THE OKLAHOMA BAR
Journal
Volume 89 — No. 19 — 7/28/2018

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THE OKLAHOMA BAR
Journal

Volume 89 – No. 19 – 7/28/2018

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Oklahoma Bar Association

table of contents

July 28, 2018 • Vol. 89 • No. 19

page

1114 Index to Court Opinions

1115 Opinions of Supreme Court

1118 Opinion of Tribal Court

1126 2019 OBA Board of Governors Vacancies

1128 YLD Elections

1130 Opinions of Court of Criminal Appeals

1133 Calendar of Events

1135 Opinions of Court of Civil Appeals

1140 Disposition of Cases Other Than by Publication

Index to Opinions of Supreme Court

2018 OK 50 In re: Amendments to Rule 7.7, Rules Governing Disciplinary Proceedings, SCAD-2018-37 1115

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 1116

2018 OK 61 In the Matter of the Reinstatement of James P. Albert to Membership in the Oklahoma Bar Association and to the Roll of Attorneys SCBD No. 6612 1116

2018 OK 62 IN THE MATTER OF THE REINSTATEMENT OF: SUTTON ALEKSANDRA SMITH MURRAY, TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS. SCBD No. 6613 1117

Index to Opinion of Tribal Court

IN THE SUPREME COURT OF THE SAC AND FOX NATION - SAC AND FOX CASINO now THE BLACK HAWK CASINO , Appellant, v. JUANITA M. COLE, Appellee. No. APL No. APL-17-0001 APPEAL FROM THE SUPREME COURT OF THE SAC AND FOX NATION FOR THE DISTRICT COURT OF THE SAC AND FOX NATION STROUD, OKLAHOMA Case No. CIV-2015-11 1118

Index to Opinions of Court of Criminal Appeals

2018 OK CR 25 ETHAN JOHNSON SPRUILL, Appellant, v. STATE OF OKLAHOMA, Appellee. Summary Opinion No. F-2016-629 1130

2018 OK CR 25 ETHAN JOHNSON SPRUILL, Appellant, v. STATE OF OKLAHOMA, Appellee. Order Granting Motion for Publication No. F-2016-629 1132

Index to Opinion of Court of Civil Appeals

2018 OK CIV APP 52 TSG TULSA RETAIL, L.L.C., Plaintiff/Appellant, vs. INDEPENDENT SCHOOL DISTRICT #9 OF TULSA COUNTY, OKLAHOMA, Defendant/Appellee. Case No. 115,915 1135

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 ex-

plaining 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 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. July 16, 2018

CORRECTION ORDER

This Court's opinion filed on June 26, 2018, is hereby corrected by changing the name of one of the attorneys for Amicus Curiae and the name of his law firm (appearing between ¶0 and ¶1), so that it reads "Randy Mecklenburg … HARRISON & MECKLENBURG, INC." instead of "Randy Mecklenberg … HARRISON & MECKLENBERG, INC."

The opinion was previously corrected on June 26, 2018. Aside from that correction, the June 26, 2018, opinion shall remain unchanged in all other respects.

DONE BY ORDER OF THE SUPREME COURT ON THIS 16th DAY OF JULY, 2018

/s/ Douglas L. Combs
CHIEF JUSTICE

2018 OK 61

In the Matter of the Reinstatement of James P. Albert to Membership in the Oklahoma Bar Association and to the Roll of Attorneys

SCBD No. 6612. July 17, 2018

ORDER

The petitioner, James P. Albert voluntarily resigned from the Oklahoma Bar Association on February 10, 2016. On December 27, 2017, Albert petitioned this Court for reinstatement as a member of the Oklahoma Bar Association. On March 9, 2018, a hearing was held before the Trial Panel of the Professional Responsibility Tribunal and the tribunal recommended that the attorney be reinstated. Upon consideration of the matter, we find:

1) The petitioner has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch.1, app. 1-A.

2) The petitioner has established by clear and convincing evidence that he has not engaged in the unauthorized practice of law in the State of Oklahoma.

3) The petitioner has established by clear and convincing evidence that he possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association.

4) The petitioner has established by clear and convincing evidence that he possesses the good moral character which would entitle him to be reinstated to the Oklahoma Bar Association.

IT IS THEREFORE ORDERED that the petition of James P. Albert for reinstatement be granted.

IT IS FURTHER ORDERED that Reinstatement is conditioned upon: 1) the payment of $595.27 in costs associated with these proceedings; and 2) the payment of dues for calendar year 2018. Costs and dues shall be paid within 30 days of the date of this order and reinstatement is conditioned upon such payment.

DONE BY ORDER OF THE SUPREME COURT THE 17th DAY OF July, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 62

IN THE MATTER OF THE REINSTATEMENT OF: SUTTON ALEKSANDRA SMITH MURRAY, TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS.

SCBD No. 6613. July 23, 2018

ORDER

¶1 The petitioner, Sutton Aleksandra Smith Murray, was stricken from the roll of attorneys February 16, 2010, after she voluntarily resigned as a member of the Oklahoma Bar Association. The Petitioner seeks reinstatement to the Oklahoma Bar Association by Petition for Reinstatement filed January 3, 2018. The Trial Panel recommended in their report by unanimous vote that reinstatement be granted. Upon consideration of the matter, we find:

1. Petitioner has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A;

2. Petitioner has established by clear and convincing evidence that she possesses the good moral character which entitles her to be admitted to the Oklahoma Bar Association;

3. Affidavits were presented showing that the Petitioner has not engaged in the unauthorized practice of law in the State of Oklahoma during the period of her resignation;

4. Petitioner possesses the competency and learning in the law required for admission to practice law in the State of Oklahoma.

¶2 IT IS THEREFORE ORDERED that the Petition for Reinstatement be granted.

¶3 IT IS FURTHER ORDERED that Petitioner shall pay the costs associated with this proceeding in the amount of $272.78.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 23rd DAY OF JULY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Opinion of Tribal Court

IN THE SUPREME COURT OF THE SAC AND FOX NATION

SAC AND FOX CASINO now THE BLACK HAWK CASINO , Appellant, v. JUANITA M. COLE, Appellee.

No. APL No. APL-17-0001

APPEAL FROM THE SUPREME COURT OF THE SAC AND FOX NATION FOR THE DISTRICT COURT OF THE SAC AND FOX NATION STROUD, OKLAHOMA

Case No. CIV-2015-11

Affirmed and Remanded.

POSEY, Vice-Chief Justice, delivered the opinion of the Court, in which Justices Lenora and Dakin joined. WILLIAMS, Chief Justice, filed a dissenting opinion, in which Justice Taylor joined.

INTRODUCTION

The Sac and Fox Nation (the "Nation") must ensure that all patrons of its casinos are afforded due process in seeking and receiving just and reasonable compensation for tort claims for personal injury or property damage against the Nation arising out of incidents occurring at its casinos. OKLA. STAT. tit. 3A § 281. Pursuant to the Nation's applicable laws, a party's authority to assert a tort claim against a Sac and Fox casino is outlined by several detailed procedural rules and codes. When tort claims are asserted against the Nation's casinos, the Nation consents to suit on a limited basis with respect to tort claims subject to the relevant provisions as set forth above. The issue in this appeal is whether a patron's cause of action in tort against a Sac and Fox casino may be dismissed by the Sac and Fox Nation Gaming Commission's ("SFNGC" or "Commission") for failure to comply with the procedures set forth under the applicable law. We determine under that facts of this case, that the patron's cause of action may not be dismissed. Sac and Fox Nation Gaming Ordinance of 2008 (the "Gaming Ordinance") was enacted to regulate and control gaming on the Indian lands of the Nation. Gaming Ordinance, § 1-1(A). Under the Gaming Ordinance, a dispute between a patron and a casino that cannot be reconciled by the managing official, or by that official's authorized representative, must be referred to an employee of the SFNGC. Gaming Ordinance, § 1-305(B). The employee "shall make all reasonable efforts to settle the dispute." *Id.* However, if the employee is unable to do so, the employee must "promptly make a written report on the controversy and advise the Chairman of the Commission who shall, in turn, promptly schedule a hearing by the Commission on the matter, giving all involved parties reasonable notice of time, place, and date of the hearing." *Id.*

The Sac and Fox Nation Gaming Commission Rules and Regulations ("Rules and Regulations"), Resolution 21 – Resolution of Tort Claims, "applies to all claims for personal injury or property damage that may arise between a patron and the Gaming operation." Rules and Regulations, § 21.1. In compliance with the Gaming Ordinance, the Rules and Regulations require casino management to attempt to resolve the conflict. Rules and Regulations, § 21.3(c). Casino management must notify the patron of the right to further review by the Commission if they are unable to resolve the situation. *Id.* To invoke this right, the patron must submit a Tort Claim Form to either the casino management or the Commission within 10 days of the date of the incident. *Id.* Then, the Commission staff must investigate the claim and formulate a written response to the claim. Rules and Regulations, § 21.3(e). If the patron is dissatisfied with the Commission's response, he or she may attend a hearing, in which "the Commission shall review the documentation on the tort claim and shall either dismiss the tort claim or enter a settlement for the claimant against the Gaming operation." Rules and Regulations, § 21.4. Notably, the rules state that "the Commission staff shall advise the patron of the right to have the complaint heard by the Commission and provide the necessary information to the patron for such a hearing by the Commission, specifically time, place and date of the Commission hearing." Rules and Regulations, § 21.3(e).

The Sac and Fox Nation Casino Tort Claims Rules and Procedures ("Tort Claims Rules") also provide requirements for a patron asserting a tort claim against a casino. Under these

rules, the Nation explains that it is waiving sovereign immunity for suits by claimants so long as the claimants follow the correct procedures. Tort Claims Rules, § 6. For instance, a patron may appeal a tort-claim denial if the following requirements have been met:

> (a.) Claimant has followed all tort claim procedures, including without limitation, the filing of a properly executed and timely Tort Claim Form. (b.) SFNGC has denied the tort claim. (c.) Claimant has filed the judicial proceeding no later than 180 days after the SNGC's denial of the claim. This deadline cannot be extended by the Claimant or the SFNGC.

Tort Claims Rules, § 6. Furthermore, "[a]ny unresolved portion of a tort claim shall be deemed denied if SFNGC fails to notify Claimant in writing of its approval within 90 days of the Filing Date." Tort Claims Rules, § 4.

