Hackney*, 1994 OK CR 29, ¶ 4, 874 P.2d at 813. The rule in *Harjo* – requiring independent evidence of a conspiracy during an *in camera* hearing prior to the admission of a co-conspirator's statements – applies only to the admission of a co-conspirator's out-of-court statements and does not apply to the direct in-court testimony of a co-conspirator. *Huckaby v. State,* 1990 OK CR 84, ¶ 13, 804 P.2d 447, 451. Under our cases, no independent evidence of a conspiracy was required before Brown took the witness stand and testified against Mitchell. The district court properly admitted Brown's testimony without a *Harjo* hearing because one was not required. *See Hackney*, 1994 OK CR 29, ¶ 4, 874 P.2d at 813. For these reasons, we find that Mitchell has not shown that error, plain or otherwise, occurred. This claim is denied.

2. Sufficiency of the Evidence/Accomplice Corroboration

¶11 Mitchell contends his convictions must be reversed because of insufficient evidence. Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the verdict. *See Day v. State*, 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298; *Coddington*, 2006 OK CR 34, ¶ 70, 142 P.3d at 456. We further recognize that the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965.

¶12 Mitchell argues the evidence was insufficient in this case because the State failed to present evidence that corroborated the testimony of his accomplices, namely Ramie Brown and Cody Taylor. This case provides us with the opportunity to revisit the unwarranted disparate treatment of accomplice and co-conspirator testimony and the requirement of corroboration.

¶13 Title 22 O.S.2011, § 742 states:

> A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show[s] the commission of the offense or the circumstances thereof.

¶14 In *Pink v. State*, 2004 OK CR 37, ¶¶ 32-33, 104 P.3d 584, 595-96, the Court held that a co-conspirator's testimony is not subject to the requirement of independent corroboration that is required of an accomplice's testimony under 22 O.S.2011, § 742. *Pink*, however, employed a faulty analysis by confusing the admissibility of a co-conspirator's in-court testimony with the admissibility of his out-of-court statements in furtherance of the conspiracy under 12 O.S.2011, § 2801(B)(2)(e).

¶15 The genesis of this confusion is found in paragraphs 27 and 28 of the *Pink* decision wherein this Court noted that the former Oklahoma Uniform Jury Instruction Nos. 9-17 and 9-39 "provide conflicting signals about whether a jury should be given special instructions regarding coconspirator testimony, and in particular, whether such testimony should be evaluated in the same manner as accomplice testimony." *Pink*, 2004 OK CR 37, ¶ 28, 104 P.3d at 594. A closer look, however, reveals there is no actual conflict because these two former instructions addressed completely different situations: OUJI-CR (2d) 9-17 concerned out-of-court statements offered pursuant to the co-conspirator hearsay exception (12 O.S.2011, § 2801(B)(2)(e)) for statements in furtherance of a conspiracy for which no corroboration is required for admission while OUJI-CR (2d) 9-39 concerned the in-court testimony of one conspirator against another for which corroboration is required in order to sustain a conviction that rests upon the co-conspirator's testimony if the co-conspirator qualifies as an accomplice.

¶16 The *Pink* Court reversed the defendant's robbery conviction in that case because it was based upon the uncorroborated testimony of two accomplices. It affirmed, however, the defendant's conspiracy conviction that rested upon the very same accomplice testimony from the same accomplice witnesses. The Court, in reviewing Pink's sufficiency of the evidence challenge for conspiracy, made a distinction concerning the status of these accomplice witnesses labeling them co-conspirators for purposes of Pink's conspiracy conviction and finding their testimony as such required no corroboration. The corroboration requirement of accomplice testimony in Section 742 cannot be so easily circumvented. An accomplice is one who is or could be charged for the offense for which the accused is being tried. *Sellers v. State*, 1991 OK CR 41, ¶ 30, 809 P.2d 676, 686. Obviously in most, if not all, instances this definition will include one who conspires with the defendant to commit a crime. *See Hackney*, 1994 OK CR 29, ¶ 8, 874 P.2d at 814 ("Co-conspirators are responsible for all that is said and done pursuant to the conspiracy until its purpose is accomplished.") One's status as a co-conspirator neither alters that same person's status as an accomplice nor does it change the requirement under 22 O.S.2011, § 742 that his or her testimony be corroborated. In other words, testimony of an accomplice, including one who is also a co-conspirator, requires corroboration

under 22 O.S.2011, § 742 for both the substantive crime as well as any alleged conspiracy.[4] Out-of-court statements by that co-conspirator, properly admitted pursuant to 12 O.S.2011, § 2801(B)(2)(e)), are substantive evidence and are admissible to corroborate his in-court testimony. *See Omalza v. State*, 1995 OK CR 80, ¶ 13, 911 P.2d 286, 295-96.

¶17 We overrule *Pink* to the extent it eliminates the corroboration requirement under Section 742 for the in-court testimony of a co-conspirator who otherwise meets the definition of an accomplice.[5] Reviewing the testimony of the two co-conspirators/accomplices who testified against Mitchell in this case in light of the corroboration requirement of Section 742, we find sufficient evidence in the record to corroborate their testimony and reject Mitchell's sufficiency of the evidence challenge.

3. Sufficiency of the Evidence

¶18 Mitchell again argues that his convictions must be reversed because of insufficient evidence. This time he claims that his conspiracy conviction must be reversed because the State failed to prove that he was a member of the conspiracy to commit armed robbery. Without sufficient evidence of his membership in the conspiracy, he contends that his felony murder conviction cannot stand because it is predicated on the conspiracy. We disagree and evaluate this challenge to the sufficiency of the evidence using the standard set forth in ¶ 11, *supra*.

¶19 The evidence, viewed in the light most favorable to the State, showed that Ramie Brown and Austin Olinger entered into an agreement to rob the victim and that Cody Taylor, Kiwane Hobia and Mitchell later became parties to that agreement. The evidence further showed that one or more of these men performed an overt act in furtherance of their plan. "In a conspiracy prosecution, the critical inquiry is whether the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists." *State v. Davis*, 1991 OK CR 123, ¶ 10, 823 P.2d 367, 370 (quoting *United States v. Kendall*, 766 F.2d 1426, 1431 (10th Cir. 1985)). The evidence presented sufficiently proved that Mitchell joined the conspiracy after Brown and Olinger made an agreement to rob the victim and that he participated in the plan once it was put into action. Evidence of an unlawful agreement and an overt act in furtherance of the plan is all that is required to support a conviction for conspiracy. 21 O.S.2011, §§ 421 & 423. Based on the record before us, we find that any rational trier of fact could have found beyond a reasonable doubt that Mitchell was guilty of the crime of Conspiracy to Commit Robbery with a Dangerous Weapon.

¶20 We reach the same conclusion concerning Mitchell's conviction for First Degree Felony Murder. The evidence, viewed in the light most favorable to the State, showed that the victim died during the commission of an armed robbery perpetrated by Mitchell and his co-conspirators. 21 O.S.Supp.2012, § 701.7(B). Mitchell's argument that his felony murder conviction was based on his unproven membership in the conspiracy is unpersuasive and unsupported by the record. First, the evidence sufficiently proved Mitchell was a member of the conspiracy as discussed above. Second, and more importantly, the State charged Mitchell with felony murder, alleging that the victim's death occurred during the course of an armed robbery in which Mitchell was an active participant. Mitchell's felony murder conviction was not based on his membership in the conspiracy, but was a discrete offense. The State's evidence proved Mitchell was both a party to the conspiracy and an active participant in the fatal armed robbery. We find on this record ample proof from which any rational trier of fact could find beyond a reasonable doubt that Mitchell was guilty of the crime of First Degree Felony Murder. This claim is denied.

4. Jury Instructions

¶21 Mitchell contends that the district court's uniform opening instruction entitled "Duty of Jurors" impermissibly shifted the burden of proof from the State to the accused. OUJI-CR (2d) No. 1-8A (Supp.2013). Mitchell's failure to raise this issue before the district court forfeits appellate review of the claim for all but plain error under the test in ¶ 9, *supra*.

¶22 Mitchell argues the instruction's explanation that "[i]t is the responsibility of the attorneys to present evidence, to examine, and cross-examine witnesses, and to argue the evidence" contradicts the rule of law that the accused in a criminal trial has no burden of production whatsoever. This Court "will not reverse on instructional error unless the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional

or statutory right." *Daniels v. State*, 2016 OK CR 2, ¶ 4, 369 P.3d 381, 383. This Court will deny relief on a claim of jury instruction error when the jury instructions, as a whole, accurately state the applicable law. *See id.*, 2016 OK CR 2, ¶ 4, 369 P.3d at 384.

¶23 We are convinced that no reasonable juror would have interpreted the single sentence within the challenged instruction as shifting the burden of proof or persuasion to the defendant, especially in light of the other instructions correctly stating the presumption of innocence and the State's burden of proof. *See Hunter v. State*, 1987 OK CR 165, ¶ 5, 740 P.2d 1206, 1208 (applying the United States Supreme Court's reasonable jury interpretation test to determine if instruction shifted the burden of persuasion). Accordingly, we find that Mitchell has not shown that error, plain or otherwise, occurred. This claim is denied.

5. Prosecutorial Misconduct

¶24 Mitchell contends that the prosecutor wrongly implied during jury selection that a defendant sentenced to life imprisonment would be paroled after serving 37 years in prison.[6] Mitchell raised no objection to the prosecutor's statement when made and he concedes in his brief that he suffered no "specific prejudice" from it. *Appellant's Brief* at 29. We have long followed the principle that there must be error plus injury to warrant relief on appeal. *See Reed v. State*, 2016 OK CR 10, ¶ 12, 373 P.3d 118, 122. This claim warrants no relief not only because of this long-standing principle but also because Mitchell cannot meet his burden under the plain error test set forth in ¶ 9, *supra*.

¶25 The record shows the prosecutor did not imply that parole was automatic once a defendant served 37 years of a life sentence and his statement did not violate our holding in *Florez v. State*, 2010 OK CR 21, ¶¶ 5-6, 239 P.3d 156, 158. The challenged statement was consistent with 21 O.S.Supp.2014, § 13.1 requiring the service of a mandatory minimum term of years before a defendant is eligible to be considered for parole. Because Mitchell has not shown that error, plain or otherwise, occurred, this claim is rejected.

6. Jury Selection

¶26 Mitchell contends that the district court erred when it failed sua sponte to remove prospective jurors M.E. and M.D. for cause. Mitchell's failure to raise this issue before the district court forfeits appellate review of the claim for all but plain error under the test in ¶ 9, *supra*.

¶27 Although Mitchell concedes that neither panelist who was purportedly partial ultimately served on his jury, he insists the mere fact that the panelists were not excused for cause deprived him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. "The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.'" *Rivera v. Illinois*, 556 U.S. 148, 158, 129 S.Ct. 1446, 1454, 173 L.Ed.2d 320 (2009) (quoting *Spencer v. Texas*, 385 U.S. 554, 563–564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967)). There is no constitutional violation when no member of the jury as finally composed was removable for cause. *Rivera*, 556 U.S. at 158, 129 S.Ct. at 1454; *Ross v. Oklahoma*, 487 U.S. 81, 86-91, 108 S.Ct. 2273, 2277-80, 101 L.Ed.2d 80 (1988) (finding any claim that jury was not impartial must focus on jurors who ultimately sat); Because Mitchell has not shown that any member of his jury as finally composed was removable for cause, we find no error – constitutional, plain or otherwise – occurred. This claim is denied.

7. Juror Misconduct

¶28 Mitchell argues for the first time on appeal that his jury pool was tainted. Review is for plain error only under the test in ¶ 9, *supra.* Mitchell's assertion that prospective jurors discussed his case over lunch in disregard of the district court's instructions is not supported by the record. The record shows instead that prospective juror A.S. disclosed that she heard something about the case as the potential jurors left for lunch. The State exercised a peremptory challenge to remove A.S. and she did not serve as a juror. Mitchell's concern that the jurors who actually served either possibly heard or discussed things about the case is speculation. His speculation and conjecture concerning what other jurors may have heard is insufficient to establish juror misconduct. *See Jones v. State*, 2006 OK CR 5, ¶ 20, 128 P.3d 521, 535; *Woodruff v. State*, 1993 OK CR 7, ¶ 13, 846 P.2d 1124, 1132; *Chatham v. State*, 1986 OK CR 2, ¶ 7, 712 P.2d 69, 71.

¶29 Mitchell further argues that prospective juror S.B.'s responses provided outside information about the case. Not every personal opinion expressed in jury selection results in a

tainted venire panel. Otherwise, it would be impossible to impanel a jury. *See Pavatt v. State*, 2007 OK CR 19, ¶ 29, 159 P.3d 272, 282. We find on this record that Mitchell has not shown that S.B.'s comments so affected the panelists who ultimately sat on his jury such that he was denied a fair trial. *Id.* Nothing in the record suggests that Mitchell's jury as finally composed was anything but fair and impartial. There is no evidence any member was removable for cause. As such, we find that Mitchell has not shown that error, plain or otherwise, occurred. This claim is denied.

8. Prosecutorial Misconduct

¶30 Mitchell contends that prosecutorial misconduct deprived him of a fair trial. Mitchell's failure to object to the prosecutor's comments at trial forfeits appellate review of his claim for all but plain error under the test in ¶ 9, *supra.* ¶31 Reviewing the litany of challenged comments and exchanges, we find that the prosecutor did not engage in either improper bolstering or vouching throughout trial. *See Taylor v. State*, 2011 OK CR 8, ¶ 57, 248 P.3d 362, 379 (quoting *Browning v. State,* 2006 OK CR 8, ¶ 43, 134 P.3d 816, 841 ("Vouching occurs when a prosecutor expresses a personal belief in a witness's credibility, either through explicit assurances or by implying that other evidence, not presented to the jury, supports the witness's testimony.")); *Nickell v. State*, 1994 OK CR 73, ¶ 4, 885 P.2d 670, 677 (Lumpkin, P.J., specially concurring) ("Bolstering" is the error associated with the "preemptive rehabilitation of a witness."). Similarly, we conclude that the prosecutor did not cast aspersions on the defense. Contrary to Mitchell's claim, the prosecutor did not engage in name-calling, ridiculing or making derogatory comments about either defense counsel or the chosen defense as condemned in *Hanson v. State*, 2003 OK CR 12, ¶ 14, 72 P.3d 40, 49 (finding "prosecutors' repeated characterizations of the defense case as resembling an octupus's ink bag, and hiding from the facts" were inappropriate.); *Coulter v. State,* 1987 OK CR 37, ¶ 31, 734 P.2d 295, 302, *overruled on other grounds by Davis v. State,* 2018 OK CR 7, ¶ 26 n. 3, ___P.3d___ (finding error for prosecutor to ridicule "opposing counsel and the defense by arguing that counsel had presented an 'air defense' and was treating the jurors as if they had just 'fell off an apple-cart.'"); *Black v. State*, 1983 OK CR 60, ¶¶ 11-12, 663 P.2d 22, 24-25 (finding prosecutor's argument "when it starts to hurt, he objects. That's what you have heard" constituted casting aspersion on opposing counsel). The prosecutor in this case instead asked the jury to make a common sense judgment about the defense's argument in light of the evidence at trial. This argument was well within the wide latitude of argument afforded the parties in closing argument. *See Pullen v. State*, 2016 OK CR 18, ¶ 13, 387 P.3d 922, 927 ("Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it.")