FACTUAL AND PROCEDURAL HISTORY

On June 15, 2013, Appellee, Juanita M. Cole ("Cole"), slipped and fell on a rug located inside the Black Hawk Casino, a Sac and Fox Casino, in Shawnee, Oklahoma. She timely filed a Notice of Tort Claim with the SFNGC on July 24, 2013. On September 4, 2013, the SFNGC, through its Executive Director, issued a response, which stated Cole's claim should be granted, her medical bills should be paid by the Casino, and if either party was not satisfied with the response, they could present their objections at a hearing before the SFNGC on October 17, 2013. Upon motion by the parties, the hearing was continued to December 19, 2013. However, before the date of the hearing, the SFNGC entered a "Notice to Decline Hearing and Transfer Matter to the District Court of the Sac and Fox Nation." It should be noted that there appears to be no statutory or regulatory authority which authorizes such action. However, despite this Order, the SFNGC, through no fault of the claimant, never actually transferred Cole's claim to the Sac and Fox Nation District Court. As a result, no judicial proceeding was brought before the District Court until Cole took the initiative to file the claim on October 30, 2015.

In response, Appellant, Sauk Business Enterprises, a governmental subdivision of the Sac and Fox Nation d/b/a The Black Hawk Casino (the "Casino"), filed a motion to dismiss for lack of subject-matter jurisdiction. The Casino argues that the SFNGC denied Cole's claim when it issued the order transferring the claim to the District Court. If this argument were valid, the Casino's sovereign immunity would have been waived for a 180-day period, pursuant to the Casino Tort Claims Rules, commencing on the date of the transfer to the District Court. Therefore, the Casino argues that because Cole did not file an appeal within 180 days of the transfer, the Casino should be exempt from suit under the Gaming Ordinance.

The District Court rejected the Casino's argument and determined that the SFNGC's transfer of Cole's claim was not a denial of the claim. It noted that the transfer order was made without changing the original finding made September 4, 2013, and the transfer was never completed. The District Court held that consistent with due process, it had jurisdiction over Cole's tort claim and denied the Casino's motion to dismiss.

Because the District Court denied the Casino's sovereign immunity defense, the Casino immediately appealed to this Court. We affirm the findings of the District Court and discuss our reasoning below.

DISCUSSION

This Court reviews a district court's denial of a motion to dismiss based on tribal sovereign immunity de novo. *Sac and Fox Nation v. Hanson,* 417 F.3d 1061, 1063 (10th Cir. 1995).

The right to due process is a recognized principle of Sac and Fox Nation law. Under the Sac and Fox Nation Constitution, the Nation must not "deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Art. X, § 8, Sac and Fox Nation Const. The Sac and Fox Nation Gaming Compact also expressly applies due process to patron tort disputes against casinos. OKLA. STAT. tit. 3A § 281. Furthermore, although the Nation is not governed by the United States Constitution, the Due Process Clause of the Fourteenth Amendment was adopted and applied to tribal nations through the Federal Indian Civil Rights Act. *See* 25 U.S.C. § 1302.

The issue on appeal is whether Cole was deprived of her due process rights when the SFNGC failed to hold a hearing on her claim and failed to properly transfer her claim to the District Court, even though Cole had complied with all the requirements for filing a tort action against the Casino. For Cole to have been

denied due process, she must: (1) be entitled to a life, liberty or property interest; (2) be deprived of that property interest; and (3) the Sac and Fox Nation's procedures must be inadequate or unfair. This Court finds that, under the circumstances of this case, all three elements are present and, therefore, Cole's due process rights were violated by the SFNGC's failure to hold a hearing on her claim and failed to properly transfer her claim to the District Court.

Cole contends that the United States Supreme Court case, *Logan v. Zimmerman Brush Company*, is comparable to her case and, therefore, provides useful insight. In *Logan*, an employee's claim against his employer was dismissed by the Illinois Fair Employment Practices Commission because it – by no fault of the employee – failed to comply with a statute requiring it to schedule a fact-finding conference within 120 days of the date the claim was filed. 455 U.S. 422, 425, 102 S. Ct. 1148, 1152, 71 L.Ed. 2d 265 (1982). The Court held that the right of the employee to adjudicate his claim under the Illinois Fair Employment Practices Act was a valid property interest protected by due process. *Id.* at 431. The Court determined that a "claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State." *Id.* Furthermore, the Court found that once the state has created a property interest, it cannot deprive a person of that interest without the proper procedural safeguards. *Id.* at 432.

Cole's right to a hearing before the SFNGC is guaranteed under Sac and Fox law. The Commission's Rules and Regulations state that the SFNGC "shall advise the complainant of the right to have the complaint heard by the Commission," and the Gaming Ordinance provides that the SFNGC "shall . . . promptly schedule a hearing by the Commission on the matter, giving all involved parties reasonable notice of time, place, and date of the hearing." Gaming Ordinance, § 1-305(B). This right is not optional, as the Casino tries to argue; it is a mandatory right, provided by the Nation's law, which establishes a property interest in Cole's right to a hearing before the SFNGC.

Similar to the law applicable in the *Logan* case, Cole was deprived of her right to the hearing by the ineffective transfer of her claim to the District Court. The Casino contends that the transfer of Cole's claim to the District Court was a final action, and therefore, a proper denial of the claim. However, the Casino's reasoning is flawed. Although the Gaming Ordinance allows the SFNGC to transfer hearings to the District Court, it does not permit complete dismissal of a claim without any hearing at all. The 180-day sovereign immunity waiver for tort claims on appeal to the District Court cannot be triggered by a transfer with no ruling because there is nothing to appeal. The SFNGC never entered an unfavorable ruling against Cole that would cause her to appeal. In fact, it entered a favorable ruling, scheduled a hearing on its own, denied that hearing, and then ineffectively sought to transfer the claim to the District Court. These actions, followed by the assertion that Cole's claim was now either denied or barred by sovereign immunity is a denial of her protected property interest without notice and an opportunity to be heard. Under these circumstances, the SFNGC procedures were clearly both ineffective and unfair. Consequently, Cole's due process rights were violated by the SFNGC's failure to either hold a hearing or complete the transfer of Cole's case to the District Court.

CONCLUSION

It is not this Court's position that any procedural requirement that restricts a claimant's property interest in adjudicating his or her claim is a violation of due process. Nevertheless, when a claimant is not able to comply with a procedural rule due to the negligence of the governmental agency responsible for investigating and deciding the claim, a dismissal of the claimant's cause of action denies the protections afforded by due process. No individual or entity should be more familiar with the procedural rules for filing a tort claim against a casino than the SFNGC, itself. As such, a claimant's constitutional rights should not be dependent upon his or her ability to correctly decipher the confusing, contradictory and statutorily unsupported actions of the SFNGC. The Casino argues that due process merely requires an *opportunity* to be heard, but this court asserts that such an unfair opportunity amounts to no opportunity at all.

The SFNGC and the Casino are both extensions of the Nation. Although it is unfortunate that the SFNGC's conduct misled the Casino into believing the statutory waiver of sovereign immunity had expired, the same conduct also misled Cole. Under such circumstances, Cole's interest in adjudicating her claims must

outweigh the Casino's interest in a 180-day waiver of sovereign immunity.

This matter is hereby ordered remanded to the trial court for further proceedings consistent with this opinion. It is so ordered.

/s/ TIMOTHY POSEY
VICE CHIEF JUSTICE

CONCUR by JUSTICES Lenora and Dakin.

CHIEF JUSTICE WILLIAMS, with whom JUSTICE TAYLOR joins, dissenting:

Part 6 of the Class III Gaming Compact between the Sac and Fox Nation (the "Nation") and the State of Oklahoma (the "Compact") contains a limited waiver of tribal sovereign immunity that allows a casino patron to be able to bring a tort claim against the Nation for personal injury or property damage based on incidents occurring at the casino. The tort claim process outlined in the Compact includes an initial administrative stage when a claim is filed, investigated, and has the possibility of being settled; then, if necessary, there is a judicial stage where an unresolved tort claim may be adjudicated in "a court of competent jurisdiction," here the Nation's Tribal court.

The Compact clearly provides that the limited waiver of tribal sovereign immunity in the judicial stage is only applicable if a tort claimant abides by the procedural and timeframe limitations in the administrative stage. Because a limited waiver of tribal sovereign immunity "must be strictly construed", a tort claim therefore cannot be adjudicated in court unless all the requirements in the administrative stage are followed. *See, e.g., Ramey Constr. Co. Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) ("When consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction . . . a waiver of [tribal] sovereign immunity is to be strictly construed.").

In this case, however, the majority has chosen to ignore the clear requirements of the Compact by permitting the case to proceed in the District Court outside the parameters of the waiver of tribal sovereign immunity. This is contrary to the clear terms of the Compact and Tribal law, and it creates questionable precedent for future tort claims that may be filed outside of the procedural and timeframe limitations established in the Compact. The Nation asserts that the District Court lacks subject matter jurisdiction to adjudicate the tort claim because the claim was filed in court beyond the timeframe set in the Compact. I agree. Although it does appear from the record that the administrative stage of the tort claim contained some irregularities, that does not alter the fact that the timeframe to file a claim in court is jurisdictional. While I remain sympathetic to Appellee's situation, I cannot allow sympathy to cloud the judgment I must exercise as a Justice of this honorable court sworn to uphold the law. I, therefore, respectfully dissent.

I.

Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et. seq.*, an Indian tribe and a state government may negotiate a gaming compact for the operation of Class III gaming on Indian lands. *Sheffer v. Buffalo Run Casino, PTE, Inc*. 2013 OK 77, ¶ 4, 315 P.3d 359. In 2004, Oklahoma voters approved a model gaming compact that was offered to Oklahoma tribes which, when accepted by a tribe, would govern the operation of Class III gaming under the terms and conditions in the Compact.

In 2005, the Nation approved a Class III compact with the State of Oklahoma. Among the terms of the Compact pertaining to the authorization of certain Class III gaming, the Compact also included terms and conditions for the resolution of tort and prize claims brought by casino patrons. Part 6 of the Compact outlines the tort claim process as both an administrative stage and, if necessary, a judicial proceeding to adjudicate an unresolved tort claim, as follows, in pertinent part:

> A. Tort Claims.
>
> . . . . .
>
> 2. The tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection and subsection C of this Part. ***No consents to suit with respect to tort claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsections B and C of this Part;***
>
> . . . .
>
> 4. Any patron having a tort claim shall file a written tort claim notice by delivery to the enterprise or the TCA.
>
> . . . .

8. The enterprise shall promptly review, investigate, and make a determination regarding the tort claim. Any portion of a tort claim which is unresolved shall be deemed denied if the enterprise fails to notify the claimant in writing of its approval within ninety (90) days of the filing date, unless the parties by written agreement extend the date by which a denial shall be deemed issued if no other action is taken.

. . . .

9. A judicial proceeding for any cause arising from a tort claim may be maintained in accordance with and subject to the limitations of subsection C of this Part ***only if the following requirements have been met:***

a. the claimant has followed all procedures required by this Part, including, without limitation, the delivery of a valid and timely written tort claim notice to the enterprise,

b. the enterprise has denied the tort claim, and

c. ***the claimant has filed the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim by the enterprise;*** provided, that neither the claimant nor the enterprise may agree to extend the time to commence a judicial proceeding; and

10. Notices explaining the procedure and time limitations with respect to making a tort claim shall be prominently posted in the facility. Such notices shall explain the method and places for making a tort claim, that this procedure is the exclusive method of making a tort claim, and that claims that do not follow these procedures shall be forever barred.

. . . .

C. Limited Consent to Suit for Tort Claims and Prize Claims. ***The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim*** or prize claim ***if all requirements of paragraph 9 of subsection A*** or all requirements of paragraph 11 of subsection B of this Part have been met . . .

(emphasis added).

The administrative stage of the tort claim process requires the claimant to file a written tort claim notice with the tribal enterprise or the TCA (defined in the Compact as a Tribal Compliance Agency) within one year of the date of the incident giving rise to the tort claim. Compact, Part 6.A.4. The notice must provide certain critical information about the tort claim, i.e., date, time, place, identity of any witness(es), compensation requested, and contact information about the claimant. Compact, Part 6.A.6.

After a tort claim is administratively filed, the Nation is required to "promptly review, investigate, and make a determination regarding the tort claim" and any portion of a tort claim that is unresolved "shall be deemed denied if the [Tribe] fails to notify the claimant in writing of its approval within ninety (90) days of the filing date" unless the parties agree in writing to extend the date (no more than ninety days) by which a denial shall be deemed issued. Compact, Part 6.A.8.

If a full resolution of the tort claim is not achieved during the administrative stage, a judicial proceeding may be initiated under Part 6.A.9 of the Compact only if: (a) the claimant has "followed all procedures required by this Part" . . . (b) "the enterprise has denied the tort claim", and (c) "the claimant has filed the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim . . . ." The limited waiver of tribal sovereign immunity clause in Part 6.C of the Compact provides that "the tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim . . . if all requirements of [Part 6.A.9] . . . have been met . . . ." (emphasis added). There is no exception granted in the Compact for permitting the restrictions in Part 6.A.9 to be circumvented.

The Nation has also enacted a Gaming Ordinance (originally enacted in 2003) (the "Ordinance") that has been subsequently amended at various dates.[1] Also, the Nation has promulgated Gaming Commission regulations (the "Regulations") that govern the duties, powers, and responsibilities of the Commission. In her brief, Appellee misguidedly attempts to evade the tort claim process in the Compact but, instead, she places great emphasis on certain general provisions in the Ordinance and the Regulations. This is not appropriate. Section 3.3 of the Regulations recognize that all the regulations "are established and promulgated pursuant to and in accordance with the Ordi-

nance" and Section 1-103(D) of the Ordinance provides that if any conflict exists between the Ordinance and the Compact, "the relevant Compact provision(s) . . . shall govern." Therefore, the Compact is the higher law over any conflicting provisions in the Ordinance and the Regulations.

II.

In this case, Appellee alleged she suffered an injury at the Sac and Fox Casino in Shawnee, Oklahoma on June 15, 2013. She submitted a proper Notice of Tort Claim form that was timely received by the Nation's Gaming Commission (the "Commission") on July 24, 2013. On September 4, 2013, the Executive Director for the Commission sent a letter to claimant stating that the Commission staff finds that the claim "for personal injury should be granted and her medical bills should be paid by the Casino . . . ." The Gaming Commission eventually issued an order setting a hearing for December 19, 2013. However, on November 13, 2013, the Gaming Commission (through the Chairperson) issued an "Order Transferring Matter to the District Court of the Sac and Fox Nation" declining a hearing and indicating that the Commission is to "transfer the matter to a more appropriate forum."

The November 13, 2013, order did not cite to any legal authority or provide an explanation for the action, but service of the order was sent on the same day (via email and U.S. mail) to both Appellee's attorney and the attorney for the Casino. Also on November 13, 2013, the Commission sent to both parties a "Notice to Decline Hearing and Transfer Matter to the District Court of the Sac and Fox Nation" that the notice was "a final decision of the Sac and Fox Nation Gaming Commission and is not subject to further appeal."

No other filing or activity regarding Appellee's tort claim occurred before the Commission after the entry of the November 13, 2013, order and the notice.

Appellee filed her Petition in the District Court on October 30, 2015. The Nation filed a motion to dismiss for lack of subject matter jurisdiction on April 1, 2016. On May 3, 2017, the District Court denied the motion to dismiss, finding that "the Commission has not completed the transfer of the [Claimant's tort claim]" and that the claim "is still a viable claim under [the Compact]."

This appeal followed.

III.

Appellee has alleged she suffered a personal injury while patronizing the Nation's casino due to the negligence of the Casino owner and/or operators, i.e., the Nation. The casino is a Class III facility that conducts Class III gaming under the Compact. Appellee filed a tort claim using the Tort Claim Form provided by the Nation and under the Tort Claim rules and procedures (the same procedures and timeframes contained in Part 6 of the Compact). The Compact thus governs Appellee's tort claim.[2]

From the record, Appellee timely filed a tort claim in accordance with the Compact, and the Commission was the agency that addressed the claim on behalf of the Nation. Even though the Commission staff looked into the matter and sent out a letter on September 4, 2013, suggesting that the "claim for personal injury should be granted," the staff letter was not a formal action on behalf of the Commission. Subsequent to the letter, both parties had requested an extension of the hearing date (to December 19, 2013), so it is clear both parties were intending to have the claim heard at a later date.

There is no dispute that the Gaming Commission scheduled a hearing date and, prior to the set date, cancelled the hearing and purported to "transfer" the case to the District Court. The record is unclear as to why the Gaming Commission took action to hear the case and then abruptly cancelled the hearing without adequate explanation. There is no provision in the Compact authorizing an action to be administrative transferred from the Gaming Commission to the District Court.

Even though the "transfer order" lacked explanation, the certificate of service on the last page of the "transfer order" clearly reveals that service of this action was provided (via email and U.S. mail) to both Appellee's attorney and the Tribal attorney on November 13, 2013. Also, the "Notice to Decline Hearing" document was an additional notification to the parties that the Commission made a final decision to decline to hear the case – this document was also sent out to both parties (via email and U.S. mail) on the same day as the "transfer order." This was the official notice to the parties that the Commission was denying the claim. Even without formal authority to transfer the matter,

all parties were on notice as of November 13, 2013, that the Commission was no longer going to hear the claim.[3]

Thus, under the Compact, the Appellee had no more than 180 days after November 13, 2013,[4] to file a judicial proceeding in the Nation's District Court. Appellee failed to file a judicial proceeding within this timeframe, and so the District Court is without subject matter jurisdiction to adjudicate the claim.

Even though the Commission's order stated that the case was being "transferred" to the District Court, the Compact places the responsibility on the claimant to timely file a judicial proceeding. *See* Compact, Part 6.A.9 ("a judicial proceeding . . . may be maintained . . . only if" . . ."the ***claimant has filed*** the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim . . . .") (emphasis added). Here, the onus was on the Appellee to make sure that the case was properly and timely docketed with the District Court, either by ensuring the Commission made the appropriate filing or by the Appellee filing her own action based on the Commission's denial. The Appellee did nothing until October 30, 2015, which was approximately five hundred thirty-six (536) days past the date of May 12, 2014, which is the one hundred eightieth day after the Commission's denial of the claim on November 13, 2013.

Appellee claims a violation of her due process rights by the failure of the Gaming Commission to hold an administrative hearing, but nothing in the Compact guarantees that a claimant will receive such a hearing during the administrative stage of the process. There is no guaranteed right to a formal hearing during the administrative stage of the tort claim process. The only requirement in the Compact imposed on the Tribe during the administrative stage is to "promptly review, investigate, and make a determination regarding the tort claim." Compact, Part 6.A.8. In fact, there is no requirement that the administrative stage reach a final determination on the merits of the tort claim; rather, the Tribe may, at that stage, decide to not act upon the claim at all. In that case, the Compact recognizes that a tort claim that is unresolved "shall be deemed denied" by the Tribe if the Tribe fails to notify the claimant of its approval within ninety days of the filing date (unless extended by written agreement of the parties). Compact, Part 6.A.8.

I agree with the majority that Appellee's due process concerns are important and must be given due weight. However, I do not agree with the majority's position that any administrative irregularities and the lack of an administrative hearing rises to the level where we are allowed to ignore the clear process set out in the Compact. Also, I contend that due process was afforded the Appellee throughout the tort claim process. When she suffered her injury she was provided a copy of the tort claims notice outlining the rules and procedure for filing and prosecuting a claim. Both the Compact and the published tort claim rules and procedures (received by Appellee when she filled out the Tort Claim form) clearly set out the procedural and timeframe parameters of a tort claim. Moreover, she was provided adequate notice and an opportunity to be heard when the Gaming Commission sent out notices to all parties of record at all stages of the process before the Commission.

Due process does not require that the administrative process go perfectly. Indeed, the very fact that a claimant has a right to seek review of any administrative action (or inaction) in the Tribal District Court speaks volumes into the due process protections afforded a claimant under the Compact. This is straightforward – if the claimant feels that the administrative process was not handled in accordance with the law or established procedure, the Compact affords the claimant the right to seek judicial review of any final administrative action (or failure to act). This is a right clearly outlined in the tort claim procedures received by claimant at the start of the process, and it is a procedure that is clearly outlined in the Compact and the gaming laws of the Nation.

The alleged due process violation based on the administrative process before the Commission being handled sloppily is a red herring designed to avert the focus from Appellee's untimely petition filed in the District Court. It appears that Appellee's original attorney may have "dropped the ball" by not following up to make sure the petition was timely filed once it was clear the Commission declined the hearing, but the law does not permit the untimeliness of the court filing to be overlooked simply because the Appellee relied on her attorney to her detriment.[5]

Appellee's reliance on the due process analysis in the *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982) case is not applicable here

because the *Logan* case involved an Illinois law that specifically established an administrative process where a formal adversary hearing could be held before a commissioner or appointed adjudicator to make findings about the complaint. Logan, 455 U.S. at 1151-52. There is no such requirement for the administrative stage under the Compact.

Appellee's argument that the Ordinance expanded upon the tort claimant's process initially established under (or "statutorily modified") the Compact must fail for three reasons:

First, an earlier form of the Ordinance was initially enacted in 2003 by SF-03-07, and this version was amended in 2004 by SF-04-86 to include a section titled "Disputes Between the Gaming Public and Gaming Operations" (which is substantially the same as the current version of Section 1-305). Thus, the 2005 Compact's specific provisions regarding the tort claim process came after the 2004 version of Section 1-305 regarding general language for Commission patron dispute resolutions. Appellee's reliance on the 2008 version of the Ordinance mistakenly assumed that Section 1-305 came after the Compact. It did not.

Second, Section 1-103(D) of the Ordinance specifically recognizes that any conflict must be resolved in favor of the Compact, so no conflicting term in the Ordinance can be held superior to the Compact's process. Appellee's reliance on the conflicting provision of Section 1-305 is weakened even more by the fact the Compact's specific tort claim process was established subsequent to Section 1-305.