¶32 Based on the record before us, we find that Mitchell has not shown that error, plain or otherwise, occurred in any of the individual instances of alleged misconduct raised. For this reason, we reject his claim that the cumulative effect of the prosecutor's actions deprived him of a fair trial. *See Ashton v. State*, 2017 OK CR 15, ¶ 54, 400 P.3d 887, 900. This claim is denied.

9. Evidence

¶33 Mitchell argues that the district court erred in admitting State's Exhibit Nos. 22 through 26, namely the cell phone logs of the victim and several of his co-conspirators. Mitchell's failure to object to the admission of these exhibits on this basis at trial forfeits appellate review of his claim for all but plain error under the test in ¶ 9, *supra*.

¶34 The calls and texts within the logs established the planned exchange between Brown and the victim and showed that the co-conspirators had entered into an agreement to rob the victim. The evidence also corroborated the co-conspirators' testimony at trial and revealed Mitchell's participation in the conspiracy via the text messages he sent and received. The probative value of these exhibits is evident. *Taylor,* 2011 OK CR 8, ¶ 40, 248 P.3d at 376 ("Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue."). Giving the call logs their maximum reasonable probative force and their minimum reasonable prejudicial value, *Stewart v. State,* 2016 OK CR 9, ¶ 19, 372 P.3d 508, 512, we find that the probative value of the logs was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. 12 O.S.2011, § 2403. Accordingly, we find that Mitchell has not shown that

error, plain or otherwise, occurred. This claim is denied.

10. Ineffective Assistance of Counsel

¶35 Mitchell argues his case should be reversed because of ineffective assistance of counsel. He faults defense counsel for failing to object to the alleged errors in Propositions 4 through 9.

¶36 This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ashton*, 2017 OK CR 15, ¶ 55, 400 P.3d at 900. Under this test, Mitchell must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Ashton*, 2017 OK CR 44, ¶ 57, 400 P.3d at 901.

¶37 The merits of the claims underlying Mitchell's ineffective assistance of counsel challenge have been rejected in the preceding propositions of error. He has failed to show either that error occurred or that error affected the outcome of his case. Consequently, he cannot make the requisite showings of deficient performance and prejudice. Without such proof, we reject Mitchell's ineffective assistance of counsel claim.

11. Cumulative Error

¶38 Mitchell claims that even if no individual error in his case merits reversal, the cumulative effect of the errors committed requires a new trial or dismissal of his convictions. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez v. State*, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. And clearly, a cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, either individually or when considered together, that deprived Mitchell of a fair trial. This claim is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY

THE HONORABLE JOHN CANAVAN, JR., DISTRICT JUDGE

APPEARANCES AT TRIAL

Larry Monard, Attorney at Law, P.O. Box 54403, Oklahoma City, OK 73154, Counsel for Defendant

Adam Panter, Abby Nathan, Assistant District Attorneys, 331 N. Broadway, Shawnee, OK 74801, Counsel for the State

APPEARANCES ON APPEAL

Lisbeth L. McCarty, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Oklahoma Attorney General, Keeley L. Miller, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

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

1. This Court has previously affirmed the convictions of two of Mitchell's co-conspirators. *See Austin Olinger v. State*, Case No. F-2016-209 (unpublished)(Okl. Cr. April 4, 2017) and *Kiwane Hobia v. State*, Case No. F-2016-1039 (unpublished)(Okl. Cr. February 15, 2018).

2. Under 21 O.S.Supp.2014, § 13.1, Mitchell must serve 85% of his sentence of imprisonment on Count 1 before he is eligible for parole consideration.

3. Mitchell cites only the testimony of Brown in this claim although another co-conspirator, Cody Taylor, testified against him as well. Any challenge beyond the cited testimony of Brown is waived. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018)(requiring an appellant to include in his or her brief citations to the record where the alleged error occurred or waive the alleged error for review on appeal).

4. Corroboration is not required for admission of out-of-court statements by co-conspirators under 12 O.S.2011, § 2801(B)(2)(e).

5. The district court instructed Mitchell's jury that Brown and Taylor were accomplices to the crime of conspiracy whose testimony required corroboration.

6. Mitchell's concession in his brief – that he was not injured by the prosecutor's statement – eliminated any basis for this Court to order relief. The absence of any injury to Mitchell should have resulted in the removal of this claim from the appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal" and focusing on key issues.).

PRO SE WAIVER DIVORCE DOCKET CLE

What is the *Pro Se* Waiver Docket Clinic? Every Wednesday afternoon volunteer lawyers, law students and DHS-CSS (1st and 3rd Wednesdays) support the *pro se* waiver docket when Oklahoma County residents encounter problems with their uncontested *pro se* divorces. The Domestic Judges refer the litigant to our clinic for assistance (located In the Oklahoma County Law Library). Family lawyers volunteer once a month on a Wednesday that is convenient for them to participate in delivering these pro bono services. Please come to the free CLE and training and learn more about this volunteer opportunity.

SATURDAY, AUGUST 25, 2018

Oklahoma City University School of Law – 800 N. Harvey OKC
Ron and Kandy Norick Lecture Hall, Room 503
4.5 HOURS of CLE with 1 hour of Ethics

SCHEDULE

8:30-8:50 a.m.:	**Registration and Coffee**
8:50-9:00 a.m.:	**Welcome:** Associate Dean of Admissions Laurie Jones
9 a.m.-9:50 a.m.:	**Pro Se Waiver Divorce Docket Project Procedures and Document Preparation Training** *Presenter: Melissa Elaroua, Legal Aid Services of Oklahoma*
9:50 a.m.-10:40 a.m.:	**Nuts and Bolts of Family Law** *Presenter: Chris Batson Deason, Esq*
10:40 a.m.-11:00 a.m.:	**Break**
11:00 a.m.-11:50 a.m.:	**Domestic Violence and Ethics Issues** *Presenter: G. Gail Stricklin, Attorney at Law*
11:50a.m.-12:30 p.m.:	**Lunch** Courtesy of Oklahoma City University School of Law
12:30 p.m.-1:45 p.m..:	**Child Support Guidelines: Overview of the statute, prison orders, a guided tour of the CSS's child support calculator; Q&A session on Child Support Guidelines** *Presenters: Janet Johnson, Office of Impact Advocacy and Legal Outreach CSS State's Attorney*

Lawyers and Law Students Welcome!

Rsvp to lawevents@okcu.edu or call 505.208.5354

July

17 **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 Rod Ring 405-325-3702

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

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

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

OBA Clients' Security Fund Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal Salem 405-366-1234

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

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

20 **OBA Board of Governors meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John Morris Williams 405-416-7000

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

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

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

August

2 **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

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

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

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

14 **OBA Legislative Monitoring Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

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

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

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

Murray Abowitz of Edmond died May 10. He was born April 5, 1941. He was a graduate of west Philadelphia's Central High School. He received his undergraduate degree from the Wharton School of Business at the University of Pennsylvania. Mr. Abowitz received his J.D. from Seton Hall University. He was elected into the American College of Trial Lawyers in 1987. He liked animals, dancing, running, rowing and entertaining. Memorial donations can be made to the Oklahoma City Boathouse Foundation, 725 S. Lincoln Blvd., Oklahoma City, 73129 or to the Free to Live Animal Sanctuary, 9150 S. Western Ave., Guthrie, 73044.

Duane Shiffler Croft of Norman died May 2. He was born Jan. 15, 1957, in Pittsburgh, Pennsylvania. He grew up in Pitcairn, Pennsylvania, and graduated from Gateway High School in 1975. He later graduated from the University of Pittsburgh with a degree in physics. He started his career as a nuclear engineer working first for Duquesne Light and then the Tennessee Valley Authority. In 2005, he received his J.D. from the OU College of Law. After passing the bar, he opened a private law practice in Norman where he continued to serve until the time of his death.

Dallas E. Ferguson of Tulsa died May 13. He was born Dec. 20, 1945, in Blackwell. He wrestled and played football at Cornell College in Mount Vernon, Iowa, where he was a member of Beta Omicron Fraternity. He earned his J.D. from Columbia University Law School in 1971. The following year he served as a law clerk for Senior Judge Alfred P. Murrah of the U.S. Court of Appeals for the 10th Circuit in Oklahoma City. After his clerkship, he began his 45-year career at Doerner, Saunders, Daniel & Anderson. Mr. Ferguson served with Legal Aid Services of Oklahoma, Planned Parenthood and the National Multiple Sclerosis Society. Memorial donations may be made to the National Multiple Sclerosis Society Dallas E. Ferguson Memorial Fund.

William Sexton Jack Fine of Payson, Arizona, died June 29, 2017. He was born Aug. 20, 1932, in Tulsa. He received his J.D. from the University of Mississippi in 1957. He focused his practice on oil and gas title law.

Arthur Fleak Jr. of Tulsa died May 30. He was born Oct. 14, 1947, and was a 1965 graduate of Will Rogers High School. He attended OSU where he earned a Bachelor's of Science in psychology. In 1973, he graduated from the TU College of Law. Mr. Fleak not only practiced law, but he also taught business law for the past 25 years at Tulsa Community College. He will be remembered as a fun-loving guy who loved to travel, sports and spending time with his sons, nephews and grandsons.

George Getman Hooper of Tulsa died May 22. He was born Sept. 17, 1943. He graduated from Edison High School in 1961 and from Texas Christian University in 1965. Mr. Hooper was a member of Phi Delta Theta and lettered in tennis. Upon graduation from the TCU **he joined the U.S. Air Force where he served from 1966 to 1970 during the Vietnam War.** After leaving the Air Force, he attended the TU College of Law and graduated in 1972. He interned with Boyd & Parks Law Firm and was hired upon graduation. Mr. Hooper was an active member of the community and won a city council seat in 1982. He served as mayor from 1984 to 1986.

Oliver S. Howard of Tulsa died May 21. He was born Oct. 24, 1945, in Oklahoma City. In 1967, he earned his undergraduate degree in history and biblical literature from Oklahoma Christian College. In 1970, he received his master's degree in patristic Greek and biblical literature, and in 1978, he earned his Ph.D. in biblical and early rabbinic Jewish literature from Hebrew Union College in Cincinnati, Ohio. He earned his J.D. from the University of Cincinnati College of Law in 1979. Mr. Howard then moved to Oklahoma to practice with GableGotwals in Tulsa. During his 39 years with the firm he served as president and chairman of the Board of Directors. He also served more than 10 years as an adjunct settlement judge for the U.S. District Court for the Northern District of Oklahoma and served on the Committee on Admissions and Grievances for the Northern District. Memorial donations may be made to the Camphill Special School, 1784 Fairview Rd., Glenmoore, Pennsylvania, 19343.

Robert L. Johnston of Oklahoma City died May 19. He was born Jan. 28, 1953, in

Little Rock, Arkansas. He grew up in Independence, Kansas. After graduating high school in 1971, he briefly attended the University of Arkansas. Mr. Johnston then earned his bachelor's degree from Wichita State University and his J.D. from the OU College of Law. He practiced criminal law. He enjoyed nature, spending time fishing and deer and pig hunting. He also competed in body building competitions.

Joe B. Lawter of Norman died May 20. He was born May 25, 1958, in Oklahoma City. He graduated from Putnam City West High School. He received his undergraduate degree from OSU and in 1982, his J.D. from the OU College of Law. After passing the bar, he worked for the McKenzie Law Firm in Norman and United Bank. In the late 1980s, he opened his solo practice in Norman. He volunteered with Lawyers Fighting Hunger every November. He served as president of the Norman Tennis Association and supported the Norman High School Tigers Society Scholars. Memorial donations may be made to support Lawyers Fighting Hunger at 104 West Gray, Norman, 73070, or the Norman High School Tiger Society Scholars at 911 West Main, Norman, 73069.

Gary W. Listen of Edmond died May 29. He was born March 31, 1953, in Edmond. He graduated from the University of Central Oklahoma with a bachelor's degree in accounting. In 1990, he earned his J.D. from the OU College of Law. Mr. Listen worked as a tax attorney focusing in oil and gas for most of his career. He will be remembered for his fastidious nature, humor, passion for music and being the Houston Astros most avid fan. Memorial donations may be made to the Isaiah Stone Foundation.

Clarence "Lefty" Maher Jr. of Chickasha died May 11. He was born Feb. 14, 1930, in Chicago. He was a 1948 graduate of Woodruff High School. **He served in the U.S. Army during the Korean War**. Mr. Maher received his J.D. from the OU College of Law in 1957 and was a member of the Sigma Nu Fraternity. During his career, he served as a county attorney, assistant district attorney, county judge and associate district judge. In 1980, he became a probate attorney. Throughout his career he was a crusader for children and human rights for which he started Lefty's Lighthouse for adolescents in trouble. Memorial donations may be made to Holy Name of Jesus Catholic Church Building Fund, P.O. Box 748, Chickasha, 73023.

George Webb Owens of Tulsa died April 26. He was born June 1, 1926. He attended the University of Texas before **entering the Navy to serve in WWII. He also served in the Marine Corp.** After the war he returned to the University of Texas graduating with a bachelor's degree in pre-medicine. In 1951, he earned his J.D. from the University of Texas School of Law. While in law school he was a member of the International Legal Fraternity Phi Delta Phi. In 1983, he was appointed presiding judge of the Oklahoma Court of Appeals. Over his nearly 70-year career he worked in oil and gas, real estate, farming, ranching and manufacturing law.

Tom Pixton of Sayre died May 8. He was born Feb. 17, 1943, in Nashville, Tennessee. He graduated from high school in Ruston, Louisiana, and continued his education at Louisiana Tech where he received his bachelor's degree. Mr. Pixton received his J.D. from Tulane University Law School in 1973. He practiced law in Louisiana and eventually moved to Oklahoma where he worked in the Beckham Country District Attorney's Office. He worked in Child Support Services and later opened his own law office in 1990 where he worked until his retirement in 2017. He enjoyed fly fishing and collecting model trains and lighthouses.

Fred E. Stoops of Broken Arrow died May 18. He was born Dec. 22, 1955, in Huntington, Indiana. In 1978, he graduated from Ball State University in Muncie, Indiana, where he majored in psychology and political science. He earned his J.D. from the TU College of Law in 1981. Mr. Stoops was admitted to the Oklahoma, Indiana and Colorado bar associations. He focused his practice on personal injury, medical malpractice and products liability. Memorial donations can be made to the First United Methodist Church of Tulsa and John 3:16 Ministries.

James Brian Ward of Piedmont died May 13. He was born Aug. 14, 1981, in Tulsa. **He was a U.S. Army veteran.** Mr. Ward received his J.D. from the OCU School of Law in 2016. He was cherished by those who had the pleasure of being his friend and will be remembered for his humor, endurance and intelligence. Memorial donations may be made to Mission 22 at www.mission22.com.

Court of Civil Appeals Opinions

2018 OK CIV APP 49

INDEPENDENT SCHOOL DISTRICT NO. 2, TULSA COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 52, OKLAHOMA COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 71, KAY COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 20, MUSKOGEE COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 18, JACKSON COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 14, OTTAWA COUNTY, OKLAHOMA; INDEPENDENT SCHOOL DISTRICT NO. 105, BLAINE COUNTY, OKLAHOMA; and INDEPENDENT SCHOOL DISTRICT NO. 2, KIOWA COUNTY, OKLAHOMA, Plaintiffs/Appellees vs. OKLAHOMA TAX COMMISSIONER, STEVE BURRAGE; OKLAHOMA TAX COMMISSIONER, DAWN CASH and OKLAHOMA TAX COMMISSIONER, THOMAS E. KEMP, JR., Defendants/Appellants.