Finally, Section 1-304 of the Ordinance specifically preserves the sovereign immunity of the Nation and affirms that any waivers must be strictly construed. Appellee cannot point to any provision of the Ordinance that waives sovereign immunity for an action brought under Section 1-305 of the Ordinance.

IV.

Under clearly established Federal law, "a waiver of sovereign immunity is to be strictly construed." *Ramey Constr. Co. Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Here, the limited waiver of sovereign immunity in the Compact contains specific timeframes and procedural requirements that must be met in order for subject matter jurisdiction to exist in the District Court. The Appellee did not comply with the specific timeframe, and this results in the District Court lacking subject matter jurisdiction to adjudicate the claim. The case should be dismissed.

I respectfully dissent.

/s/ O. JOSEPH WILLIAMS
CHIEF JUSTICE

CONCUR by JUSTICE Taylor.

1. The Nation has made several amendments to the Ordinance since originally enacting SF 03-07 in 2003 which is a Governing Council Ordinance creating the Sac and Fox Gaming Commission, to-wit: SF-07-185 (Sept. 10 2007), SF-08-180 (May 8, 2008), SF-08-237 (Aug. 5, 2008), SF-09-10 (Oct. 17, 2008), SF-11-14 (Oct. 20, 2010), and SF-11-19 (Nov. 12, 2010).

2. In her Petition, Appellee also asserts that her tort claim suit is brought under the Compact. She makes no reference in her Petition to any procedure under the Ordinance or Commission Regulations.

3. Notably, Appellee herself recognized that the "notice" to transfer the case had legal significance when, in paragraph nine of her Petition filed October 30, 2015, Appellee states "[p]ursuant to the Notice to Transfer, Juanita Cole initiates this claim." Nowhere in her Petition does Appellee allege that the Commission's November 13, 2013, order was an effective transfer of the case to the District Court.

4. The one hundred-eightieth day from November 13, 2013, is calculated to be May 12, 2014.

5. Even if Appellee and her attorney had a good faith belief that the Commission's order was a legal "transfer" of the case to the District Court, it is remarkable that no one bothered to follow-up on the status of the proceedings for almost two years. The record does not reflect that Appellee or her attorney made any kind of inquiry or initiated any activity with the Commission or the District Court regarding the status of the case that was purportedly transferred on November 13, 2013, until the filing of the petition in the District Court on October 15, 2015.

2019 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 7, 2018

OFFICERS

President-Elect
Current: Charles W. Chesnut, Miami
Mr. Chesnut automatically becomes OBA president Jan. 1, 2019
(One-year term: 2019)
Nominee: **Vacant**

Vice President
Current: Richard Stevens, Norman
(One-year term: 2019)
Nominee: **Vacant**

BOARD OF GOVERNORS

Supreme Court Judicial District Three
Current: John W. Coyle III, Oklahoma City
Oklahoma County
(Three-year term: 2019-2021)
Nominee: **Vacant**

Supreme Court Judicial District Four
Current: Kaleb K. Hennigh, Enid
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Supreme Court Judicial District Five
Current: James L. Kee, Duncan
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
Nominee: **Vacant**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

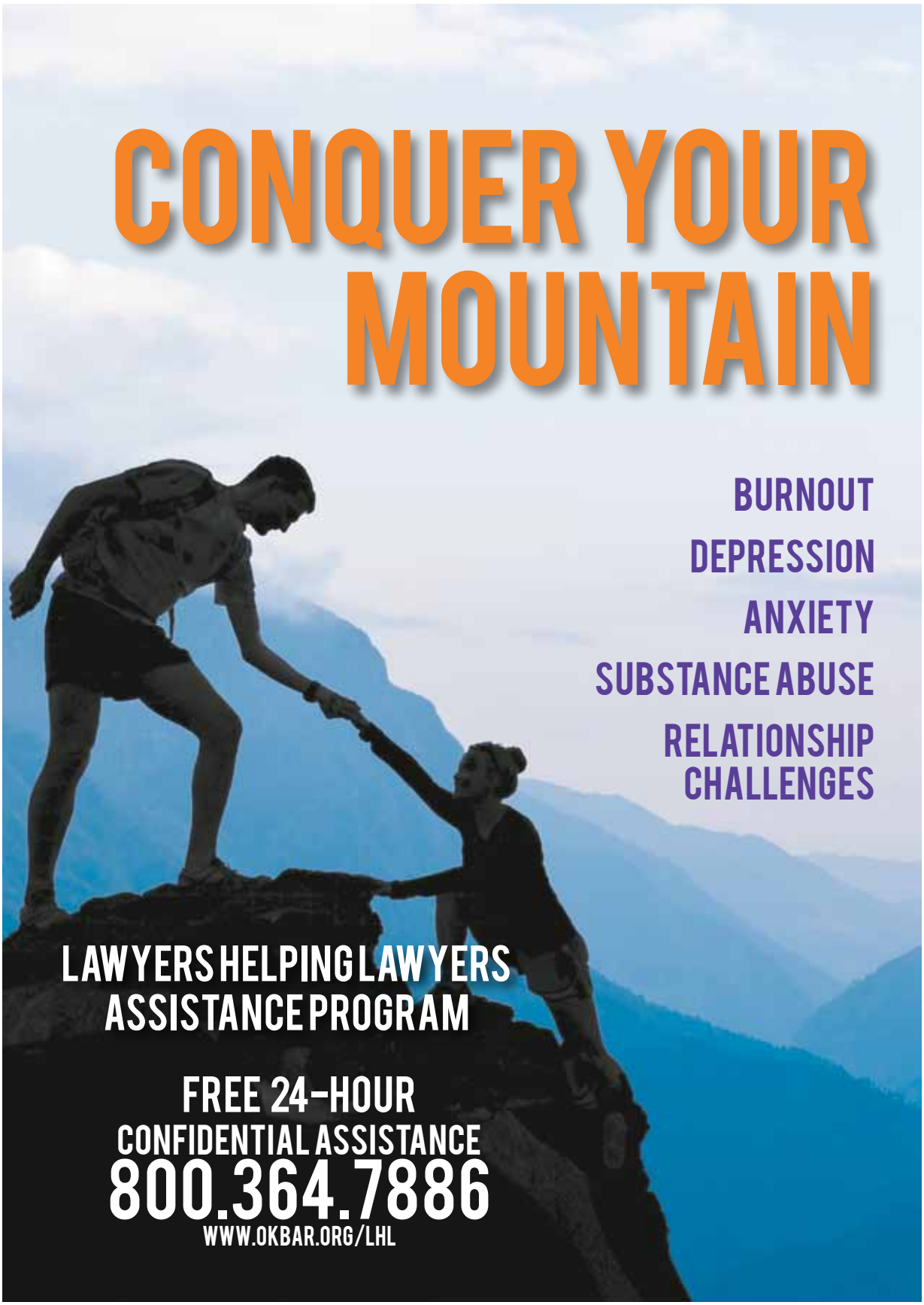
If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 9, during the Nov. 7-9 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2018.

Nomination and resolution forms can be found at www.okbar.org/members/BOG/BOGvacancies.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Want to Get Involved With the YLD?

Run for the OBA/YLD Board of Directors

By Lane R. Neal

Each year the Young Lawyers Division holds elections for its officer and director positions. Per the bylaws, the YLD is composed of a chairperson, chairperson-elect, immediate past-chairperson, 20 voting directors and the ex-officio members. The directors and ex-officio members consist of one representative from each Supreme Court Judicial District and Oklahoma and Tulsa counties each having two additional representatives; seven at-large representatives, five of whom are to be elected at large from the division without regard to geographic residence and two of whom are to be elected from counties other than Oklahoma and Tulsa counties; and four ex-officio, nonvoting members. The YLD board's full composition can be found at www.okbar.org/members/YLD/Bylaws.

NOMINATING PROCEDURE

Article 5 of the division bylaws requires that any eligible member wishing to run for office must submit a nominating petition to the Nominating Committee. The petition must be signed by at least 10 members of the OBA/YLD. The original petition must be submitted by the deadline set by the Nominating Committee chairperson. A separate petition must be filed for each opening, except a petition for a directorship shall be valid for one-year and two-year terms and at-large positions. A person must be eligible for division membership for the entire term for which elected.

2019 YLD Board Vacancies

OFFICERS

Officer positions serve a one-year term.

Chairperson-Elect: any member of the division having previously served for at least one year on the OBA/YLD Board of Directors. The chairperson-elect automatically becomes the chairperson of the division for 2020.

Treasurer: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

Secretary: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

BOARD OF DIRECTORS

Board of Director positions serve a two-year term.

District 1: Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties

District 3: Oklahoma County (two seats)

District 5: Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties

District 6: Tulsa County (two seats)

District 7: Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties

District 9: Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties

At-Large: all counties (two seats)

At-Large Rural: any county other than Tulsa or Oklahoma counties (one seat)

ELIGIBILITY

All OBA members in good standing who were admitted to the practice of law 10 years ago or less are members of the OBA/YLD. Membership is automatic – if you were first admitted to the practice of law in 2008 or later, you are a member of the OBA/YLD!

ELECTION PROCEDURE

Article 5 of the division bylaws governs the election procedure. In October, a list of all eligible candidates and ballots will be published in the *Oklahoma Bar Journal*. Deadlines for voting will be published with the ballots. All members of the division may vote for officers and at-large directorships. Only those members with OBA roster addresses within a subject judicial district may vote for that district's director. The members of the Nominating Committee shall only vote in the event of a tie. Please see OBA/YLD Bylaws for additional information.

DEADLINE

Nominating petitions, accompanied by a photograph and bio (in electronic form) for publication in the OBJ, must be received by Lane Neal, Nominating Committee Chairperson, Durbin Larimore, 920 North Harvey, Oklahoma City, OK

73102 or lneal@dlb.net no later than 5 p.m. Monday, Aug. 6, 2018.

Results of the election will be announced at the November YLD meeting at the OBA Annual Meeting.

TIPS FROM THE NOMINATING COMMITTEE CHAIRPERSON

A sample nominating petition can be found at www.okbar.org/members/YLD/YLDelections. This will help give you an idea of format and information required by OBA/YLD Bylaws (one is also available from the Nominating Committee).

Signatures on the nominating petitions do not have to be from young lawyers in your own district (the restriction on districts only applies to voting).

Take your petition to local county bar meetings or to the courthouse and introduce yourself to other young lawyers while asking them to sign – it's a good way to start networking.

You can have more than one petition for the same position and add the total number of original signatures – if you live in a rural area, you may want to fax or email petitions to colleagues and have them return the petitions with original signatures by U.S. mail.

Don't wait until the last minute – I will only accept faxes or emails of the petitions *if* the original petitions are postmarked by the deadline.

Membership eligibility extends to Dec. 31 of any year which you are eligible.

Membership eligibility starts from the date of your first admission to the practice of law, even if outside of the state of Oklahoma.

All candidates' photographs and brief biographical data are required to be published in the OBJ. All biographical data must be submitted by email or on a disk, no exceptions. Petitions submitted without a photograph and/or brief bio are subject to being disqualified at the discretion of the Nominating Committee.

ABOUT THE AUTHOR

Lane R. Neal practices in Oklahoma City. He serves as the YLD immediate past chair and as the YLD Nominating Committee chairperson. He may be contacted at LNeal@dlb.net.

2018 OK CR 25

ETHAN JOHNSON SPRUILL, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-629. July 19, 2018

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Ethan Johnson Spruill, was tried by a jury and convicted in Cleveland County District Court, Case No. CF-2014-322, of First Degree Manslaughter, in violation of 21 O.S.2011, § 711(2).[1] The jury recommended as punishment twenty-three (23) years imprisonment. The Honorable Tracy Schumacher, District Judge, sentenced Spruill in accordance with the jury's verdict.[2] Spruill now appeals. He raises the following propositions of error on appeal:

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL PROTECTIONS AGAINST SELF-INCRIMINATION THROUGH A DELIBERATE EFFORT BY LAW ENFORCEMENT TO OBTAIN AND RECORD INCRIMINATING STATEMENTS FROM AN INTOXICATED, UNSOPHISTICATED SUSPECT, IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS;

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS NOT ACTING IN SELF-DEFENSE AT THE TIME HE SHOT AND KILLED AARON MCCRAY, MAKING THE EVIDENCE INSUFFICIENT TO SUPPORT HIS CONVICTION; and

III. THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENSE USE-OF-FORCE EXPERT TESTIMONY TO AID AND ASSIST THE JURY IN ITS DETERMINATION OF WHETHER APPELLANT WAS ACTING IN SELF-DEFENSE IN THE SHOOTING INCIDENT.

¶2 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's Judgment and Sentence is therefore **AFFIRMED**.

I

¶3 The trial court did not abuse its discretion in denying the motion to suppress Appellant's statements. *Johnson v. State*, 2012 OK CR 5, ¶ 11, 272 P.3d 720, 726 (reciting standard of review for motion to suppress); *Mitchell v. State*, 2011 OK CR 26, ¶ 13, 270 P.3d 160, 169 (same). "The Fifth Amendment right [to counsel] arises when one who is in custody is interrogated." *Taylor v. State*, 2018 OK CR 6, ¶ 6, __P.3d__ (citing *Miranda v. Arizona*, 384 U.S. 436, 469-70, 86 S. Ct. 1602, 1625-26, 16 L. Ed. 2d 694 (1966)). "Under *Miranda*, no statement obtained through custodial interrogation may be used against a defendant without a knowing and voluntary waiver of those rights." *Taylor,* 2018 OK CR 6, ¶ 6 (citing *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612).

¶4 The record shows that Appellant was in custody at the time of his various recorded statements; that Appellant requested the presence of counsel repeatedly starting at the moment he was arrested in front of his apartment; that Appellant's statements were unwarned – that is, authorities never read him the warning mandated by *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630; and that Appellant refused to sign any waiver indicating that he understood his rights. However, the record also shows that Appellant's statements were not made in response to interrogation from authorities. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980) (the term "interrogation" for *Miranda* purposes "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."). Rather, Appellant's statements were volunteered to virtually anyone who would listen while he was at the police department. Volunteered statements of any kind are not barred by the Fifth Amendment. *Miranda*, 384 U.S. at 478, 86 S. Ct. at 1630.

¶5 "Once a suspect in custody has asserted his right to speak only through counsel, all attempts at interrogation must cease. A suspect can, however, change his mind and decide to speak to police without counsel." *Underwood v. State*, 2011 OK CR 12, ¶ 31, 252 P.3d 221, 238 (internal citation omitted). Here, the State met

its burden to prove that Appellant's statements were the product of an essentially free and unconstrained choice by Appellant. *Id.*, 2011 OK CR 12, ¶ 33, 252 P.3d at 238. There is no constitutional prohibition to admission of these statements at trial despite Appellant's requests for counsel, *see Frederick v. State*, 2001 OK CR 34, ¶¶ 92-93, 37 P.3d 908, 934, or his intoxication. *Coddington v. State*, 2006 OK CR 34, ¶ 38, 142 P.3d 437, 448. Appellant's argument that he was uninformed of his rights and fearful of authorities when he made these statements is also not supported by the record. Proposition I is denied.

II

¶6 "Self-defense is an affirmative defense which admits the elements of the charge, but offers a legal justification for conduct which would otherwise be criminal." *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114; 21 O.S. 2011, § 733. Pursuant to Oklahoma law, a person is justified in using deadly force if a reasonable person in the circumstances and from the defendant's viewpoint would reasonably have believed that he was in imminent danger of death or great bodily injury. *Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 114. Appellant maintained, from his arrest through trial, that he acted in self-defense and the district court fully instructed the jury on self-defense. Thus, "the State was obligated to prove, beyond a reasonable doubt, that Appellant did not act in self-defense." *McHam v. State*, 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667.

¶7 The State presented evidence showing that Appellant forced his way inside the victim's apartment after earlier confronting the victim's wife upstairs. The evidence showed Appellant aggressively pounded on the victim's front door while yelling threats and accusing them of abusing their children. The evidence was undisputed that Appellant was intoxicated and had had prior disputes with the victim about noise disturbances. At all times, Appellant was armed with the murder weapon, a fully loaded .38 revolver. True, Appellant testified that he was pulled inside the apartment by the victim. The victim's wife, however, disputed Appellant's version of events. She testified that Appellant stumbled inside the apartment then forcefully resisted and pushed back when the victim told Appellant to leave and attempted to push Appellant back outside. Appellant's own words to authorities, along with the rest of the State's evidence, showed he was the aggressor who instigated this entire deadly affair.

¶8 Self-defense is not available to an aggressor or one who voluntarily enters into a situation armed with a deadly weapon. *Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 115. Nor may self-defense be invoked by one who enters into mutual combat. *West v. State*, 1990 OK CR 61, ¶ 7, 798 P.2d 1083, 1085. We have also held that a trespasser's right to self-defense arises only after the trespasser has availed himself of every reasonable means of escape from the imminent danger of death or great bodily harm. When Appellant refused to leave after being told by the victim, and forcefully resisted the victim's reasonable efforts to push him outside the apartment, Appellant was clearly a trespasser. *Jones v. State*, 2009 OK CR 1, ¶ 66, 201 P.3d 869, 886; *Walston v. State*, 1979 OK CR 69, ¶¶ 6-7, 597 P.2d 768, 770-71.

¶9 The State's evidence established that the victim had an absolute right under these circumstances to defend himself, and his family, using deadly force inside his home. 21 O.S.2011, § 1289.25. "Where there is conflict in the testimony, this Court will not disturb the verdict on appeal if there is competent evidence to support the jury's finding." *Davis*, 2011 OK CR 29, ¶ 83, 268 P.3d at 112. Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the absence of self-defense and the existence of the elements of the lesser-included offense of first degree manslaughter. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 560 (1979); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Proposition II is denied.

III

¶10 We review a district court's evidentiary rulings for abuse of discretion. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 14, 241 P.3d 214, 224. In this context, an abuse of discretion has been defined as "any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Cripps v. State*, 2016 OK CR 14, ¶ 4, 387 P.3d 906, 908. Relevant evidence may be excluded under 12 O.S.2011, § 2403 "if its probative value is 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."

¶11 Here, the probative value of John Boren's proposed expert testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. It was also cumulative to evidence already presented. The trial court did not abuse its discretion in disallowing this proposed testimony. Appellant was not deprived of his constitutional right to present a complete defense. 12 O.S.2011, §§ 2401-03; 12 O.S.Supp.2013, § 2702; *Simpson v. State*, 2010 OK CR 6, ¶¶ 9-10, 230 P.3d 888, 895 (and cases cited therein); *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286 (and cases cited therein). Proposition III is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY

THE HONORABLE TRACY SCHUMACHER, DISTRICT JUDGE

APPEARANCES AT TRIAL

Mack K. Martin, Amber B. Martin, Martin Law Office, 125 Park Ave., 5th Floor, Oklahoma City, OK 73102, Counsel for Defendant

David Stockwell, Attorney at Law, 119 E. Main, Norman, OK 73069, Counsel for Defendant

John Pevehouse, Zachary Simmons, 201 S. Jones, Ste. 300, Norman, OK 73069, Counsel for the State

APPEARANCES ON APPEAL

Mack K. Martin, Amber B. Martin, Martin Law Office, 125 Park Ave., 5th Floor, Oklahoma City, OK 73102, Counsel for Defendant

Mike Hunter, Oklahoma Attorney General, Theodore M. Peeper, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. Appellant was charged and tried for First Degree Murder. Appellant was convicted, however, of the lesser-included offense of First Degree Manslaughter.

2. Under 21 O.S.2011, § 13.1, Spruill must serve 85% of the sentence imposed before he is eligible for parole.

2018 OK CR 26

ETHAN JOHNSON SPRUILL, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-629. July 19, 2018

ORDER GRANTING MOTION FOR PUBLICATION

¶1 On May 17, 2018, a Summary Opinion was handed down in the above-styled proceeding. The opinion, amongst other things, addressed the applicability of 21 O.S.2011, § 1289.25, to the facts of this case. On May 29, 2018, the State of Oklahoma, by and through Mike Hunter, Attorney General of Oklahoma, and Theodore M. Peeper, Assistant Attorney General, filed a Motion for Publication and Brief in Support in the above-referenced matter.

¶2 For good cause shown, the Court **GRANTS** the State's request for publication, and the Summary Opinion, as corrected, is hereby released for publication. *See A.R.M. v. State*, 2011 OK CR 24, 260 P.3d 434.

¶3 **IT IS THEREFORE THE ORDER OF THIS COURT** that the Summary Opinion, as corrected and paragraphed, is hereby **AUTHORIZED FOR PUBLICATION.**

¶4 The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Cleveland County; the District Court of Cleveland County, the Honorable Lori Walkley, District Judge; and counsel of record.

¶5 **IT IS SO ORDERED**.

¶6 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 19th day of July, 2018.

/s/ GARY L. LUMPKIN, Presiding Judge
/s/ DAVID B. LEWIS, Vice Presiding Judge
/s/ ROBERT L. HUDSON, Judge
/s/ DANA KUEHN, Judge
/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

Calendar of Events

August

2 **OBA Law Day Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Roy Tucker 918-684-6276 or Kara Pratt 918-599-7755

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

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

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

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

21 **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

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

24 **OBA Board of Governors meeting;** 10 a.m.; Duncan; Contact John Morris Williams 405-416-7000

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

30 **OBA Awards Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jennifer Castillo 405-553-3103

September

3 **OBA Closed** – Labor Day

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

6 **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

2018 OK CIV APP 52

TSG TULSA RETAIL, L.L.C., Plaintiff/ Appellant, vs. INDEPENDENT SCHOOL DISTRICT #9 OF TULSA COUNTY, OKLAHOMA, Defendant/Appellee.