Case No. 115,678. February 9, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED AS MODIFIED

Gary Watts, Tulsa, Oklahoma,

Stephanie L. Theban, RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, P.C., Tulsa, Oklahoma and

Robert A. Nance, RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees

Marjorie L. Welch, FIRST DEPUTY GENERAL COUNSEL, Alan R. Leizear, ASSISTANT GENERAL COUNSEL, OKLAHOMA TAX COMMISSION, Oklahoma City, Oklahoma, for Defendants/Appellants

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Steve Burrage, Dawn Cash and Thomas E. Kemp, Jr., as the Commissioners of the Oklahoma Tax Commission (Tax Commission) appeal the district court's December 9, 2016 Journal Entry of Declaratory Judgment and Injunction entered in favor of eight Oklahoma Independent School Districts. The Tax Commission also appeals the denial of its motion to dismiss, based on the plaintiffs' failure to join all school districts as necessary parties, contained in the same judgment. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. The Tax Commission has misconstrued the effect of a 2015 amendment to section 1104 of the Motor Vehicle License and Registration Act (47 O.S.2011 §§ 1101 through 1151.4) providing for the collection and apportionment of fees, fines and penalties to Oklahoma school districts. As a result, the Commission failed to distribute to the plaintiffs funds they were statutorily entitled to receive. The judgment of the district court is affirmed as modified.

BACKGROUND

¶2 The plaintiffs are eight independent school districts that receive funds collected by the Tax Commission from motor vehicle fees, taxes and penalties pursuant to the Oklahoma Vehicle License and Registration Act. Section 1104 of the Act requires the Tax Commission to distribute a certain percentage of those collections to eligible school districts, including the plaintiffs. During the 2016 fiscal year, July 1, 2015 through June 30, 2016, the plaintiffs received fewer funds than they had received in some months of the 2015 fiscal year.[1] In this suit, they sought a declaratory judgment that their receipt of diminished funds occurred because the Tax Commission misinterpreted and, therefore, misapplied a 2015 amendment to section 1104. The plaintiffs also sought injunctive relief, preventing the Tax Commission from continuing to apply section 1104 as it had since the 2015 amendment.

¶3 In summary, the plaintiffs argue that the statute requires the Tax Commission to distribute at least the same amount of funds distributed in the corresponding month of the previous year, or a proportionate amount thereof, rather than distribute a percentage of the funds collected based on average daily attendance, as it had

been doing. The Tax Commission argues that its interpretation of the 2015 amendment to section 1104 is correct, and that the district court should defer to the Tax Commission's "great expertise" in interpreting tax statutes. The Tax Commission also filed a motion to dismiss, arguing that the declaratory judgment statute required the joinder of all school districts that receive a portion of motor vehicle collections, because the amount each received would be affected by any relief obtained by the plaintiffs. The Tax Commission appeals the district court's judgment granting the plaintiffs' motion for summary judgment and enjoining the Tax Commission from apportioning motor vehicle collections to the school districts based on average daily attendance. The Tax Commission also appeals that portion of the district court's judgment denying the motion to dismiss.

STANDARD OF REVIEW

¶4 Appellate review of the ruling on a motion to dismiss involves a de novo consideration as to whether the petition is legally sufficient. *Indiana Nat'l Bank v. Dep't of Human Servs.*, 1994 OK 98, ¶ 2, 880 P.2d 371. Title 12 O.S.2011 § 2056 governs the procedure for summary judgment in this case. A motion for summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." 12 O.S.2011 § 2056(C). An order granting summary judgment disposes of issues that are "purely legal" and is subject to the de novo standard of appellate review. *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051. De novo review involves a plenary, independent, and non-deferential examination of the district court's rulings of law. *Neil Acquisition L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

¶5 The dispositive legal issue in this case requires the interpretation of 47 O.S.2011 § 1104. Legal issues involving statutory interpretation are also questions of law, subject to de novo review. *Raymond v. Taylor*, 2017 OK 80, ¶ 9, ___ P.3d ___ (citing *Head v. McCracken*, 2004 OK 84, ¶ 4, 102 P.3d 670; *Fulsom v. Fulsom*, 2003 OK 96, ¶ 2, 81 P.3d 652). "[S]tatutes are construed to determine legislative intent in light of the general policy and purpose that underlie them." *Troxell v. Okla. Dep't of Human Servs.*, 2013 OK 100, ¶ 4, 318 P.2d 206.

ANALYSIS

I. The Tax Commission's Motion to Dismiss

¶6 The Tax Commission's motion to dismiss cites 12 O.S.2011 § 1653: "When a declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ." According to the Tax Commission, all of the school districts that receive a portion of motor vehicle collections would be affected by any declaratory judgment in favor of the plaintiffs, because any increase in the amount distributed to the plaintiffs would reduce the amount available for distribution to the non-plaintiff school districts. The Tax Commission contends, therefore, that those school districts "shall be made parties." *Id.* The Tax Commission cites no authority, other than the language of the statute, for the proposition that "shall" as used in section 1653 is mandatory. Nonetheless, that is a common tenant of statutory construction. "The use of 'shall' by the Legislature is normally considered as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Oglesby v. Liberty Mut. Ins. Co.*, 1992 OK 61, ¶ 19, 832 P.2d 834 (emphasis added). But, as the plaintiffs point out, the word "shall" in section 1653 has not always been interpreted as mandatory, requiring the joinder of all parties who have an interest that may be affected by the litigation.

¶7 In *Reed v. City of Bartlesville,* 1973 OK CIV APP 2, ¶ 11, 510 P.2d 1013, this Court observed: "In spite of the word 'shall' the joinder requirement [in section 1653] is not mandatory in the sense that all parties who might be affected by a declaration must be joined but only those necessarily and directly affected thereby." *Reed* held that all property owners affected by a zoning ordinance were not required to be joined in a declaratory judgment action challenging that ordinance. The *Reed* Court relied, in part, on an article written at the time section 1653 was adopted. *See* George B. Fraser, *Oklahoma's Declaratory Judgment Act*, 32 Okla.B.J. 1447 (1961). In that article, Professor Fraser stated that "the joinder requirement is not mandatory in spite of the use of the word 'shall.'" *Id.* at 1450. And, in a footnote, he concluded: "Obviously, when the validity of a statute is challenged, all interested persons cannot be joined." *Id.* at n.32. This Court has concluded that "nonjoinder is not an automatic deficiency." *Constr. Res. Corp. v. Courts, Ltd.*, 1979 OK CIV APP 1, ¶ 12, 591 P.2d 335.

¶8 In *Oliver v. City of Tulsa*, 1982 OK 121, 654 P.2d 607, the Supreme Court cited *Reed*, *Construction Resources* and decisions from other jurisdictions in support of its holding that one of the five hundred members of an association was the proper and only necessary party to a declaratory judgment action. That member sought a determination of rights pursuant to a collective bargaining agreement, and "there was no showing of any controversy between him and any members of the association." *Id.* ¶ 38. However, the Court reversed that portion of the judgment awarding specific sums of money to individual members of the association, based on its finding that they were "necessary parties in a proceeding to determine whether they were entitled to personal judgments." *Id.* ¶ 39.

¶9 Although we agree with the authority that "shall" as used in section 1653 is not mandatory, that does not resolve the joinder issue raised by the Tax Commission's motion to dismiss. The manner in which section 1104 is interpreted affects the interests of the plaintiffs and some of the non-plaintiff school districts differently. As the Tax Commission points out, only a limited amount of money is available for distribution to the eligible school districts. And, the amount received by any particular school district is not the same if distributed based on average daily attendance rather than on a historical basis determined by an amount previously received.

¶10 However, the issue framed by the plaintiffs is not how much money each district should receive for the 2016 fiscal year. The issue is whether the Tax Commission's interpretation of the 2015 amendment to section 1104 is correct. As the plaintiffs acknowledged in their response to the Tax Commission's motion to dismiss, their petition does not seek any monetary relief; it is limited to "declaratory and injunctive relief." And the plaintiff school districts "are not asking for any money back from the Tax Commission [or from] any school district. They simply want the apportionments to be correct in the future."[2] When the issue is the proper construction of a statute, it is not always necessary that all parties potentially affected by the result be joined in the action. *See, e.g., Naifeh v. State ex rel. Okla. Tax Comm'n*, 2017 OK 63, 400 P.3d 759 (deciding the constitutionality of a proposed tax without joinder of all potential beneficiaries of the tax); *Murray Cnty. v. Homesales, Inc.*, 2014 OK 52, 330 P.3d 519 (deciding all counties' rights to collect taxes pursuant to the Documentary Stamp Tax Act, 68 O.S.2011 §§ 3201 through 3206, in an action brought by only two of the seventy-seven affected counties); *Deutsche Bank Nat'l Trust v. Brumbaugh,* 2012 OK 3, 270 P.3d 151 (construing provisions of Article Three of the Oklahoma Uniform Commercial Code in a mortgage foreclosure action involving only one of numerous affected lenders); *In re: Initiative Petition No. 379,* 2006 OK 89, 155 P.3d 32 (holding invalid an initiative petition filed by a "diverse political and economic group of Oklahoma citizens," but not all of the qualified voters). Because the plaintiffs' case is consistent with these types of cases, we find it unnecessary to address the "public interest" exception to the joinder requirements argued by the plaintiffs and relied on by the district court. *See also Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 60 S. Ct. 569 (1940). We hold that the non-plaintiff school districts were not required to be joined in this declaratory judgment action and affirm the district court's denial of the Tax Commission's motion to dismiss.

II. The Declaratory Judgment Action

¶11 The substantive issue in this appeal concerns the proper interpretation of a 2015 amendment to section 1104 of the Motor Vehicle License and Registration Act. Section 1104 generally provides that the Tax Commission will distribute all motor vehicle fees, taxes and penalties it collects to eligible school districts and other governmental entities.[3] Of particular importance in this appeal are subparagraphs B(2)(a) and B(2)(b) of the 2015 version (hereafter, 2(a) and 2(b) for all versions of the statute unless otherwise noted). Subparagraph 2(a) provides, as it has since the statute's inception, that funds will be apportioned so that each district receives the same amount received in the corresponding month of the previous year. Subparagraph 2(b) provides that, in case of a previous deficit, any excess funds will be distributed so that each district receives the "cumulative total" it was entitled to, but had not yet received, pursuant to subparagraph 2(a). Any funds remaining at that point are to be apportioned based on average daily attendance as provided in the second part of subparagraph 2(b).

¶12 The facts in this case are not disputed and concern the apportionment of motor vehicle collections to 419 Oklahoma school districts for fiscal year 2015, July of 2015 through June

of 2016. In each of those months, except for September and December of 2015 and March of 2016, the amount collected and distributed was less than the amount collected and distributed in the corresponding month of the preceding year. In those deficit months, the Tax Commission distributed, pursuant to the second part of subparagraph 2(b), the available funds to the school districts based on average daily attendance. In each of the three months when collections exceeded the amount collected in the corresponding month of the preceding year, the Tax Commission distributed, as required by subparagraph 2(a), sufficient funds for each district to receive the same amount that it had received in that month of the preceding year. However, the remaining funds were distributed based on average daily attendance rather than pursuant to the "cumulative total" requirement of the first part of subparagraph 2(b).

¶13 As the plaintiffs point out, in using this method the Tax Commission disregarded subparagraph 2(a) in the nine deficit months as well as the "cumulative total" provision of subparagraph 2(b) in the three excess collection months. An understanding of the purpose of the statute as evident from its historical context is necessary to determine whether the Tax Commission's interpretation of the 2015 amendment to section 1104 is correct.

A. The Evolution of Section 1104 Funding

¶14 Partial funding for Oklahoma schools from fees, taxes and penalties collected pursuant to this Motor Vehicle License and Registration Act began in 1985 with the enactment of the original version of section 1104. Thereafter, an eligible school district received "the same amount of funds as such district received from the taxes and fees provided in this act in the corresponding month of the preceding year." 47 O.S. Supp. 1985 § 1104(B)(1)(a), now B(2)(a).[4] Although the percentage of all motor vehicle collections apportioned to the school districts has varied over time, this method for allocating the amount distributed to the school districts remained relatively unchanged until 2017.

¶15 Section 1104 has been amended numerous times, but for historical purposes, the 1997 version of that statute is relevant to this case. And, it was the version in effect immediately prior to the 2015 amendment. The 1997 statute provided that thirty-five percent (35%) of all motor vehicle collections were to be apportioned to eligible school districts according to the following formula:

> a. except as otherwise provided in this subparagraph, each district shall receive the same amount of funds as such district received from the taxes and fees provided in this title in the corresponding month of the preceding year. . . .
>
> b. any funds remaining unallocated following the allocation provided in subparagraph a of this paragraph shall be apportioned to the various school districts so that each district shall first receive the cumulative total of the monthly apportionments for which it is otherwise eligible under subparagraph a of this paragraph and then an amount based upon the proportion that each district's average daily attendance bears to the total average daily attendance of those districts entitled to receive funds pursuant to this section. . . .
>
> c. if, for any month, the funds available are insufficient to provide the total allocation required in subparagraph a of this paragraph, each district shall receive a proportionate share of the funds available based upon the proportion of the total revenues that such district received in the corresponding month of the preceding year.

47 O.S. Supp. 1997 § 1104(A)(2) (section 1104(B)(2) of the 2015 version). This is the same formula that had been used since 1987. *See* 47 O.S. Supp. 1987 § 1104(B)(2).

¶16 In 2000, section 1104 was amended, to gradually increase the percentage of motor vehicle collections apportioned to the school districts and ensure that the money received by the school districts would not "be less than the monies apportioned in the previous fiscal year." 47 O.S. Supp. 2000 § 1104(M). In addition, subparagraph 2(c) was repealed, eliminating the proportionate reduction provision applicable in deficit collection months.

¶17 Thereafter, and until the 2015 amendment, motor vehicle collections were to be disbursed pursuant to subparagraphs 2(a) and 2(b), and paragraph M, in order for each eligible school district to receive at least the same amount it had received in the previous fiscal year. However, during that time, according to the affidavit of the Tax Commission official charged with apportioning motor vehicle collections to the school districts, "for any month

in which the amount to be apportioned was less than the amount apportioned to the school districts in the same month of the previous year, the hold harmless provision was applied resulting in monies that would have otherwise gone to the general fund being used to ensure school districts received no less than in the previous year."

¶18 "Hold harmless" is a concept usually associated with a contractual agreement by one party to assume the potential liability of another party. *Black's Law Dictionary* 658 (5th ed. 1979). The term has also been used in reference to another aspect of school funding but unrelated to this case. *See Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, 746 P.2d 1135 (Wilson, J., dissenting). We understand the Tax Commission's use of the term in this case to refer to the allocation of funds to the school districts necessary to ensure that the districts received on a monthly basis, through subparagraphs 2(a) and 2(b), or on an annual basis, through paragraph M, not less than the same amount received for the corresponding time period of the previous year. Although the Tax Commission interprets the 2000 version of section 1104 as containing two "hold harmless" provisions, the affidavit refers only to the latter. This is apparent from the reference in the next sentence of the affidavit to the 2015 repeal of the "hold harmless provision," *i.e.*, paragraph M. The 2015 amendment did not alter, change or affect subparagraphs 2(a) and 2(b).

¶19 The Tax Commission's approach during the 2000 to 2015 time period is confusing. The "hold harmless" provision in paragraph M did not specify how monthly collections were to be apportioned. That provision provided that the school districts would not receive "less than the monies apportioned in the previous fiscal year." 47 O.S. Supp. 2000 § 1104(M). Consequently, paragraph M provides for any annual reconciliation necessary to ensure that the funds received in one fiscal year were not less than those received in the prior fiscal year, but only when the monthly distributions made pursuant to subparagraphs 2(a) and 2(b) were insufficient to make up any annual deficit. Only subparagraphs 2(a) and 2(b) specify how the Tax Commission is to apportion the available funds in any particular month.

¶20 Nonetheless, this appears to be the method used by the Tax Commission from 2000 until July 1, 2015, the effective date of the 2015 amendment to section 1104. The 2015 amendment fixed the percentage of motor vehicle collections distributed to the school districts at thirty-six and twenty one-hundredths percent (36.20%). However, the hold harmless provision in paragraph M – now renumbered as paragraph N – was repealed. As a result, the school districts were no longer guaranteed the same amount received in the previous fiscal year. And, the total amount the school districts could receive was now capped: "in no event shall the amount apportioned in any fiscal year [to the school districts] exceed the total amount apportioned for the fiscal year ending on June 30, 2015." 47 O.S. Supp. 2015 § 1104(B)(2)(d). Any excess was "placed to the credit of the General Revenue Fund." *Id.*

¶21 Subparagraphs 2(a) and 2(b) were not affected by the 2015 amendment. Consequently, the method for distributing the thirty-six and twenty one-hundredths percent (36.20%) of motor vehicle collections among the eligible school districts on a monthly basis remained unchanged. First, each district was to receive "the same amount of funds as such district received . . . in the corresponding month of the preceding year." 47 O.S. Supp. 2015 § 1104(B)(2)(a). Second, any remaining funds were to be distributed "so that each district shall first receive the cumulative total of the monthly apportionments for which it is otherwise eligible under subparagraph a . . . ." 47 O.S. Supp. 2015 § 1104(B)(2)(b). Third, any funds unallocated at that point were to be distributed based on a percentage determined by average daily attendance. *Id.*

B. The Plaintiffs' Interpretation

¶22 It is not disputed that the total amount of motor vehicle collections that the Tax Commission apportioned to the plaintiffs in fiscal year 2016 was less than those districts received in the 2015 fiscal year, and that in only three months of fiscal year 2016 did the plaintiffs receive an amount equal to the amount received in the corresponding month of the preceding fiscal year. The plaintiffs allege that the deficit funding they received resulted from the Tax Commission's misinterpretation of the 2015 amendment to section 1104. They argue that the Tax Commission completely disregarded the "cumulative total" provision of subparagraph 2(b) and was wrong to conclude that subparagraph 2(a) did not permit the proportionate distribution of funds in months when the available funds were less than the total

funds distributed in the corresponding month of fiscal year 2015.

C. The Tax Commission's Interpretation

¶23 The Tax Commission contends that after July 1, 2015, in months when the funds available for distribution were insufficient to distribute the same amount the school districts received in the corresponding month of the preceding year, the Tax Commission was required to distribute the available funds based on a school district's average daily attendance because there was no other statutory provision applicable in such circumstances. Specifically, the Tax Commission argues that the 2000 repeal of subparagraph 2(c) left it with no statutory authority to distribute, on a monthly basis, less than the amount previously distributed. According to the Tax Commission, in months when the amount available for distribution was less than the total amount distributed to the school districts in the corresponding month of the previous year, subparagraph 2(a) did not apply because it was impossible for "each district [to] receive the same amount of funds as such district received . . . in the corresponding month of the preceding year." 47 O.S. Supp. 2015 § 1104(B)(2)(a). The Tax Commission's narrow focus after the 2015 amendment on only a portion of the language of subparagraph 2(a) infuses that language with a new meaning it had not previously had and "leads to an inconsistent or incongruent result." *Hogg v. Okla. Cnty. Juvenile Bureau*, 2012 OK 107, ¶ 7, 292 P.3d 29. We are required, therefore, to "utilize rules of statutory construction to reconcile the discord and ascertain the legislative intent." *Id.*

III. The Effect of the 2015 Amendment

¶24 The Tax Commission asserts two arguments in support of its interpretation of the 2015 amendment to section 1104. First, it argues that the courts should defer to the Tax Commission's expertise in this area. Second, the Tax Commission argues that it has properly interpreted the 2015 amendment and the amendment's effect. We find neither argument persuasive.

A. The Tax Commission's Deference Argument

¶25 The Tax Commission correctly argues that its expertise in construing and administering tax statutes is entitled to *some* persuasive value. "[T]he contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons . . . ." *Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶ 10, 714 P.2d 1013. Of equal importance, however, is the principle that where the Legislature has "convened many times during this period of administrative construction," or "amends the statute or re-enacts it without overriding such construction," the Legislature may be regarded as having acquiesced in or approved of the administrative construction. *Id.* ¶ 17. Here, the Legislature amended section 1104 numerous times between 1985 and 2015 without altering subparagraphs 2(a) and 2(b) or the method of distribution the Tax Commission understood those provisions to require. When the Legislature is regarded as having adopted the Tax Commission's construction, "the Commission may not with the stroke of a pen undo it." *Id.* ¶ 19.

¶26 Further, construction of section 1104 and the 2015 amendment thereto does not require any particular technical or scientific knowledge, skill or expertise. "This is simply a matter of determining what a statute means, and that is within the expertise of the courts." *Dobson Tel. Co. v. State ex rel. Okla. Corp. Comm'n,* 2017 OK CIV APP 16, ¶ 15, 392 P.3d 295 (approved for publication by the Supreme Court). "This Court and the Oklahoma Supreme Court are 'the ultimate authority on the interpretation of the laws of this State . . . .'" *Id.* (quoting *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc*., 2016 OK 42, ¶ 13, 371 P.3d 477).

B. The Tax Commission's Statutory Construction Argument

¶27 The Tax Commission has conceded that, prior to 2015, it had a long history of interpreting subparagraph (2)(a) as a "hold harmless" provision: "The 2015 amendment deleted one 'hold harmless' provision in subsection [M], but did not change the 'hold harmless' provision which has been included in paragraph (2)(a). . . for a period of more than twenty (20) years." In that twenty-, actually thirty-year period, the Tax Commission had distributed available funds pursuant to subparagraph 2(a), even when the funds available were less than the funds distributed in the corresponding month of the previous year.

¶28 It may be, as the Commission contends, that during most of that time subparagraph 2(c) was in effect. However, subparagraph 2(c)

only provided the method for determining the amount each district would receive in months when the available funds were less than those available in the corresponding month of the previous year. Subparagraph 2(a) still provided the authority for apportioning the available funds to the school districts, and the benchmark for determining the amount received by each district, *i.e.*, the amount received in the corresponding month of the previous year. The Tax Commission's interpretation, by contrast, would have prevented any distribution in any deficit collection month and any distribution of the funds collected in excess collection months until the excess funds were sufficient to make up the entire deficit. The Tax Commission avoided that incongruent result by treating paragraph M as authorizing distributions on a monthly basis when necessary to apportion the amount specified in subparagraph 2(a).

¶29 Further, the Commission's interpretation fails to account for the first clause of subparagraph 2(a): "except as otherwise provided in this subparagraph." There are two exceptions "otherwise provided" to the requirement that each school district receive the same amount received in the corresponding month of the preceding year. First, in months when there was an excess, the districts would receive more, as provided in subparagraph 2(b). Second, in months when there was a deficit, the districts would receive less, as provided in subparagraph 2(c). In either case, the amount received was some portion of the funds authorized by subparagraph 2(a).

¶30 The Tax Commission has not explained why the repeal of subparagraph 2(c) in 2000 requires a new interpretation of subparagraphs 2(a) or 2(b). The 2015 amendment did not alter, amend or change the language of either. And, subparagraphs 2(a) and 2(b) had been the subject of a long-standing, consistent administrative and legislative interpretation since 1987. Even after 2000, subparagraph 2(b) still continued to provide a mechanism for apportioning excess funds, when available, to accomplish as nearly as possible the basic allocation of funds contemplated in subparagraph 2(a), when funds available for distribution were insufficient to provide the same amount distributed in the corresponding month of the previous year. The Tax Commission's current construction of subparagraph 2(a) "'must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" *Anderson v. Eichner*, 1994 OK 136, n.25, 890 P.2d 1329 (quoting *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 591-92 (1962)). We find no expression of Legislative intent to alter the original intent and application of subparagraphs 2(a) or 2(b) until 2017.

C. The Object and Policy of Section 1104

¶31 Since 1987, the Legislature has contemplated that there may be months in which the funds available for distribution as specified in subparagraph 2(a) would be insufficient. This is clearly evident from the provision in subparagraph 2(c) for proportionate reduction of the amount specified in subparagraph 2(a). But, this intent is equally evident from the language of subparagraph 2(b), which provides a "catch-up" mechanism from excess funds collected in subsequent months when the funds actually distributed in any prior month had failed to meet the threshold specified in subparagraph 2(a). In those months, the excess funds were "apportioned to the various school districts so that each district shall first receive the cumulative total of the monthly apportionments for which it is otherwise eligible under subparagraph [2(a)] . . . ." 47 O.S. Supp. 1987 § 1104(B)(1)(b). Only if an amount less than the amount specified in subparagraph 2(a) had actually been distributed would there be any need for an additional "catch-up" distribution. More importantly, only after the school districts had been "made whole" pursuant to the first part of subparagraph 2(b) was the Tax Commission authorized to apportion funds on the basis of average daily attendance. *Id.* The Tax Commission's interpretation of the 2015 version of subparagraph 2(a) as prohibiting proportionate distributions in deficit collection months cannot be reconciled with the monthly "catch-up" procedure provided in subparagraph 2(b) of that statute.

¶32 Further, in 2017, section 1104 was amended to delete subparagraphs 2(a) and 2(b) in their entirety. Effective August 25, 2017, the motor vehicle collections available for the school districts are "apportioned to the various school districts so that each district shall receive an amount based upon the proportion that each district's average daily attendance bears to the total average daily attendance of those districts entitled to receive funds . . . ." 47 O.S. Supp. 2017 § 1104(B)(2).

> [B]y amending a statute the Legislature may have intended (1) to change existing law or (2) to clarify ambiguous law. The exact intent is ascertained by looking to the circumstances surrounding the amendment. If the earlier version of a statute def-initely expresses a clear and unambiguous intent or has been judicially interpreted, a legislative amendment is presumed to change the existing law. Nonetheless, if the earlier statute's meaning is in doubt or uncertain, a presumption arises that the amendment is designed to clarify, *i.e.*, more clearly convey, legislative intent which was left indefinite by the earlier statute's text.

Samman v. Multiple Injury Trust Fund, 2001 OK 71, ¶ 13, 33 P.3d 302 (footnotes omitted). Until July of 2015, the meaning of subparagraphs 2(a) and 2(b), as construed by this Court and by the Tax Commission, had not been in doubt or uncertain. If the repeal of subparagraph 2(c) and later paragraph M created confusion concerning how funds were to be apportioned to the school districts, as the Tax Commission contends, the Legislature could have clarified "existing law" by reinstating subparagraph 2 (c), making it clear that the previous method of apportioning funds to the school districts was still provided in subparagraph 2(a). The Legislature did not do this.

¶33 The language of the 2017 amendment and the method of distributing motor vehicle collections to the school districts is so different from the previous method provided in subparagraph 2, that it is clear the Legislature intended to change the existing law by eliminating any apportionment based on amounts historically received. Further, the 2017 amendment cannot be construed as an accident or coincidence. The original version of section 1104 provided that any excess funds would "be apportioned . . . based upon the portion that each district's average daily attendance bears to the total average daily attendance . . . ." 47 O.S. Supp. 1985 § 1104(B)(1)(b). In 1987, that subparagraph was amended to add the "catch-up" method previously discussed, a method unchanged until its repeal in 2017. Consequently, the Legislature was thoroughly familiar with the historical and attendance-based methods of apportioning funds to the school districts. In 2017, the Legislature chose to rely solely on the attendance method. In doing so, the Legislature changed existing law. "The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses." *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 9, 130 P.3d 213.

¶34 Therefore, it is apparent that even after the 2015 amendment to section 1104, the Legislature intended for subparagraph 2(a) to require an apportionment of available funds even in months when the available funds were insufficient to provide each district with the same amount distributed in the corresponding month of the previous year, and for subparagraph 2(b) to first require the distribution of any excess collections in subsequent months to ensure, as nearly as possible, that the amounts specified in subparagraph 2(a) would be received. Not until 2017 did the Legislature change this method of apportioning motor vehicle collections to the school districts. Although the Tax Commission may have been able in 2015 to predict that the Legislature was going to adopt an attendance-based method, this case requires us to interpret the statute in effect until the Legislature subsequently amended the statute.

D. The District Court's Judgment

¶35 The district court's interpretation of the 2015 version of section 1104 is consistent with this Court's interpretation. The district court ordered the Tax Commission to recalculate the amount the plaintiff school districts were entitled to receive for fiscal year 2016 and to base future distributions on the recalculated amount. We modify that portion of the district court's judgment. The Tax Commission shall recalculate the amount of motor vehicle collections that all eligible school districts should have received for fiscal year 2015 and base the future apportionment of funds on that amount consistent with the interpretation of the 2015 version of section 1104 in this Opinion. This method should govern until the effective date of the 2017 amendment. The plaintiffs do not seek, and we do not order, redistribution of motor vehicle collections received by the school districts in fiscal year 2015.

CONCLUSION

¶36 The Tax Commission has misinterpreted the effect of a 2015 amendment to section 1104 and consequently apportioned the wrong amount of motor vehicle collections to eligible school districts, including the plaintiffs. Between July 1, 2015, and August 25, 2017, the school districts should have received each month a per-

centage of the available funds based on the amount each district received in the corresponding month of the 2015 fiscal year. Any excess funds collected during September and December of 2015 and March of 2016 should have been distributed "so that each district shall first receive the cumulative total of the monthly apportionments for which it is otherwise eligible under subparagraph a …." 47 O.S. Supp. 2015 § 1104(B)(2)(b). The Tax Commission shall recalculate the amount that should have been apportioned to the school districts pursuant to this method and base the apportionment of motor vehicle collections on the recalculated amounts for the July 1, 2016 to August 25, 2017 time period.

¶37 **AFFIRMED AS MODIFIED**.

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

JOHN F. FISCHER, PRESIDING JUDGE:

1. In this Opinion, we will the use the convention adopted by the school districts and the Tax Commission, identifying the fiscal year by the year in which it ends.

2. The plaintiffs' petition was filed on June 15, 2016, before the start of the 2017 fiscal year. The injunctive relief that the plaintiffs sought could, and in this case did, affect how the funds are distributed in fiscal year 2017. The Tax Commission was on notice that might be a result of this litigation and, therefore, was in apposition to avoid "paying any money back" wrongly distributed in fiscal year 2017.