Case No. 115,915. April 20, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANA KUEHN, JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

S. Douglas Dodd, Tom Ferguson, Jon Brightmire, Tulsa, Oklahoma, for Appellant,

Douglas Mann, Cheryl Dixon, Tulsa, Oklahoma, for Appellee.

Larry Joplin, Judge:

¶1 Appellant, TSG Tulsa Retail, L.L.C. (TSG), seeks review of the district court's grant of Appellee's, Independent School District #9 of Tulsa County, Oklahoma (the School District), motion for summary judgment, granted by order of the district court on March 6, 2017. TSG sought declaratory, injunctive and related equitable relief relating to the School District's use of a mutual access easement that facilitates traffic flow in and around Flynn Plaza in south Tulsa, Oklahoma. In granting the School's motion for summary judgment, the district court determined the School District's use of the mutual access easement to facilitate traffic from a neighboring property was reasonable and provided for in the deed of dedication. Further, the court determined the School was not burdening the servient estate (TSG's property) by sending school traffic over lot 5 to the mutual access easement. The court also found the road over lot 5, used to access the easement, was appropriate at the present time. The court concluded by finding the amended easement restriction did not preclude lot 5 from being used for "school use." TSG now appeals the district court's grant of the School's motion for summary judgment.

¶2 In December 2014, TSG purchased two lots in the Flynn Plaza subdivision, lots 2 and 3. The School District owns lot 5, which is adjacent to lots 2 and 3. The School District purchased lot 5 in 2007 and completed a roadway extension over the lot in 2012. Other than the roadway extension, the school has constructed no other improvements on lot 5. Tulsa Union High School sits to the north and east of lot 5. The lot 5 roadway extension takes traffic from the high school property to the mutual access easement and eventually to lots 2 and 3 and beyond.

¶3 On October 16, 2015, TSG filed a petition against Independent School District #9 of Tulsa County requesting declaratory, injunctive and related equitable relief with respect to the School's use of lot 5 and the mutual access easement. In its first claim under the petition, TSG asked the court to declare that the use of lot 5 is limited to "Use Unit 11" of the City of Tulsa Zoning Code, which permits low intensity uses, such as office buildings. TSG also requested a declaration that consents given by the 2006 owners of lots 1, 2 and 4, purporting to consent to the amendment to the deed of dedication of Flynn Plaza, are ineffective and not binding on TSG, because the consents and the amendment were never signed nor approved by the Tulsa Metropolitan Area Planning Commission. In addition, TSG asked the court to declare the consents and amendment ineffective as they were not filed prior to TSG's acquisition of lots 2 and 3.[1] TSG requested the School District be enjoined from using lot 5 for school uses until the planned unit development (PUD) and the deed of dedication are amended as required.

¶4 In the second claim of the petition, TSG requests the court to declare the School District is not permitted by the deed of dedication and the PUD to use lot 5 to provide access for the high school to and from 71st Street South. TSG also requests the School District be enjoined from using the easement to provide access to and from 71st Street South, or order the School District to refrain from overburdening the easement and exceeding the intended scope of the easement. TSG's third claim asks the court to declare that the existing site plan does not allow traffic circulation onto Flynn Plaza from lot 5 as the School District is currently doing and requests an injunction to prevent the School District from allowing traffic to circulate from the Union School campus to Flynn Plaza.

¶5 The School District filed a motion for summary judgment on September 15, 2016, asserting the easement is governed by the deed of dedication and under the terms of the deed the school has an absolute right to use the mutual access easement and to continue to use it in its current capacity. The School District also claimed it was not using lot 5 in an unlawful manner as alleged by TSG. Finally, the School District argued it had been using the easement in a manner consistent with its current use before TSG purchased lots 2 and 3 and TSG chose to complete its purchase of the lots anyway, indicating that the School District's use was not so burdensome as to prevent TSG's purchase.[2]

¶6 The appellate court will review the trial court's summary judgment decision under a de novo standard. This means the appellate court will review the entire summary judgement record without deference to the lower court and affirm the grant of summary judgment if the appellate court determines there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶11, 160 P.3d 959, 963.

¶7 The mutual access easement in the deed of dedication reads as follows:

> D. Mutual Access Easements
>
> The owner hereby grants and establishes perpetual non-exclusive mutual access easements depicted on the accompanying plat as "Mutual Access Easement" for the purposes of permitting the owner of each lot, their grantees, tenants, invitees, guests, successors and assigns to have vehicular and pedestrian access and passage within FLYNN PLAZA and to and from E. 71st Street South over, on and across the areas within each lot subject to a mutual access easement and to permit access to and from the properties to the East and West of FLYNN PLAZA. The mutual access easements shall be for the use and benefit of the owners of each lot within FLYNN PLAZA and their grantees, tenants, invitees, guests, successors and assigns, and shall be appurtenant to the ownership of each lot. Governmental agencies and the suppliers of utility services to FLYNN PLAZA shall have the use of such easements for vehicular and pedestrian access to the lots within FLYNN PLAZA.

¶8 TSG argues the mutual access easement is an appurtenant easement, as stated in the deed of dedication itself, and that the School District is impermissibly treating the easement as an easement in gross.[3] RESTATEMENT (THIRD) OF PROPERTY (Servitudes) §4.11 cmt. b, (2000). The Restatement (Third) of Property comment provides that "unless otherwise provided an appurtenant easement cannot be used to serve property other than the dominant estate[,]" which in this case is lot 5. *Id.* The Restatement comment states, [t]he rationale is that use to serve other property is not within the intended purpose of the servitude." *Id.*

¶9 For this reason, TSG argues the School District cannot use the appurtenant easement for the use of the Tulsa Union property that lies north and east of the dominant estate, because the Tulsa Union property is not the dominant estate. And the roadway extension which is on lot 5 and carries the traffic from the Tulsa Union property, over lot 5, to the mutual access easement, is not used for the benefit of lot 5 itself, but for the benefit of traffic flow from the Tulsa Union property.

¶10 The question presented here is whether the mutual access easement was intended to benefit property owned by a third party and whether such a third party benefit is permissible. The School District argues the language of the easement itself states it is intended to benefit "invitees" and "guests" and makes a specific provision for access to and from the easement from properties to the east and west of Flynn Plaza. As a result, the School District asserts the deed gives express permission for the Tulsa Union High School property's access to the easement because the high school is north and east of Flynn Plaza.[4]

¶11 The School District points out the mutual access easement was created by the deed of dedication and that "[w]hen property rights originate by deed, the scope of those rights should be construed in the same manner as other written contracts." *Logan County Conservation Dist. v. Pleasant Oaks Homeowners Ass'n*, 2016 OK 65, ¶14, 374 P.3d 755, 762. The primary objective is to determine the intent of "the parties at the time of the original conveyance." *Id.* And if the instrument creating the easement uses "plain and unambiguous" language, and there is no uncertainty in the language regarding the parties' intent, then "the intent of the parties is to be determined by the language of the written instrument alone." *Id.* (citing *Beattie*

v. Grand River Dam Auth., 2002 OK 3, ¶12, 41 P.3d 377, 382; *Johnson v. Butler,* 1952 OK 207, 245 P.2d 720, 722).

¶12 We agree that an appurtenant easement cannot be used to serve property other than the dominant estate, unless otherwise provided. *Beattie*, 41 P.3d at 385 n.8. But the deed of dedication made the following provision for properties to the east and west of Flynn Plaza (emphasis added):

> The owner hereby grants and establishes perpetual non-exclusive mutual access easements depicted on the accompanying plat as "Mutual Access Easement" for the purposes of permitting the owner of each lot, their grantees, tenants, invitees, guests, successors and assigns to have vehicular and pedestrian access and passage within FLYNN PLAZA and to and from E. 71st Street South over, on and across the areas within each lot subject to a mutual access easement and to permit access to and from the properties to the East and West of FLYNN PLAZA.

In addition, this language permits the owner of each lot, which includes the School District as owner of lot 5, as well as the owners' invitees and guests, to have access to the easement "over, on and across the areas within each lot[.]" Travelers coming from the Tulsa Union property are the invitees and/or guests of the owners of lot 5, the School District. And use of the easement to permit access to and from the properties to the east was contemplated in the deed of dedication, based on the easement language provided in the deed itself.

¶13 The district court's grant of summary judgment was based on the language in the deed of dedication. *Logan County Conservation Dist.*, 374 P.3d at 762. And because the deed itself provides "otherwise," the appurtenant easement in this case is not limited to the service of only the dominant estate. The district court's summary judgment decision with respect to this issue is affirmed.

¶14 TSG also asserts the School District's use of the easement and the manner in which it has directed traffic from the Tulsa Union School property, over lot 5, to the easement unreasonably burdens the servient estate due to easement overuse. "The use made by the dominant estate owner must not unreasonably overburden the servient estate[, which in this case includes TSG's property at lots 2 and 3]. *Hayes v. City of Loveland,* 651 P.2d 466, 468 (Colo. Ct.App.1982); *Thompson on Real Property,* §60. 04(a)(1); *see Shell Pipe Line Corp. v. Curtis,* 1955 OK 212, 287 P.2d 681, 685." *Burkhart v. Jacob,* 1999 OK 11, ¶11, 976 P.2d 1046, 1049. "Whether or not a use is reasonable is a question of fact. The burden of proof rests with the party relying on the easement[.]" *Burkhart,* 976 P.2d at 1050.

¶15 The Oklahoma Supreme Court outlined several factors to consider in determining the reasonableness of the proposed use of the easement:

> (1) the purpose of the easement;
>
> (2) the new use compared to the past use, taking into account the purpose of the land and the language granting the easement;
>
> (3) the physical character of the easement;
>
> (4) the burden on the servient land; and
>
> (5) any other relevant factors.

Burkhart, 976 P.2d at 1050 (citing *Hayes*, 651 P.2d at 468). Burdens on the servient estate include such things as:

> (1) decreased property value;
>
> (2) increased noise and traffic or interference with the servient owner's peace and enjoyment of the land; and
>
> (3) physical damage to the servient estate.

Id. (citing *Shell Pipe Line Corp. v. Curtis,* 1955 OK 212, 287 P.2d 681, 685; *Swensen v. Marino*, 306 Mass. 582, 29 N.E.2d 15, 17 (1940)).

¶16 From the record provided, there is considerable evidence that current and more recent use and traffic to the easement is different than past use and traffic patterns, including the configuration of pathways to the easement, increasing traffic, and the closing off of other access points that were at one time available. For example, prior to the construction of the roadway extension on lot 5, there was an access point to 71st street over what was called the Sam's Club Permanent Easement. The Sam's Club easement, which had been in use for a number of years, was blocked by the School District before the construction of the roadway extension, effectively cutting off access to 71st Street along that route. Shortly thereafter, construction of the roadway extension over lot 5 directed traffic to the mutual access easement, giving the Tulsa Union property access to 71st

street through Flynn Plaza, instead of over the Sam's Club easement. There may also be fact issues to consider regarding the physical character of the mutual access easement, as TSG claims the School's more recent and frequent use, since the construction of the roadway extension, has caused damage to the easement at a rate in excess of that which was experienced prior to the closing of the Sam's Club easement and the construction of the roadway extension. TSG has also presented evidence that the purpose of the easement is not facilitated by the School District's current use and roadway extension over lot 5.

¶17 The School District disputes use of the roadway extension or the blocking of other easements has altered the traffic patterns to and from the easement in a manner that has caused any undue burden on the mutual access easement. The School also argues its current use of the easement is compatible with the access that was contemplated in the deed of dedication.

¶18 In granting summary judgment below on the issue of the School District's reasonable use of the mutual access easement, the district court essentially determined the School District's use was reasonable as a matter of law; and the district court lists a number of factors to support its summary judgment decision on this fact question. However, TSG has presented sufficient facts at this time to show traffic increase and damage to the servient estate to a degree that warrants a hearing on this fact issue; this is especially true because the burden to show the use is reasonable rests on the School District. Under the facts of this case, in which the roadway extension was built to lead the considerable Tulsa Union school traffic directly to the mutual access easement and the fact other access points were closed off in favor of funneling traffic to the mutual access easement, as well as facts that may implicate the factors outlined in *Burkhart*, the court cannot determine as a matter of law upon the record provided that the School District's use is reasonable and does not overburden the easement. Whether or not the use is reasonable and whether or not the burden is too great are questions of fact both parties will need to present to the finder of fact below. *Burkhart*, 976 P.2d at 1050. The granting of summary judgment upon this issue was premature.

¶19 TSG also argues that the School District is using lot 5 in an unlawful manner. Lot 5 is categorized for "Use Unit 11" under the terms of the City of Tulsa zoning code, which permits low intensity uses such as a light office facility use for the lot 5 property.[5] TSG asserts that by building the roadway extension so that the Tulsa Union school can utilize lot 5 for traffic flow, the School District has effectively converted the use of lot 5 from a low intensity use permitted by Use Unit 11, to a property that is operated for public school use, under a Use Unit 5 categorization for which the property is not currently zoned. The record indicates the School District sought to rezone lot 5 for school use to replace the Unit 11 zoning restriction with a Unit 5 designation, but the lot was not rezoned and remains a Use Unit 11 property.

¶20 The language provided in granting the mutual access easement does not limit easement access based on compliance with zoning requirements. Instead, the easement is framed in terms of the property ownership of each lot. For this reason, it is not clear from the deed of dedication or the remaining record available that violating the restrictions of use foreclose an owner's ability to access the easement. Although such violations may effect the court's analysis with respect to the fact questions of reasonable use and burdening the easement, the deed does not actually prohibit use of the mutual access easement based on zoning violations.[6]

¶21 Whether the School District is using lot 5 in violation of zoning ordinances is not, in itself, evidence that the School District has violated the easement or is engaged in easement misuse. TSG's attempt to directly equate a zoning violation, if in the event there is one, with a violation of the terms of the easement does not appear warranted under the language provided in the deed of dedication.

¶22 For the reasons provided herein, this court finds the appurtenant easement is not limited to only the service of the dominant estate, as the deed of dedication provides access to the easement for invitees and guests of the property owners and makes provisions for travel from properties to the east and west of Flynn Plaza. With respect to the district court's finding that the use by the School District is reasonable and does not burden the easement, TSG has presented a fact question regarding the School District's reasonable use of and burden on the easement that cannot be answered as a matter of law on the record provided.

¶23 The summary judgment order of the district court is AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

BELL, P.J.; and BUETTNER, J., concur.

Larry Joplin, Judge:

1. The district court's summary judgment order makes reference to "the amended easement agreement." It should be noted the parties dispute the validity and effectiveness of the amended agreement. Upon the record provided, the amended agreement is not in force and effect, as it lacks the consent of the other lot owners and was not filed with nor approved by the city authorities prior to TSG's purchase of lots 2 and 3.

2. It should be noted that TSG's rights and obligations, as well as the School District's, with respect to the easement are conferred by the deed of dedication, which must serve as the seminal "gauge of the parties' intent." *Beattie v. Grand River Dam Auth.*, 2002 OK 3, ¶12, 41 P.3d 377, 382. As a result, the intention of the parties "must be ascertained solely from the language used in the conveyance. *Messner v. Moorehead*, 787 P.2d 1270, 1990 OK 17." *Beattie*, 41 P.3d at 382. For this reason, TSG can seek to enforce the deed or the contract that conferred the easement and is not foreclosed from asserting the School District violated the easement, even if those alleged violations originated and continued prior to TSG's purchase of the servient estate.

3. An easement in gross is "by definition, useable without regard to the beneficiary's ownership or occupancy of any particular parcel of land." Restatement (Third) of Property (Servitudes) §4.11 cmt. b, (2000).

4. "...on and across the areas within each lot subject to a mutual access easement and to permit access to and from the properties to the East and West of FLYNN PLAZA." Deed of Dedication, p.10 (emphasis added).

5. "Section II. Planned Unit Development Restrictions

...

(3) The use of Lot 5, Block 1 shall be limited to the uses permitted by Use Unit 11 of the City of Tulsa Zoning Code."

Deed of Dedication, p. 7.

6. TSG may also seek relief in the event the School District is violating zoning laws as an aggrieved neighboring land owner or under the terms of the deed, which is akin to a contract between TSG and the School District. *Garrett v. City of Oklahoma City*, 1979 OK 60, 594 P.2d 764, 765 (party aggrieved by zoning ordinance may seek injunction); *O'Rourke v. City of Tulsa*, 1969 OK 112, 457 P.2d 782 (neighboring land owners permitted to intervene in zoning case); *Logan County Conservation Dist.*, 374 P.3d at 762 (easement conferred by deed akin to contract). In either event, the scope of the School District's compliance or lack thereof with zoning regulations is an issue that would need to be addressed by both parties in the court below.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, July 5, 2018

C-2017-184 — Charles Franklin Morgan, Petitioner, entered a plea of guilty to Count 1, second degree burglary, in Case No. CF-2015-73; and Count 1, second degree burglary, and Count 2, grand larceny in Case No. CF-2015-121, in the District Court of Ottawa County. The Honorable Robert G. Haney, District Judge, found Petitioner guilty in each count after former conviction of two or more felonies, and deferred sentencing pursuant to an agreement for concurrent twenty year suspended sentences upon successful completion of drug court, or three concurrent life sentences, restitution, assessments, and costs, upon failure to complete the program. The State subsequently moved to terminate Petitioner's participation in drug court and proceed to sentencing. The trial court heard evidence, sustained the motion to terminate, and sentenced Petitioner to concurrent terms of life imprisonment, a $1,000.00 fine in each count, $6,100.00 restitution and other assessments, and one year of post-imprisonment community supervision. Petitioner filed a timely motion to withdraw the plea. The court appointed new counsel for the motion to withdraw, which it denied after hearing. Petitioner now seeks the writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs in results; Rowland, J., concurs.

F-2017-269 — On October 21, 2015, Appellant Jesse Bowden stipulated to an application to revoke in Delaware County District Court Case Nos. CF-2010-439, CF-2011-11 and CF-2011-74. Appellant was admitted to the Delaware County Drug Court Program pursuant to a Drug Court Plea Agreement and his sentencing was delayed. July 26, 2016, the State filed an application to terminate Appellant's participation in Drug Court. Following a hearing on the application, the Honorable Robert G. Haney, District Judge, sustained the State's application and sentenced Appellant pursuant to his Drug Court Plea Agreement. Appellant appeals. The termination of Appellant's participation in Drug Court is AFFIRMED. Opinion by: Hudson, J., Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

RE-2017-54 — Marquise Allen, Appellant, appeals from the revocation of his eight year suspended sentences in Case Nos. CF-2007-5433 and CF-2007-5434 the District Court of Oklahoma County, by the Honorable Jerry D. Bass, District Judge. AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

RE-2016-1123 — Jay Edward Buza, Appellant, appeals from the revocation in full (6 years and 185 days) of his suspended sentence in Case No. CF-2015-6927 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concu;.

Thursday, July 12, 2018

F-2017-628 — On November 25, 2015, Appellant Daniel Lee Roshto stipulated to the motion to revoke filed in Case No. CF-2013-324 and entered a plea of guilty to the charges in Case No. CF-2015-339. Appellant was admitted to the Beckham County Drug Court Program pursuant to a Drug Court Plea Agreement and his sentencing was delayed. On April 5, 2017, the State filed an application to terminate Appellant's participation in Drug Court. Following a hearing on the application, the Honorable F. Douglas Haught, District Judge, sustained the State's application and sentenced Appellant pursuant to his Drug Court Plea Agreement. Appellant appeals. The termination of Appellant's participation in Drug Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

RE-2016-642 — On January 28, 2011, Appellant William O'Dell Sherman, represented by counsel, entered a guilty plea to Delivery of a Counterfeit Bill in Muskogee County Case No. CF-2009-985. Sherman was sentenced to seven (7) years, all suspended, subject to terms and

conditions of probation. On September 26, 2013, the State filed an Application to Revoke Sherman's suspended sentence. On July 7, 2016, the District Court of Muskogee County, the Honorable Mike Norman, District Judge, revoked Sherman's suspended sentence in full. The revocation of Sherman's suspended sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., dissents; Rowland, J., concurs.

J-2018-402 — M.T.G., Appellant, appeals from an order entered by the Honorable Walter Hamilton, Special Judge, granting the State's motion to sentence juvenile as an adult in Case No. JDL-2017-24 in the District Court of McCurtain County. The State confessed error that Appellant should have been charged as a youthful offender rather than as a juvenile. REVERSED and REMANDED to the District Court. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-281 — Appellant, John Scott Floro, was tried by jury and convicted of Forcible Sodomy in District Court of Payne County Case Number CF-2016-443. The jury recommended as punishment imprisonment for eight (8) years. The trial court sentenced Appellant accordingly and imposed a post imprisonment supervision period of two (2) years. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-457 — Alan Eugene Strickland, Appellant, was tried by jury for the crime of First Degree Malice Murder, After Conviction of Two or More Felonies, in Case No. CF-2015-7080 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Alan Eugene Strickland has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., CONCUR; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., recuse.