3. Other recipients of motor vehicle collections have included the Tax Commission Reimbursement Fund, various county transportation projects, cities, the Oklahoma Law Enforcement Retirement Fund, the Wildlife Conservation Fund and the General Revenue Fund. *See, e.g.,* 47 O.S. Supp. 1997 § 1104(A)(3) through (11). The funds allocated to other entities do not affect the application of section 1104 to the school districts, only the amount received by the districts. The other distributees are, therefore, not discussed in this Opinion.

4. What is not apparent from this record is how the original amount distributed to any particular district was determined.

2018 OK CIV APP 50

HAROLD KOPPITZ, On Behalf of Himself and All Others Similarly Situated, Plaintiff/Appellant, vs. CHESAPEAKE ENERGY CORPORATION, and CHESAPEAKE EXPLORATION, L.L.C., As Successor By Merger to Chesapeake Exploration, L.P., Defendants/Appellees, Sandridge Energy, Inc., and Tom L. Ward, Defendants.

Case No. 115,521. March 9, 2018

APPEAL FROM THE DISTRICT COURT OF WOODS COUNTY, OKLAHOMA

HONORABLE JUSTIN EILERS, JUDGE

REVERSED AND REMANDED

Charles D. Watson, Drumright, Oklahoma, for Appellant,

Timothy J. Bomhoff, Patrick L. Stein, McAfee & Taft, Oklahoma City, Oklahoma, for Appellees.

Larry Joplin, Judge:

¶1 Plaintiff/Appellant Harold Koppitz (Plaintiff) seeks review of the trial court's order granting the motion to dismiss of Defendants/Appellees Chesapeake Energy Corporation, and Chesapeake Exploration, L.L.C., As Successor By Merger to Chesapeake Exploration, L.P. (Defendants) on Plaintiff's claims to damages for the Defendants' violation of the Oklahoma Anti-Trust Reform Act, 79 O.S. 201, et seq. (OARA), based on allegations of Defendants' "conspiracy to rig bids and depress the market for purchases of oil and natural gas leasehold interests located within the State of Oklahoma."

¶2 Defendants filed a motion to dismiss for lack of subject matter jurisdiction "because the claim involves a unique issue under federal antitrust law." Particularly, Defendants alleged they had confessed their violation of federal antitrust law and cooperated with the investigation conducted by the United States Department of Justice, Anti-Trust Division, which qualified them for leniency and limited any potential recovery of damages to "single" actual damages (as opposed to the joint and several treble damages ordinarily recoverable) under the Antitrust Criminal Penalty Enhancement and Reform Act, 15 U.S.C. §1, note. So, said Defendants, to the extent the ACPERA federal law limited damages and conflicted with the treble damage provision of OARA, federal law preempted state law antitrust claims under the doctrine of conflict preemption.

¶3 Plaintiff responded. Plaintiff first argued that the assertion of a federal defense – the limitation on damages under ACPERA – to his state law claim under OARA did not convert his state law claim under OARA into a federal claim within the exclusive domain of the federal courts. Plaintiff secondly argued that federal antitrust law did not, ipso facto, preempt state law antitrust claims. Plaintiff thirdly pointed out that ACPERA, by its own terms, applied to "any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law." 15 U.S.C. §1, note, at §213(a). Plaintiff also pointed out that parallel federal and state law antitrust claims have been allowed to proceed against ACPERA participants.[1]

¶4 On consideration of the parties' submissions and arguments, the trial court granted the motion to dismiss of Defendants:

> In his Petition, Plaintiff asserts claims against the Chesapeake Defendants arising under Section 203(A) of the Oklahoma Antitrust Reform Act, 79 Okla. Stat. §203(A). The Chesapeake Defendants argue in their motion that the federal Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") divests the Court of subject matter jurisdiction and preempts Plaintiffs state law antitrust claims because Chesapeake participated in the Leniency Program of the United States Department of Justice, Antitrust Division. The Court agrees and GRANTS the Chesapeake Defendants' motion to dismiss on this basis.
>
> . . .
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Chesapeake Defendants motion to dismiss is GRANTED based on lack of jurisdiction and federal preemption. Therefore, Plaintiffs claims against the Chesapeake Defendants are hereby DISMISSED.

Plaintiff appeals, and the matter stands submitted on the trial court record.[2]

¶5 "Appellate courts review *de novo* a district court's dismissal of an action for lack of subject matter jurisdiction." *Beachner Const. Co., Inc. v. State ex rel. Office of State Finance*, 2014 OK CIV APP 3, ¶10, 316 P.3d 229, 231. (Citations omitted.) (Emphasis original.) "'Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim.'" *Beachner Const. Co., Inc.*, 2014 OK CIV APP 3, ¶10, 316 P.3d at 231. (Citations omitted.)

¶6 The "unique" issue presented by this appeal is whether, by the adoption of ACPERA, 15 U.S.C. §1, note, the Congress of the United States intended to preempt the prosecution of state law antitrust claims where a defendant has participated in ACPERA as to enjoy the ACPERA amnesty from treble damages.

¶7 We first observe that, by its express terms, ACPERA applies in "any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law." 15 U.S.C. §1, note, at §213(a). ACPERA thus clearly limits recovery of single damages in both federal law antitrust cases and state law antitrust cases against ACPERA participants. The question remains, however, whether, by ACPERA's single damages limitation in both federal and state antitrust law cases, Congress in ACPERA intended to preempt the assertion of a state law antitrust claim against an ACPERA participant.

¶8 We think not. It is well established that federal antitrust law does not preempt the assertion of antitrust claims under parallel state antitrust law. Indeed, it appears well-recognized that "Congress ha[s] not preempted the field of antitrust law, but rather intend[s] the federal antitrust laws to supplement, not displace, state antitrust remedies." *Major v. Microsoft Corp.,* 2002 OK CIV APP 120, ¶6, 60 P.3d 511, 513.

¶9 That said, however, where state law conflicts with federal law, and impairs or impedes the enforcement of federal law, federal law preempts the application of state law to the extent of the conflict. *See, e.g., Smith v. Cogeneration Mgmt. Inc. v. Corp. Comm'n,* 1993 OK 147, ¶18, 863 P.2d 1227, 1229.[3] By ACPERA, Congress has clearly extended amnesty from the joint and several, treble damages provisions of both federal antitrust law and state antitrust law to participants in ACPERA, and limited recoverable damages from ACPERA participants to "single" damages on claims under either federal antitrust law or state antitrust law. 15 U.S.C. §1, note, at §213(a).

¶10 We therefore hold that, to the extent the ACPERA single damage limitation conflicts with the treble damage provision of OARA, the doctrine of conflict preemption clearly applies and proscribes the recovery of state antitrust treble damages from an ACPERA participant. However, given the complimentary provisions of federal antitrust law and state antitrust law, we further hold that the doctrine of conflict preemption does not divest the state courts of subject matter jurisdiction to determine state law antitrust claims against ACPERA participants.

¶11 The order of the trial court granting the Defendants' motion to dismiss for lack of subject matter jurisdiction is REVERSED, and the cause REMANDED for further proceedings.

BELL, P.J., dissents, and GOREE, V.C.J. (sitting by designation), concurs.

Larry Joplin, Judge:

1. *See, e.g., In re Capacitors Antitrust Litigation*, 106 F.Supp.3d 1051 (N.D. Cal. 2015); *In re Polyurethane Foam Antitrust Litigation*, 314 F.R.D. 226 (N.D. Ohio 2014); *Oracle America, Inc. v. Micron Technology, Inc.*, 817 F.Supp.2d 1128 (N.D. Cal. 2011).

2. *See*, Rule 4(m), Rules for District Courts, 12 O.S. 2011, Ch. 2, App., and Okla.Sup.Ct.R. 1.36, 12 O.S. 12 O.S. 2011, Ch. 15, App.

3. "The pre-emption doctrine stems from the Supremacy Clause of the United States Constitution and it invalidates any state law which contradicts or interferes with an act of Congress." (Footnote omitted.)

2018 OK CIV APP 51

TODD HORINEK, Plaintiff/Appellee, vs. ELIZABETH GRACE GACSAL, Defendant/Appellant.

Case No. 115,772. May 31, 2018

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY, OKLAHOMA

HONORABLE KYRA FRANKS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Mark A. Warman, FRANDEN | FARRIS | QUILLIN GOODNIGHT + ROBERTS, Tulsa, Oklahoma, for Defendant/Appellant

JANE P. WISEMAN, PRESIDING JUDGE:

¶1 Elizabeth Grace Gacsal appeals trial court orders granting judgment in favor of Todd Horinek and denying her motion for new trial and/or motion to vacate in this small claims case. The principal issue is whether the trial court abused its discretion in denying a new trial after refusing to continue the small claims trial because Gacsal's counsel was late. After reviewing the facts and applicable law, we conclude Gacsal's brief in chief reasonably supports her claim that the trial court abused its discretion in refusing to continue the hearing and in refusing to grant a new trial. Accordingly, we reverse its orders and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 15, 2016, Horinek filed a small claims action arising from a car accident seeking against Gacsal $7,500 in damages "for [d]imunition of value/property damage," plus costs. The court ordered Gacsal to appear on January 10, 2017, at 9:00 a.m. On January 10, 2017, the court entered judgment in favor of Horinek in the amount of $7,500, plus costs in the amount of $213.

¶3 On January 17, 2017, Gacsal filed a "Motion for New Trial and/or to Vacate Judgment" alleging that she appeared for "trial and advised this Court that she was represented and that her attorney was on his way to the hearing but was late due to a clerical error of scheduling." She stated, "Counsel for the Defendant did call the court clerk to advise of the error[1] and advise that he was on his way to represent the interest of his client. The clerk called back and advised defense counsel that she had talked with the Court and the hearing would not be delayed." Gacsal's counsel "appeared at 10:30 a.m. due to the above-noted clerical error (hearing date was not put on counsel's calendar)." Gacsal alleged, "The Court conducted a hearing by looking at a variety of documents presented to the Court from the Plaintiff. Defendant was not provided a copy of said documents and did not see what was given to the Court." Gacsal stated, "After reviewing these documents, the Court awarded the Plaintiff $7,500.00 plus costs and expenses against this Defendant without the benefit of sworn testimony, cross-examination or disclosure of evidence against her."

¶4 Gacsal asserted that a new trial should be granted pursuant to 12 O.S. § 651(1) and (6).[2] She maintains she "was denied a fair trial when the Court conducted the hearing without allowing defense counsel to appear, albeit late, due to clerical error." She further claimed irregularity in the proceedings because:

> The hearing of this matter took place in the following manner after mediation failed.[3] The Court called the case, Plaintiff and Defendant stood before the Court, Plaintiff handed the Court a variety of documents and the Court reviewed [the] same. Plaintiff requested more money than originally pled or allowed under small claims procedures. The Court correctly refused, but then entered judgment against the Defendant.
>
> It should be noted that no witnesses were sworn to testify, no access to the documents were [sic] given, and no cross-examination was allowed. No testimony was taken as to why Defendant would be indebted to Plaintiff. Defendant was not allowed to confront witnesses or exhibits.

Gacsal attached her affidavit to support her motion for new trial/motion to vacate.

¶5 The trial court denied Gacsal's motion for new trial, stating:

> Further, there are many factual inaccuracies contained within said Motion, including but not limited to, Defendant's assertion that the parties were not sworn, nor was testimony heard.
>
> The matter was set for 9:00 a.m. and there was no Entry of Appearance filed in the case for Defendant. Further, the parties were sworn, testimony was heard, and the Defendant did not dispute the amount owed, at one point stating that her "insurance company just needs to pay this." Also, unfortunately for the Defendant, her factual inaccuracies are contained in a sworn affidavit.

¶6 Gacsal appeals from the order granting judgment in favor of Horinek and from the order denying her motion for new trial/motion to vacate.

STANDARD OF REVIEW

¶7 "A trial court's denial of a motion for new trial is reviewed for abuse of discretion." *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100. "The granting of a continuance is within the sound discretion of the trial court. In the absence of an abuse of discretion or prejudice to the substantial rights of the parties, refusal to continue a hearing is not reversible error." *In re Guardianship of Deere*, 1985 OK 86, ¶ 4, 708 P.2d 1123.

ANALYSIS

¶8 First, we note that Horinek failed to file an answer brief. "Reversal is never automatic on appellee's failure to file answer brief." *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496. However, if the failure to file an answer "is unexcused, this Court is under no duty to search the record for some theory to sustain the trial court judgment, and will, ordinarily, where the brief-in-chief is reasonably supportive of the allegations of error, reverse the appealed judgment with appropriate directions." *Sneed v. Sneed,* 1978 OK 138, ¶ 10, 585 P.2d 1363. After reviewing the record, we conclude Gacsal's brief-in-chief does reasonably support her allegations of error, and we therefore reverse the trial court's orders.

¶9 Gacsal asserts that her counsel advised the court that she was represented by counsel and that he was en route to the hearing to represent her. She stated that it is her belief that "the trial court abused its discretion by failing to grant her a new trial or to vacate the judgment, based upon the denial of her request for a delay in the proceedings to give her a fair opportunity to present her side of her case." Although the court in its order denying a new trial states Gacsal's attorney had not filed an entry of appearance in the case, counsel for Gacsal claims he called the court and advised the court he was representing Gacsal and had been delayed. We conclude Gacsal has reasonably supported her claim that the trial court abused its discretion in refusing to grant a new trial after it proceeded with trial despite her counsel advising the court that he was running late for court and seeking a brief continuance in order to appear and represent his client.

¶10 In *Beck v. Jarrett*, 1961 OK 162, ¶ 10, 363 P.2d 215, the Supreme Court stated:

> While it is true that diligence of litigants in attending to their matters pending in the courts is of importance, and while it is a significant function of the courts that the litigation before them be determined and disposed of as rapidly as possible, it is also important that all litigants be given a reasonable opportunity to have their day in court, and to have their rights and liberties tried upon the merits. The latter is and should be the primary right of the parties and duty of the courts.

Id. "The courts should always be loath to deny a determination of a case upon its merits by reason of the actual or supposed fault of an attorney and one of the parties litigant." *Id.* ¶ 14. Although this is not a default judgment, as the trial court states that it considered testimony of the parties, Gacsal was deprived of counsel's assistance to defend her case. Even though this was a small claims matter, Gacsal hired an attorney to represent her and may not have been as prepared to go forward with the case in the same manner as she would have been if she had not retained an attorney.

¶11 And, although we see prejudice materially affecting Gacsal's substantial rights in the court's refusal to grant a brief delay, we see no prejudice to Horinek in granting the continuance. We conclude Gacsal's brief in chief reasonably supports her allegations that the trial court abused its discretion in refusing a continuance in the small claims trial until her attorney arrived to represent her and abused its discretion in failing to grant a new trial to correct the initial error.

CONCLUSION

¶12 The arguments in Gacsal's brief reasonably support her propositions of error. The orders of the trial court are reversed and the case is remanded for a new trial.

¶13 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FISCHER, J., concurs, and THORNBRUGH, C.J., concurs in result.

JANE P. WISEMAN, PRESIDING JUDGE:

1. Counsel represents in his appellate brief that he contacted the court in advance of the hearing to advise of his unexpected lateness stating this would be consistent with Local Court Rule 1.3 of the Rules of the Northeastern Judicial Administrative District for the Tenth, Eleventh, Twelfth, and Thirteenth Judicial Districts: "'An attorney who finds it impossible to be on time should immediately inform the Court, giving the reason for the delay, and expected arrival time.'" (Emphasis omitted.)

2. Title 12 O.S.2011 § 651 provides in relevant part:

> A new trial is a reexamination in the same court, of an issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:
>
> 1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;
>
> . . .
>
> 6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law . . . .

3. Gacsal states in her affidavit supporting her motion for new trial that she told the trial court that she was represented by counsel who was on his way and she asked to delay the trial until he arrived. She further states, "The Court would not grant the requested delay and instead sent me to mediation. I had no idea what to do." She adds, "After mediation, I was called into Court along with Mr. Horinek."

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, June 21, 2018

F-2017-82 — David Thad Webb, Appellant, was tried by jury for the crime of First Degree Manslaughter, After Conviction of a Felony, in Case No. CF-2015-179 in the District Court of LeFlore County. The jury returned a verdict of guilty and recommended as punishment 35 years imprisonment and a $10,000 fine. The trial court sentenced accordingly. From this judgment and sentence David Thad Webb has perfected his appeal. Judgment and Sentence AFFIRMED; Application for Evidentiary Hearing on Sixth Amendment Claim DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2017-504 — On September 28, 1992, Appellant Johnnie Lee Reeves, represented by counsel, entered a guilty plea to two counts of Robbery with a Firearm After Former Conviction of a Felony in Oklahoma County Case No. CF-1992-759. He was sentenced to twenty-four years for each count, with all but the first fourteen years suspended, subject to terms and conditions of probation. The sentences were ordered to be served concurrently. On November 21, 2016, the State filed an Application to Revoke Reeves's suspended sentences in Oklahoma County Case No. CF-1992-759 alleging he committed the new offense of Driving Under the Influence as charged in Oklahoma County Case No. CM-2017-43. On May 4, 2017, at the conclusion of a revocation hearing, the District Court of Oklahoma County, the Honorable Timothy Henderson, District Judge, revoked Reeves's suspended sentences in full. The revocation of Reeves's suspended sentences is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

RE-2017-205 — On November 17, 2008, Appellant Joshua Clayborn, represented by counsel, entered a guilty plea to Assault and Battery with a Dangerous Weapon in Oklahoma County Case No. CF-2008-4739. Clayborn was sentenced to ten years, all suspended, subject to rules and conditions of probation. On January 30, 2017, the State filed an Application to Revoke Clayborn's suspended sentence. On February 24, 2017, the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, revoked Clayborn's suspended sentence in full. From this Judgment and Sentence, Clayborn appeals. The revocation of Clayborn's suspended sentence is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-839 — Nathan Scott Walker, Petitioner, entered a blind plea of nolo contendere to five counts of child abuse (Counts 1-5) in Case No. CF-2015-442 in the District Court of Ottawa County. The Hon. Robert E. Reavis, II, accepted his plea, found him guilty, and sentenced him to twenty (20) years imprisonment on each count to be served concurrently. Petitioner filed a timely motion to withdraw his guilty plea, which the 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., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-247 — John Anthony Macario, Appellant, was tried by jury for the crimes of Counts I and II - Sexual Abuse, Child Under 12, in Case No. CF-2015-4199 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 30 years imprisonment and a $500.00 fine on Count I and 25 years and a $500.00 fine on Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence John Anthony Macario has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur in Results; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

S-2017-580 — On May 16, 2011, Appellee Steven Wade Jameson entered blind pleas of guilty in the District Court of Tulsa County, Case No. CF-2010-1641, to three counts of First Degree Manslaughter with the misdemeanor

predicate of Driving Under Revocation, Suspension or Cancellation, one of two alternative predicate misdemeanors, (Counts I – III) and one count of Possession of Controlled Dangerous Drug (Count IV). A charge of Driving without a License (Count V) was dismissed by the State. The pleas were accepted by the Honorable Matthew Henry, Associate District Judge, and the appellee was sentenced to imprisonment for sixteen (16) years in each of Counts I- III, with the first eight (8) years of each sentence suspended, and one year in prison for Count IV. All sentences were ordered to run concurrent. The appellee did not timely seek to withdraw the guilty pleas. Approximately four years after entering the guilty pleas, appellee filed an *Application for Post-Conviction Relief* with District Court of Tulsa County. The Honorable James Caputo, District Judge, granted post-conviction relief and vacated and set aside the Judgments and Sentences. On appeal by the State, this Court reversed the trial court's granting of relief. The appellee was ultimately granted an appeal out of time by this Court and subsequently filed a *Motion to Withdraw Guilty Plea* in the District Court. On January 27, 2017, Judge Caputo granted the motion to withdraw and vacated the Judgments and Sentences. In a ruling issued on June 13, 2017, the District Court held that the Driving Under Suspension alternate predicate misdemeanor to the First Degree Manslaughter charge was not supported by sufficient evidence and that the State could not proceed to trial on that theory. The State appealed the trial court's ruling to this Court pursuant to 22 O.S.2011, § 1053 arguing that the trial court abused its discretion by quashing the State's alternative theory of First Degree Manslaughter with the predicate misdemeanor of Driving Under Suspension without proper consideration of both the evidence and the law. The District Court's order of June 13, 2017, finding: 1) the charge of First Degree Manslaughter with an alternative predicate misdemeanor of Driving Under Suspension is not supported by sufficient evidence and that the State cannot proceed to trial under that theory; 2) the State could proceed to trial on a charge of First Degree Manslaughter with an alternative predicate misdemeanor of Driving Under the Influence of Marijuana and a charge of Possession of a Controlled Dangerous Substance; and 3) the State was barred from proceeding by the statute of limitations on a charge of driving without a license is REVERSED and the case is REMANDED to the District Court for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2018), the MANDATE is ORDERED issued upon delivery and filing of this decision. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-545 — Appellant Lapifanie Michelle Prejean was tried by jury for Child Abuse by Injury or in the alternative Child Neglect, in the District Court of Tulsa County, Case No. CF-2016-4737. She was found guilty of Child Neglect and the jury recommended as punishment thirteen (13) years imprisonment. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, June 28, 2018

F-2017-599 — Appellant Christopher Michael Hildebrandt was tried by jury and convicted of First Degree Rape of a Child under 14 (Count I); Forcible Sodomy (Count II); and Abduction of a Person Under 15 (Count III), in the District Court of Osage County, Case No. CF-2016-101. The jury recommended as punishment imprisonment for twenty-five (25) years in Count I, twenty (20) years in Count II and five (5) years in Count III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The JUDGMENT and SENTENCE is AFFIRMED, except the case is ordered REMANDED to the District Court for an order vacating the illegal imposition of $960.00 prosecution reimbursement costs. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

RE-2017-344 — On February 24, 2011, Appellant Mickey Joe Edward Richardson entered a plea of guilty to Manufacture of CDS/Possession of Material with Intent to Manufacture in Haskell County District Court Case No. CF-2010-104. He was convicted and sentenced to twenty years imprisonment, with all but the first seven years suspended. On July 26, 2016, the State filed a Motion to Revoke Appellant's suspended sentence. Following a hearing on the application, the Honorable Jonathan K. Sullivan, District Judge, found Appellant had vi-

olated his rules and conditions of probation and revoked Appellant's remaining suspended sentence in full. Appellant appeals. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

S-2017-266 — The State of Oklahoma, Appellant, charged Benjamin Frair, Appellee, with with Count 1: Endangering Others While Eluding/Attempting to Elude a Police Officer, After Former Conviction of Two or More Felonies and Count 2: Possession of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies, in the District Court of Okmulgee County, Case No. CF-2016-1. Frair was bound over at preliminary hearing on both counts. Frair filed separate motions to suppress both the eyewitness identification testimony establishing Frair as the driver of the suspect vehicle in this case and a cell phone recovered by authorities from inside the suspect vehicle. A hearing was held on Frair's motions and at the conclusion of the hearing, the Honorable Kenneth E. Adair, District Judge, granted Frair's motions to suppress. Appellant, the State of Oklahoma, now appeals. The District Court's orders sustaining Appellee's motions to suppress are REVERSED and this case is REMANDED for further proceedings not inconsistent with this Opinion. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-542 — Sarah Francis, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2014-4507, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Sarah Francis has perfected her appeal. AFFIRMED. Appellant's Application for Evidentiary Hearing on Sixth Amendment Claim is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Specially Concurs.

M-2016-1031 — Appellant James Dylan Randolph was charged with Driving Under the Influence in the District Court of Payne County, Case No. CM-2015-831. On October 25, 2016, after a jury trial, Randolph was found guilty of the charged offense and sentenced to forty-five (45) days in the county jail and fined $1000. Randolph appeals. Appellant's misdemeanor judgment and sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J. concurs.

Thursday, July 5, 2018

F-2017-284 — Willoman Cornelius Brown, Sr., Appellant, was tried by jury for the crimes of Count 1, falsely personating another to create liability; Count 2, possession of a stolen vehicle; and Count 3, driving with a suspended license, a misdemeanor in Case No. CF-2015-851 in the District Court of Muskogee County. The jury returned a verdict of guilty and set punishment at four years imprisonment in Count 1, three years imprisonment in Count 2, and a $500.00 fine in Count 3. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Willoman Cornelius Brown, Sr. has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2017-292 — On December 15, 2003, Appellant Reshaun Antonio Alexander, represented by counsel, entered a guilty plea to Count 1, Possession of a Firearm while in the Commission of a Felony and Count 2, Possession of a Controlled Dangerous Substance (Crack Cocaine) in Muskogee County Case No. CF-2003-325. He was sentenced to twenty (20) years for each count, all suspended, subject to terms and conditions of probation. That same day, Alexander entered a guilty plea to Count 1, Escape from Arrest or Detention in Muskogee County Case No. CF-2003-399. He was sentenced to twenty (20) years, all suspended, subject to terms and conditions of probation. The sentences in the two cases were ordered to run concurrently with each other. On October 1, 2014, the State filed an Application to Revoke Alexander's suspended sentences in Muskogee County Case Nos. CF-2003-325 and CF- 2003-399. On January 1, 2015, Alexander stipulated to the probation violations alleged in the State's revocation application and entered guilty pleas to Counts 1 and 2 in Muskogee County Case No. CF-2014-812. Alexander was sentenced to one (1) year for each of the offenses, to run concurrently with each other, and with his suspended sentences in Case Nos. CF-2003-325 and CF-2003-399. Alexander was remanded to probation in all three cases. From July 6, 2015 to

August 24, 2016, the State filed multiple Applications to Revoke Alexander's suspended sentences, based upon new violations and additional criminal charges filed in five separate Muskogee County cases. On March 16, 2017, the District Court of Muskogee County, the Honorable Thomas H. Alford, District Judge, revoked Alexander's suspended sentences in full. The revocation of Alexander's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-1098 — Robert Len German, Appellant, was tried in a non-jury trial and convicted of lewd or indecent acts or proposals with a child under sixteen in Case No. CF-2016-65 in the District Court of Bryan County. The Honorable Mark R. Campbell, District Judge, sentenced German to twenty years imprisonment, with all but twelve years suspended. From this judgment and sentence Robert Len German has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Wednesday, June 20, 2018

116,107 — Apache Corporation, a Delaware corporation, Plaintiff/Appellant, vs. George L. Mothershed, Defendant/Appellee, and Edrio Oil Company, Inc., a corporation' Carrilee Abernathy Bell, an individual; Gary Brooks, an individual; and Brooks Investments, LLC, a limited liability company, Defendants. Appeal from the District Court of Grady County, Oklahoma. Honorable John E. Herndon, Judge. Opinion by Kenneth L. Buettner, Judge: Plaintiff/Appellant Apache Corporation, a Delaware Corporation, appeals from the trial court's order denying its application for attorney fees and costs. After *de novo* review, we hold that Apache is entitled to attorney fees and costs pursuant to the Production Revenue Standards Act (PRSA) and based on the court's inherent equitable authority to award attorney fees against a party for bad faith litigation misconduct. The order denying attorney fees and costs is reversed and the cause remanded for the trial court to determine the amount of the award. REVERSED AND REMANDED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

Friday, June 22, 2018

115,183 — (Comp. w/115,771) Angela Skudin, nee Williams, Petitioner/Appellee, vs. Brad Williams, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable J. Anthony Miller, Judge. Father seeks review of the trial court's order adjudicating an arrearage of medical and child care expenses due Mother pursuant to the parties' decree of divorce. In this appeal, Father asserts the trial court erred in awarding Mother a sum for unpaid medical expenses and erred in awarding Mother a sum for summer camp fees as an item of child care expenses. Father also asserts the trial court erred in granting Mother attorney's fees for her defense of his motion to dismiss. Having reviewed the record, we cannot say the trial court abused its discretion in allowing summer camp expenses as child care expenses for which Father was obligated to pay his 80% share. We further cannot say the trial court abused its discretion in allowing Mother reimbursement of medical expenses incurred in the years between 2009 and 2013. The trial court adjudicated Father's total obligation for dental and psychological expenses of $2,025.20, and the trial court's judgment is neither contrary to the evidence nor affected by an abuse of discretion. Father has demonstrated no unreasonable delay or intentional relinquishment of rights by Mother, nor actual prejudice to him, and Mother's claims are not barred by laches, estoppel or waiver. Father's assertions of bar to Mother's claims by issue and claim preclusion were not well founded, and under the circumstances of this case, we cannot say the trial court abused its discretion in awarding Mother attorney's fees incurred in defense of Father's interlocutory motion to dismiss. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,771 — (Comp. w/115,183) Angela Skudin, nee Williams, Petitioner/Appellee, vs. Brad Williams, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable J. Anthony Miller, Judge. Father seeks review of the trial court's order granting post-judgment, offsetting awards of attorney's fees to both Father and Mother, after adjudicating Father not guilty of contempt, but liable for an arrearage of unpaid medical expenses, child care expenses, as well as an award of Mother's interlocutory attorney's fees. In four propositions of the present appeal, Father challenges the trial court's order deter-

mining him liable for unpaid medical expenses, child care expenses, and interlocutory attorney's fees, which we affirmed this date in the companion case, *Skudin v. Williams*, Case No. 115,183. In the remaining fifth proposition of this appeal, Father challenges the trial court's post-judgment award of offsetting attorney's fees to both parties. In matrimonial litigation, the trial court's award of attorney's fees will not be disturbed unless affected by an abuse of discretion. This case was hotly contested over an extended period of years in both New York and Oklahoma. Father sought attorney's fees exceeding $37,000.00 and Mother sought attorney's fees exceeding $18,000.00. After an adversary evidentiary hearing, the trial court determined, in the judicial balancing of the equities, that each party was entitled to an award of attorney's fees in the sum of $17,500.00 against the other. The effect of these offsetting awards makes Mother and Father responsible for payment of their own attorney's fees. Under the circumstances of this case, we hold the trial court did not abuse its discretion in awarding offsetting attorney's fees. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,558 — In the Matter of the Adoption of M.G.K., a minor child: Mark Clarence Mohr and Krici Beth Mohr, Petitioners/Appellees, vs. Elizabeth G. Dobbs, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Judge. Respondent/Appellant Elizabeth G. Dobbs appeals the Final Decree of Adoption making Dobbs's natural child, M.G.K, the lawfully adopted child of Petitioners/Appellees Mark Clarence Mohr and Krici Beth Mohr. The trial court's finding that M.G.K. was eligible for adoption without consent was previously affirmed by another division of this court and is therefore settled law of the case. Clear and convincing evidence supports the trial court's findings that active efforts were made to prevent the break up of the Indian family and that the adoption was in the child's best interests. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,605 — In the Matter of the Estate of Martha Lou Holsted, Deceased: Lonnie Ann New, Personal Representative, Plaintiff/Appellant, vs. Deanna M. Holsted; Terry Holsted; and Mary Ellen Holsted, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Judge. Plaintiff/Appellant Lonnie Ann New, as Personal Representative of the Estate of Martha Lou Holsted, appeals the trial court's order denying her motion to transfer the probate of the Estate of Martha Lou Holsted to Rogers County. After *de novo* review, we hold that Rogers County has exclusive jurisdiction over the probate proceedings and Tulsa County is without subject matter jurisdiction. The order of the trial court is REVERSED and REMANDED with instructions to transfer the probate case to Rogers County. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

Friday, June 29, 2018

115,824 — In Re the Marriage of Powell: Tracy Powell, Petitioner/Appellant, vs. Shane Powell, Respondent/Appellee. Appeal from the District Court of Hughes County, Oklahoma. Honorable Allen B. Gordon, Judge. In this dissolution of marriage proceeding, Petitioner/Appellant, Tracy Powell (Mother), appeals from the trial court's decree awarding sole custody of the parties' minor child to Defendant/Appellee, Shane Powell (Father), and granting expansive visitation to Mother. Mother also appeals the trial court's refusal to equitably divide Mother's credit card indebtedness, to award Mother the value of her separate funds contributed to the rental (marital) home, and its refusal to award Mother the value of personal property retained and/or discarded by Father. The evidence demonstrates Father is likely to encourage the child's visitation with Mother. Therefore, we hold the trial court did not abuse its discretion when it entered the custody order. We also affirm the trial court's determination to encumber Mother with the credit card indebtedness she incurred after the parties' separation, and its rejection of Mother's reimbursement claim for the separate funds she expended on the rental home. Finally, we affirm the trial court's denial of Mother's $30,000.00 claim for her personal property which was either retained and discarded by Father. Mother failed to specifically identify and value the damaged/destroyed property, and she may file contempt proceedings to recover the personal property awarded to her by the decree. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

115,976 — Richard Perry, Petitioner/Appellee, vs. Brandii Perry, Respondent/Appellant. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Mindy M. Beare, Judge. Respondent/Appellant Brandii Perry (Mother) appeals from the trial court's order terminating joint custody and awarding sole

custody of the minor child to Petitioner/Appellee Richard Perry (Father). Mother challenges the trial court's finding that Father met his burden of rebutting the presumption that the child's best interests required not awarding custody to a perpetrator of domestic violence. The trial court's decision is not against the clear weight of the evidence or an abuse of discretion and we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,011 — Brett Crawley, Plaintiff/Appellant, vs. Michael R. Earnest and Alycia Earnest, Defendants/Appellees. Appeal from the District Court of Okfuskee County, Oklahoma. Honorable Lawrence E. Parish, Judge. Plaintiff/Appellant, Brett Crawley, appeals from the trial court's judgment in favor of Defendants/Appellees, Michael R. Earnest and Alycia M. Earnest in this action involving the purchase of real property. In 2006, Plaintiff bought 16.33 acres from Defendants in Okemah. The land is adjacent to Okemah Lake, separated by city-owned land. Evidence indicated it was common practice for the City to grant an easement across the City land to adjacent landowners. Plaintiff alleged Defendants orally assured him they had no plans to use their or his adjacent City property. However, when Defendants later built a road and boat dock on the land between Plaintiff and the lake, Plaintiff sued for breach of an oral promise. We find Plaintiff's alleged oral contract is precluded by both the Parol Evidence Rule and the Statute of Frauds. Finding no abuse of discretion by the trial court, we affirm. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,719 — In the Matter of Adoption of A.M.T., a minor child. Cynthia Thompson, Petitioner/Appellee, vs. Lisa McDonald, Respondent/ Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard W. Kirby, Judge. Respondent/Appellant Lisa McDonald (Mother) appeals from the trial court's order finding her minor child eligible for adoption without consent and that adoption without consent was in the best interests of the child. We hold there is not clear and convincing evidence that Mother willfully failed to substantially comply with the child support order for a period of twelve consecutive months out of the fourteen months immediately preceding the filing of the petition for adoption. The petition for adoption without consent and the trial court's order were based on 10 O.S. § 7505-4.2(B)(1) only. The support order had been in place less than ten months at the time the petition for adoption was filed. REVERSED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Thursday, June 21, 2018

116,591 — Samuel Sadler, Jr., Plaintiff/Appellant, vs. Bank of America, Defendant/Appellee, and Brandon Swearingen Renovations, LLC, Intervenor. Appeal from an order of the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge. Samuel Sadler, Jr., individually and as personal representative of the Estate of Sandra I. Davis, appeals the trial court's order dismissing his claims against Bank of America. Sadler alleged he entered into an agreement with Bank in which Bank was "to auto debit all future payments for this mortgage," but Bank never executed the debit program or attempted to withdraw monthly payments. He alleged Bank's conduct constituted breach of contract. Bank filed a motion to dismiss pursuant to 12 O.S. § 2012(B)(6) asserting Sadler's claims were barred by res judicata and by the statute of limitations. The trial court granted Bank's motion to dismiss, but it did not provide Sadler with the opportunity to amend. The order of dismissal does not state that the motion to dismiss was considered pursuant to the provision in § 2012(B) converting it to a motion for summary judgment. We cannot assume that the trial court considered the materials attached to Bank's motion to dismiss, nor can we dismiss that possibility. We conclude it was error to dismiss Sadler's claim pursuant to 12 O.S.2011 § 2012(B)(6). The trial court's order granting Bank's motion to dismiss with prejudice is reversed. The matter is remanded for the trial court to specify the deficiencies as to Sadler's claim against Bank, if the court is treating this as a § 2012(B)(6) motion to dismiss for failure to state a claim, and on remand, the trial court must then either state that no amendment of the petition can cure the stated defect(s) or set a reasonable time for Sadler to amend his petition. If the court is converting the motion to one for summary judgment, then the parties must be given reasonable opportunity to present materials pertinent to the motion according to the rules for summary judgment. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

115,892 — Niger Ferguson, Plaintiff/Appellee, vs. Ridge View Apartment Homes, LLC, Defendant/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. Barbara Swinton, Trial Judge. Defendant Ridge View Apartment Homes, LLC, appeals the trial court's judgment in favor of Plaintiff Niger Ferguson. In our previous Opinion (Case No. 111,867), we reversed and remanded the case to "the trial court to determine whether the hole on the stair constituted a hidden danger or an open and obvious condition." We further concluded "that the issue of contributory, and therefore comparative, negligence may not be applied in premises liability cases where a hidden danger is found to exist because an invitee using ordinary care has no duty to discover and avoid hidden dangers not known or observable by her in the exercise of ordinary care under the circumstances." We now address the propriety of the trial court's determination that the hole on the stair was a hidden danger and not an open and obvious condition. We are hard-pressed to conclude that this finding is without competent evidentiary support, and we find no error. The trial court's findings are supported by competent evidence, and the judgment is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

116,150 — Jarvis J. Smith, Petitioner, vs. Warehouse Specialists, Inc., Travelers Indemnity Co. of America, and The Workers' Compensation Commission, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Commission, Hon. Michael T. Egan, Administrative Law Judge (ALJ), affirming the ALJ's decision finding Claimant sustained a compensable single event injury to his cervical spine but not to his lumbar spine as a result of a 2014 accident. Claimant asserts that the ALJ and the Workers' Compensation Commission (WCC) committed reversible error when they failed to apply and follow the burden found in 85A O.S. § 112(I). We cannot agree with this proposition of error because there was clear and convincing evidence to support the WCC's deviation from the independent medical examiner's (IME) opinion. The ALJ did not follow the IME opinion on causation because (1) "of the lapse of time before the Claimant alleged a lumbar injury," (2) "the examination of the Claimant's lumbar spine which was characterized as being normal with no sign of trauma," and (3) "the fact that Claimant did not work for Respondent from the time of the initial MRI to the second MRI which revealed that the Claimant had a condition which warranted surgical treatment." With these findings, we conclude the WCC thoroughly set out its reasons for deviating from the IME's opinion and there was clear and convincing evidence for the WCC not to follow that opinion. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Friday, June 22, 2018

115,344 — In re the marriage of Jennifer Ray, Petitioner/Appellee, vs. Cameron Ray, Respondent/Appellant. Appeal from Order of the District Court of Pontotoc County, Hon. Steven Kessinger, Trial Judge. Appellant Cameron Ray appeals those portions of the district court's Decree of Dissolution of Marriage denying him visitation with his minor child during his incarceration and awarding certain property to Jennifer Ray. We find no error in the district court's decision to deny visitation while Cameron is incarcerated. However, we find that the testimony and evidence presented at trial supports Cameron's contention that certain real property was his separate property. The Decree of Dissolution of Marriage is affirmed in part, with respect to the visitation issue. That portion of the Decree distributing the real property as marital property is vacated and the Decree is reformed to award the property to Cameron Ray. AFFIRMED IN PART, VACATED AND MODIFIED IN PART. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., concurs, and Wiseman, P.J., concurs in part, and dissents in part.

115,867 — El Nacional de Oklahoma, Inc., Plaintiff/Appellee, vs. Sunshine State Television Network, Inc., Defendant/Appellant. Appeal from an order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge. Appellant Sunshine State Television Network, Inc., appeals from the trial court's order of default judgment entered against it. As set forth in the order granting default judgment, after Sunshine's counsel was allowed to withdraw from the case, the trial court ordered Sunshine to obtain substitute counsel within 10 days from the date of the order and advised that failure to do so might result in a default judgment against it. Sunshine requested the trial date be reset and that it be granted 30 days to obtain counsel. There is simply no indication

that allowing that amount of time would have resulted in substantial delay or injustice to the non-moving party. Sunshine has not had the opportunity to be heard on the merits of El Nacional's claims, and we find the ends of justice are best served by allowing the dispute to be threshed out on its merits. We conclude it was an abuse of the trial court's discretion to enter a default judgment against Sunshine after allowing Sunshine's counsel to withdraw, knowing it could not legally represent itself without substitute counsel, and then giving it only 10 days to accomplish this vital step with a trial setting less than three weeks away. El Nacional had no objection to allowing Sunshine's counsel to withdraw or to providing Sunshine time to obtain new counsel as long as the case was reset on the court's earliest available non-jury trial docket. For these reasons, we reverse the trial court's order, and remand the case for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Monday, June 25, 2018

116,161 — In the Matter of the Estate of Jackie Laverne Carter, Deceased, Billy E. Skelton, Petitioner/Appellee, vs. Billy Carter, Contestant/Appellant. Appeal from an order of the District Court of Roger Mills County, Hon. F. Pat Versteeg, Trial Judge. Billy Carter appeals a trial court order overruling his motion for summary judgment to disallow a will. The issue before us is whether the trial court's decision is against the clear weight of the evidence or contrary to law. In this will contest, Carter presented no affirmative evidence that the Will was not properly executed. Although two of the Will's witnesses admitted that their memories surrounding the execution of the Will were not totally clear, Carter has not affirmatively shown that they signed or notarized the Will anywhere other than at the hospital in Decedent's presence. We must presume the trial court's decision is correct, and the decision seems well within, and supported by, the evidence presented on the circumstances surrounding the execution of this Will. Carter failed to rebut Skelton's prima facie case that the Will was properly executed or to establish that the trial court's decision is either against the weight of the evidence or contrary to law. Finding no error, we affirm the decision of the trial court. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 4)
Tuesday, June 19, 2018

116,721 — Talen Paul Hobson, Plaintiff/Appellant, v. Cimarex Energy Co., a Delaware corporation, Defendant/Appellee. Appeal from an Order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. The plaintiff, Talen Paul Hobson (Hobson), appeals an Order dismissing the action against the defendant, Cimarex Energy Co. (Cimarex) with prejudice. This appeal concerns the meanings and scope of provisions of the Oklahoma Surface Damages Act, 52 O.S.2011 and Supp. 2017, §§ 318.2-318.9. Specifically, the issue is whether Hobson's status as a vested remainderman, or future interest owner, qualifies him as a surface owner under the SDA. The SDA provides a means to balance the interests of mineral owners and surface owners when an oil or gas well is drilled. The SDA does not mention specifically a remainderman when defining or providing for a "surface owner." In summary, the SDA is a statute which modifies the common law relationship between mineral owners with the right to drill and surface owners. In balancing these interests, the Legislature provides a process for compensation of those persons having an interest in the surface. Damages are measured by loss of market value, or, if temporary, by cost of restoration. In either case, a vested remainderman has an interest in the total compensation as it relates to the remainder interest. Here, there is no question that Hobson "owns" an interest in the subject property and that his right to possession is postponed due to the life estate. However, SDA focuses on ownership and not on possession and provides a means to adjust for the rights of both mineral and surface owners. This Court holds that Hobson, a vested remainderman, qualifies under the SDA as a "surface owner" and "owner" entitled to compensation under the act. Accordingly, the judgment of the trial court is reversed and the cause is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Fischer, J., (sitting by designation) concurs, and Goodman, J., dissents.

Monday, July 2, 2018

116,365 — In the Matter of the State of Oklahoma in the Interest of: J.B.D., R.C.D., C.L.D., K.G.D., S.G.D., N.G.D. and R.G.D. Stephanie Dazey and Charles Dazey, Appellants, v. State of Oklahoma, Appellee. Appeal from the District Court of Pottawatomie County, Hon. Dawson Engle, Trial Judge. This is an appeal by Stephanie Dazey and Charles Dazey, the natural and adoptive parents of the minor children, from the district court judgment decreeing their minor children to be deprived. Based on our review of the record and applicable law, we hold the issue raised by Appellants is now moot, and we therefore dismiss the appeal pursuant to Oklahoma Supreme Court Rule 1.6(c)(1), 12 O.S. Supp. 2013, ch. 15, app. 1. DISMISSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Wednesday, June 6, 2018

116,091 — Jeff Cannon, Plaintiff/Appellant, vs. The City of Shawnee, a municipal corporation, Defendant/Appellee. Appellant's Application for Rehearing and Brief in Support, filed May 25, 2018, is *DENIED*.

(Division No. 4)
Monday, June 25, 2018

115,886 — Gregory A. Horvath, Plaintiff/Appellant, vs. Kamran Momeni, Jennifer Hill, Cannon Momeni, PLLC, James E. Thompson, Jason Bennett, Reza Ghavami and Bixby Woodcreek Homeowners Association, Inc., Defendants/Appellees. Appellant Gregory A. Horvath's Petition for Rehearing is *DENIED*.

Wednesday, June 27, 2018

115,125 — Armond Davis Ross, Appellant, vs. Rogers County District Attorney, Appellee. Armond Davis Ross' petition for rehearing is *DENIED*.

Monday, July 2, 2018

116,346 — The City of Bixby, Oklahoma, a municipal corporation, Plaintiff/Appellee, vs. Fraternal Order of Police, Lodge 189 and Shad Lee Rhames, member of Fraternal Order of Police Lodge 189, Defendants/Appellants. The Petition for Rehearing filed by Defendants/Appellants Fraternal Order of Police Lodge 189 and Shad Lee Rhames is *DENIED*.

SERVICES

OF COUNSEL LEGAL RESOURCES – SINCE 1992 – Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 25 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf 405-728-9925, marygayelaw@cox.net.**

INTERESTED IN PURCHASING PRODUCING & NONPRODUCING MINERALS; ORRi. Please contact Greg Winneke, CSW Corporation, P.O. Box 23087, Oklahoma City, OK 73123; 210-860-5325; email gregwinne@aol.com.

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

CONTRACT LEGAL SERVICES – Lawyer with highest rating and with 30+ years' experience on both sides of the table is available for strategic planning, legal research and writing in all state and federal trial and appellate courts and administrative agencies. Admitted and practiced before the United States Supreme Court. Janice M. Dansby, 405-833-2813, jdansby@concentric.net.

BRIEF WRITING, APPEALS, RESEARCH AND DISCOVERY SUPPORT. Eighteen years experience in civil litigation. Backed by established firm. Neil D. Van Dalsem, Taylor, Ryan, Minton, Van Dalsem & Williams PC, 918-749-5566, nvandalsem@trsvlaw.com.

EXPERIENCED APPELLATE ADVOCACY
Over 150 appeals, over 40 published decisions
Over 20 Petitions for Certiorari granted
405-382-1212 • jerry@colclazier.com

FORENSIC DOCUMENT EXAMINER Board Certified, Diplomate, Fellow, FBI National Academy Graduate, Former OSBI Agent and Licensed Polygraph Examiner. Arthur D. Linville, DABFE, FACFEI 405-736-1925.

OFFICE SPACE

LUXURY OFFICE SPACE AVAILABLE - One fully furnished office available for lease in the Esperanza Office Park near NW 150th and May Avenue. The Renegar Building offers a beautiful reception area, conference room, full kitchen, fax, high-speed internet, security, janitorial services, free parking and assistance of our receptionist to greet clients and answer telephone. No deposit required, $955/month. To view, please contact Gregg Renegar at 405-488-4543 or 405-285-8118.

OFFICE SPACE

OFFICE SPACE AVAILABLE IN PRIME MIDTOWN LOCATION

Prime professional executive suite space in popular Midtown District near downtown OKC. Professionally decorated office space includes all telecom services, WiFi, copy/printing/mailing services and full-time receptionist. Multiple conference rooms available for meetings, gated parking and plenty of storage. Conveniently located by new trolley stop for convenient access to all courts in downtown OKC. Share space with 7 other attorneys, some referrals available.

405-229-1476 or 405-204-0404

YOUR NAME IN LIGHTS - DIGITAL SIGN - MODERN FURNISHED ONE OF A KIND OFFICE SPACE FOR LEASE IN OKC. Two offices with high-end glass desks, one office with traditional wood furnishings, and one space for secretary, large and small conference rooms, full kitchen, luxury bathroom with shower for athletes, lots of parking, high-speed internet and WiFi, copy/fax/scan, phone. 1133 N. Portland, two blocks from new bike trails to river, 10 minutes from downtown. Established adoption, bankruptcy and family practice, some referrals of what we don't handle and contested divorces. Digital sign for advertising. $700 per month each office. Call Christopher A. Wood & Associates PC 405-525-5005 or email cawlaw525@gmail.com for details.

TWO MONTHS FREE RENT

with 3-year lease agreement
Perimeter Center Office Complex, located at 39th and Tulsa Avenue currently has available office space for lease at $13 per square foot, ranging in size from 595 to 4,500 square feet.

EXECUTIVE SUITE – ONE MONTH

Single unfurnished offices. Prices range from $200 to $700 per month. Amenities include conference rooms, breakroom, fax, copy and answering services.
Please call 405-9433-3001 M-F from 8-5 for an appointment

OFFICE SHARE

ESTABLISHED NINE PERSON OKLAHOMA CITY LAW FIRM SEEKING OFFICE SHARING or of counsel arrangement. Turn key new office space on Hefner Parkway with receptionist, all office equipment and network available. Joining law firm may have up to seven attorneys plus staff. If interested, please contact us at "Box R," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

ESTABLISHED OKLAHOMA CITY LAW FIRM SEEKS ASSOCIATE for Personal Injury Department. Minimum 3 years of personal injury experience. Competitive salary, full health and dental, PTO and 401K match. Submit cover letter and resume to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE LAW FIRM OF CHUBBUCK DUNCAN & ROBEY PC is seeking an experienced associate attorney with 1-3 years of experience. We are seeking a motivated attorney to augment its fast-growing trial practice. Excellent benefits. Salary commensurate with experience. Please send resume and writing sample to Chubbuck Duncan & Robey PC, located at 100 North Broadway Avenue, Suite 2300, Oklahoma City, OK 73102.

TULSA LAW FIRM IS SEEKING AN OIL AND GAS TITLE ATTORNEY. The ideal candidate will demonstrate strong writing skills and attention to detail. Although experience is preferred, it is not required. The firm offers a competitive salary and excellent benefits. Send cover letter and resume to "Box G," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

HARTZOG CONGER CASON & NEVILLE, AN OKLAHOMA CITY FIRM, SEEKS AN ATTORNEY with 5-10 years relevant experience to work in its corporate law practice area. Candidates must have a strong academic background, good research and writing skills, and the ability to work in a fast-paced practice with frequent deadlines. The ideal candidate would have significant experience in M&A, private equity transactions and general corporate transactional work. Applications will be kept confidential. Send resume to Attn: Debbie Blackwell, HR Administrator, 201 Robert S. Kerr Ave., Suite 1600, Oklahoma City, OK 73102 or email to dblackwell@hartzoglaw.com.

THE LAW FIRM OF COLLINS, ZORN & WAGNER PC IS CURRENTLY SEEKING AN ASSOCIATE ATTORNEY with a minimum of 5 years' experience in litigation. The associate in this position will be responsible for court appearances, depositions, performing discovery, interviews and trials in active cases filed in the Oklahoma Eastern, Northern and Western federal district courts and Oklahoma courts statewide. Collins, Zorn and Wagner PC, is primarily a defense litigation firm focusing on civil rights, employment, constitutional law and general insurance defense. Please send your resume, references and a cover letter including salary requirements to Collins, Zorn and Wagner PC, c/o Hiring Coordinator, 429 NE 50th, Second Floor, Oklahoma City, OK 73105.

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

POSITIONS AVAILABLE

ATTORNEY POSITIONS. The Office of Legal Counsel to the OSU/A&M Board of Regents has openings for two entry level attorney positions, one of which will office in Stillwater and the other in Tulsa. The Stillwater position will serve as a higher education generalist, dealing with a variety of legal issues, including, but not limited to, student conduct, open records, regulatory compliance, contracts, research agreements and intellectual property licensing. This position will work closely with and monitor outside counsel handling intellectual property and immigration issues as well. The Tulsa position will be dedicated to the OSU-Center for Health Sciences and will focus on regulatory compliance, contracts and healthcare law issues impacting a research center and Osteopathic Medical School. The precise duties assigned to both positions may vary from the above, based upon the experience and aptitude of the successful applicant. Each position requires a bachelor's degree and J.D./LL.B. degree from an accredited law school and membership in good standing in the Oklahoma Bar Association. Both positions also require superior oral and written communication skills, an ability to identify and resolve complicated, sensitive problems creatively and with professional discretion and an ability to interact and function effectively in an academic community. To receive full consideration, resumes should be submitted by Friday, Aug. 31, 2018 to: Attorney Search, Office of Legal Counsel, OSU/A&M Board of Regents, 5th Floor - Student Union Building, Stillwater, OK 74078. Additionally, applicants should submit a cover letter advising whether the candidate is applying for the Stillwater position, Tulsa position or both. The OSU/A&M Board of Regents is an Affirmative Action/Equal Opportunity/E-verify employer committed to diversity and all qualified applicants will receive consideration for employment and will not be discriminated against based on age, race, color, religion, sex, sexual orientation, genetic information, gender identity, national origin, disability, protected veteran status, or other protected category. All OSU campuses are tobacco-free.

EXPERIENCED LITIGATION LEGAL ASSISTANT (minimum 3 years' experience) – downtown Oklahoma City law firm seeks litigation legal assistant with experience in civil litigation. Great working environment and excellent benefits. Salary commensurate with experience. Please send resume to Attn: Danita Jones, Chubbuck Duncan & Robey, P.C., located at 100 North Broadway Avenue, Suite 2300, Oklahoma City, OK 73102.

SECRETARY FOR DEFENSE FIRM, must be a self-starter, well organized, work well under deadlines, type 80 words per minute or more. Please send resumes to slf@smilinglaw.com.

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

POSITIONS AVAILABLE

THE FIRM OF DEWITT PARUOLO & MEEK IS SEEKING AN ATTORNEY with a minimum of 1 year's experience in civil trial practice, insurance defense litigation and insurance coverage. Please submit your resume, cover letter and a writing sample to Derrick Morton, P.O. Box 138800, Oklahoma City, OK 73113 or by email to morton@46legal.com.

FILE CLERK, FILING IN FILES IN OFFICE, RUNNING ERRANDS, finding files, copying in office, answering phones, closing files, take files to storage, self-starter, well organized. Must have a car to do courthouse filing, must be able to lift 30 lbs. or more. Please send resumes to slf@smilinglaw.com.

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

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

SMALL EASTERN OKLAHOMA LAW FIRM, WITH MULTIPLE OFFICES, IS SEEKING ASSOCIATE to assist in general practice. Excellent opportunity for young lawyer to receive courtroom experience. Salary commensurate with experience. Please email resume to mclaughlinlaw@justice.com.

TITUS HILLIS REYNOLDS LOVE, A MID-SIZE DOWNTOWN TULSA AV-RATED LAW FIRM, is seeking a general civil litigation attorney with 1-7 years' experience. Applicants must be proficient at legal research, writing, analysis and practical litigation strategies, and must be able to work in a fast-paced team environment. Salary commensurate with experience. Firm provides excellent benefits. Please send resume to Hiring Manager, 15 E. 5th Street, Suite 3700, Tulsa, OK 74103.

METRO AREA LAW FIRM SEEKING OIL AND GAS TITLE ATTORNEYS for its OKC and Norman offices. Great salary and bonus structure, plus health insurance and 401K benefits immediately available. Please send resume, references and writing sample to office@ballmorselowe.com.

POSITIONS AVAILABLE

BILLING CLERK FOR DEFENSE FIRM, must know Legal X, CounselLink and TyMetrix 360° billing systems, take credit card payments, responsible for paying monthly bills, responsible for sending all bills to clients for payment. Please send resumes to slf@smilinglaw.com.

SUPERVISING ATTORNEY, LITIGATION – TULSA, OK – REMOTE. The supervising attorney is responsible for managing the attorneys and employees of the Oklahoma (Tulsa) Division of the firm, whose primary clients are mortgage lenders and servicers, banks and other mortgage investors throughout the region. Supervisory duties include the compliance with FHA, VA, Fannie Mae, Freddie Mac and loan servicer/investor guidelines. This person will be responsible for the development, forecasting and managing of the department annual P&L. This person will manage and direct a team of attorneys, managers, supervisors and legal professionals providing both legal and operational oversight as required with daily business operations for the judicial foreclosure process for the state of Oklahoma. This person will utilize expert legal knowledge and experience as necessary to manage the litigation process on behalf of national lending institutions with an emphasis on mortgage foreclosures and the defense of clients in complex civil litigation cases, including the analysis and preparation of case management strategy, the mitigation of client exposure and compliance. This person will actively manage and develop existing and potential business. Must attend mediations, trials and hearings, and other duties as assigned, must be accountable for legal, risk mitigation and cost control while remaining compliant with the Consumer Financial Protection Bureau (CFPB) and the Office of Comptroller of the Currency (OCC), must collaborate with executive manage, senior leadership, and team members throughout the firm, including bankruptcy, litigation, title, REO, human resources, accounting and IT departments, to ensure operational and legal compliance, must manage attorneys and paralegals, must develop departmental policies, procedures and goals, must be willing and able to write articles and make presentations to clients, trade associations and must be willing and able to participate in marketing initiatives/business development. Looking for someone with a J.D. from accredited law school and a minimum of eight years of litigation/courtroom experience and default management (foreclosure, title, bankruptcy, evictions and REO). Send resumes to ckoenigshof@aldridgepite.com.

ASSISTANT DISTRICT ATTORNEY NEEDED FOR LOGAN COUNTY, GUTHRIE. Prefer prosecutor with two years major crimes or significant misdemeanor jury trial experience. Strong research and writing skills required. Must have strong work ethic, be self-motivated and have the ability to work professionally with law enforcement and other organizations. Submit resume with references, cover letter and writing samples to Laura Austin Thomas, District Attorney at scott.staley@dac.state.ok.us.

FOR SALE

CLOSING LAW OFFICE. I'm closing my downtown Tulsa law office in the near future, and have books, furniture and office equipment available for sale. If interested, please call 918-584-5523.

CLASSIFIED INFORMATION

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

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

DEADLINE: See www.okbar.org/members/BarJournal/advertising.aspx or call 405-416-7084 for deadlines.

SEND AD (email preferred) stating number of times to be published to:

advertising@okbar.org, or
Mackenzie Scheer, Oklahoma Bar Association,
PO Box 53036, Oklahoma City, OK 73152.

Publication and contents of any advertisement are not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly nondiscriminatory.

DO NOT STAPLE BLIND BOX APPLICATIONS.

oba cle
continuing legal education

Save the Date

MCLE CREDIT 2/0

LEGISLATIVE DEBRIEFING

SPONSORED BY THE
OKLAHOMA BAR ASSOCIATION
LEGISLATIVE MONITORING COMMITTEE

REGISTRATION FREE
& LUNCH PROVIDED FOR
IN-PERSON PROGRAM ONLY

TUESDAY, AUGUST 14

11:30 A.M. - 1:30 P.M.

Oklahoma Bar Center

LIVE Webcast Also Available

WEBCAST ONLY $100

DETAILS AND REGISTRATION COMING SOON!

Stay up-to-date and follow us on

UPCOMING LUNCH-HOUR WEBCASTS

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

Wednesday, July 18
Disaster Planning and Network Security For a Law Firm
Presented by CLESeminars.com with Britt Lorish

Wednesday, July 25
Lies, Damn Lies & Legal Marketing: The Ethics of Legal Marketing
Presented by MESA CLE with Sean Carter, Humorist at Law

Wednesday, August 15
Don't Try This At Home: Why You Should Never Emulate TV Lawyers
Presented by MESA CLE with Sean Carter, Humorist at Law

Friday, July 20
Changing Minds Inside and Out of the Courtroom
Presented by CLESeminars.com with Steven Hughes

Wednesday, August 8
Legal Ethics Is No Laughing Matter: What Lawyer Jokes Say About Our Ethical Foibles
Presented by MESA CLE with Sean Carter, Humorist at Law

Wednesday, August 22
Fantasy Supreme Court League: The 2018 Season
Presented by MESA CLE with Sean Carter, Humorist at Law

oba cle
continuing legal education

To register go to: www.okbar.org/members/CLE/Webcasts