Thursday, July 19, 2018

F-2017-245 — Arthur Dawayne Taylor, Appellant, was tried by jury for the crime of Robbery with a Firearm (Counts 1 and 2), Larceny of Automobile (Count 5), Knowingly Concealing/Receiving Stolen Property (Count 6), Possession of a Firearm AFCF (Count 7), Eluding a Police Officer (Count 8), Obstructing an Officer (Count 9), and Resisting an Officer (Count 10) in Case No. CF-2016-2536 in the District Court of Tulsa County. The jury returned verdicts of guilty and set punishment at thirty-two years imprisonment and a $5,000.00 fine on each of Counts 1 and 2, ten years imprisonment and a $1,000.00 fine on Count 5, five years imprisonment and a $100.00 fine on Count 6, fifteen years imprisonment on Count 7, one year in the county jail and a $750.00 fine on Count 8, six months in the county jail and a $250.00 fine on Count 9, and eight months in the county jail on Count 10. The Honorable Doug Drummond, District Judge, sentenced Taylor accordingly, ordering the sentences imposed on Counts 2, 5, 6, 7, 8, 9, and 10, to run consecutively with the sentence imposed on Count 1 and concurrently with each other. From this judgment and sentence Arthur Dawayne Taylor has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

RE-2017-0488 — Donald Leamon Hughart, Appellant, entered a plea of guilty on October 1, 2003, in Muskogee County District Court Case No. CF-2003-59 to Arson First Degree. He was sentenced on December 3, 2003, to thirty-five years in the Department of Corrections, with the latter half of the sentence suspended. Appellant's sentence in CF-2003-59 was modified on October 12, 2004, to fifteen years imprisonment and twenty years suspended, with credit for time served. On January 24, 2008, post-conviction relief was granted and Appellant's sentence in CF-2003-59 was commuted to thirty years, suspended. On December 29, 2008, Appellant stipulated to the State's allegation in the application to revoke Appellant's suspended sentence. Appellant was ordered to enter an alcohol rehab program and the revocation hearing was continued. On May 11, 2012, revocation was taken under advisement. On September 15, 2011, in Muskogee County District Court Case No. CF-2011-813, Appellant was charged with Plan/Conspire/Endeavor Act of Violence, a felony, after three prior felony convictions. Appellant entered a plea of guilty on July 24, 2013. He was sentenced to twenty years, suspended, with rules and conditions of probation, and a fine of $1,000.00. The State filed an application to revoke Appellant's suspended sentences in Case Nos. CF-2011-813 and CF-2003-59 on May 9, 2014. Following a

revocation hearing on October 6, 2014, six months of Appellant's suspended sentences were revoked. On December 16, 2016, the State filed another application to revoke Appellant's suspended sentences in both cases. At a revocation hearing held on March 20, 2017, Appellant stipulated to the violations. On April 12, 2017, The State filed a fourth application to revoke in Case No. CF-2003-59 and a third application to revoke in Case No. CF-2011-813. Following a revocation hearing on May 1, 2017, before the Honorable Michael Norman, District Judge, Appellant was found in violation of the rules and conditions of probation. The sentences were revoked in full and ordered to run concurrently. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2017-464 — Lloyd Ray Conner, Sr., Appellant, was tried by jury for the crime of Kidnapping, After Former Conviction of a Felony (Count 1), Rape-First Degree (By Force or Fear), After Former Conviction of a Felony (Count 2), and Burglary in the First Degree, After Former Conviction of a Felony (Count 4) in Case No. CF-2015-471 in the District Court of Washington County. The jury returned verdicts of guilty and set punishment at twenty years imprisonment and a $5,000.00 fine on Count 1, thirty years imprisonment and a $7,000.00 fine on Count 2, and fifteen years imprisonment and a $3,000.00 fine on Count 4. The trial court sentenced accordingly. Judge DeLapp ordered Conner's sentences on Counts 1, 2, and 4 to run consecutively to each other. From this judgment and sentence Lloyd Ray Conner, Sr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-348 — Johnny William Burnett, Appellant, was tried by jury for the crimes of Lewd or Indecent Acts to a Child under 16 (Counts 1 & 2) and Forcible Oral Sodomy (Counts 7 & 8) in Case No. CF-2015-460 in the District Court of Cleveland County. The jury returned a verdict of guilty and set punishment at twenty-five years imprisonment on each of Counts 1 and 2, and twenty years imprisonment on each of Counts 7 and 8. The trial court sentenced accordingly and ordered the sentences on Counts 1 and 2 to be served consecutively to Counts 7 and 8, but concurrently with each other. From this judgment and sentence Johnny William Burnett has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2017-358 — Kevin Lee Cassil, Appellant, appeals from the revocation in full of his suspended sentences totaling twenty-seven years in Case No. CF-2002-918 in the District Court of Oklahoma County, by the Honorable Cindy H. Truong, District Judge. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Part/Dissents in Part; Rowland, J., Concurs.

C-2016-1167 — Gerald Dwayne Jackson, Petitioner, entered a blind guilty plea, in Case No. CF-2012-587, in the District Court of Oklahoma County, before the Honorable Cindy H. Truong, District Judge, to Count 1: First Degree Murder; Count 2: First Degree Burglary, After Former Conviction of Two or More Felonies; Counts 3, 4 & 5: Kidnapping, After Former Conviction of Two or More Felonies; Counts 6 & 7: Robbery with a Firearm, After Former Conviction of Two or More Felonies; and Count 9: Possession of a Firearm, After Prior Felony Conviction. After a hearing Judge Truong sentenced Petitioner to life without the possibility of parole on Count 1; forty-five years imprisonment on Count 2; forty years imprisonment on Count 3; thirty years imprisonment on each of Counts 4, 5, 6, and 7; and ten years imprisonment on Count 9. The court ordered Count 1 to be served concurrently with all the other counts. Judge Truong further ordered Counts 2 and 3 to be served consecutively to each other, but concurrently with all the other counts. Petitioner was also ordered to pay various costs and fees. Petitioner filed multiple *pro se* motions to withdraw his plea and after a hearing before Judge Truong, Petitioner's request was denied. Petitioner now seeks a writ of certiorari. Petitioner also submitted an *Application for Evidentiary Hearing on Sixth and Fourteenth Amendment Claims*. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Jackson's *Application for Evidentiary Hearing on Sixth and Fourteenth Amendment Claims* is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Recused.

C-2017-1124 — J.D., Petitioner, entered a plea of guilty as a Youthful Offender to Count 1, robbery with a dangerous weapon and Count 2, possession of a firearm after former juvenile adjudication in Case No. YO-2015-27 in the District Court of Tulsa County. The Honorable James M. Caputo, District Judge, accepted the plea and sentenced Petitioner to fifteen (15) years imprisonment and a fine of $500.00 in Count 1, and ten (10) years imprisonment and a $500.00 fine in Count 2, to be served concurrently in custody of the Office of Juvenile Affairs (OJA) pending review of his progress as a Youthful Offender. Shortly after his release from OJA custody in December, 2016, Petitioner was arrested and charged with committing additional felonies. After a Youthful Offender review hearing, the trial court bridged Petitioner to serve the foregoing sentences in the Department of Corrections. Petitioner filed a timely motion to withdraw the 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., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 2)
Tuesday, July 10, 2018

115,110 — Frances Marlene Pryor and Patrick C. Pryor, Plaintiffs/Appellees, v. Accurate Home Inspections, Inc., an Oklahoma Corporation, Defendant/Appellant, and Fran E. Byerly, Jeff Phillips, Aaron Kelcy d/b/a Kelcy Appraisal Group and Prime Lending, a Texas Corporation, Defendants. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. Defendant, Accurate Home Inspections, Inc., (AHI) appeals the trial court's Order Denying Defendants, Accurate Home Inspections, Inc. and Jeff Phillip's, Motion to Compel Arbitration in this negligence and breach of contract action. This Court agrees with the trial court and finds *Amundsen v. Wright,* 2010 OK CIV APP 75, 240 P.3d 16, analogous to the present action. Here, the parties agreed to binding arbitration per the "commercial rules of the Construction Arbitration Services, Inc." At the time the parties entered into the Inspection Agreement, CAS did not exist and, therefore, there were no rules of CAS to follow. Thus, there could not be "commercial rules" of CAS for the parties to follow because CAS was a non-existent entity at the time Plaintiffs and AHI contracted. Based on the foregoing, this Court finds the trial court did not err in denying AHI's motion to compel arbitration. The trial court's Order Denying Defendants, Accurate Home Inspections, Inc., and Jeff Phillip's, Motion to Compel Arbitration is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Goodman, J., concurs, and Fischer, P.J., dissents.

Wednesday, July 18, 2018

116,750 — Brown & Gould, PLLC, an Oklahoma Professional Liability Company, Plaintiff/Appellee, vs. Nathanael Tanner, Defendant/Counterclaim Plaintiff/Appellant, and Melissa Tanner, Counterclaim Plaintiff/Appellant, vs. Brown & Gould, PLLC, Dane J. Flesch; George H. Brown; Tina Brown, Counterclaim Defendants/Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge. Nathanael and Melissa Tanner appeal a trial court order granting summary judgment in favor of Brown & Gould, PLLC, Dane J. Flesch, George H. Brown, and Tina Brown. The order from which the Tanners seek appellate relief does not resolve all of the issues in the case because it reserves the issue of damages for later determination. It further appears that the trial court's determination of damages has not become final because Nathanael Tanner's petition for rehearing remains pending. The Tanners' lack of response to our show cause order gives us no jurisdictional basis to consider this appeal, and it must be dismissed as premature for lack of an appealable order. APPEAL DISMISSED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Monday, July 9, 2018

115,175 — In Re the Marriage of Tortorello: Rarchar S. Tortorello, Petitioner/Appellant, vs. Susan A. Queyrel-Tortorello, Respondent/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Stephen Bonner, Trial Judge. Petitioner/Appellant Rarchar S. Tortorello (Husband) appeals from a decree of divorce (Decree) entered on July 5, 2016 regarding the marriage between Husband and Respondent/Appellee Susan A. Queyrel-Tortorello (Wife), ordering property division, alimony in lieu of property division, and awarding support alimony to Wife. The parties were married on May 10, 2012, and separated on or

about October 6, 2014. There were no children of the marriage. Husband filed a petition for divorce on October 6, 2014. Wife responded, requesting support alimony. A temporary order hearing was held, and the trial court did not award temporary alimony or address Husband's allegations that Wife removed funds from the parties' bank accounts. Wife was allowed entry to the parties' home to retrieve her personal items and business and financial documents. At a resolution conference held on January 22, 2016, the parties informed the court that the following were still at issue: real property, personal property, support alimony, and debts. WE AFFIRM IN PART, REVERSE IN PART, AND REMAND WITH INSTRUCTIONS. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

115,645 — Dustin Michael McCabe, Plaintiff/Appellant vs. Brittany Lomeli, Defendant/Appellee. Appeal from the District Court of Pottawatomie County, Oklahoma. Honorable Dawson Engle, Judge. Plaintiff/Appellant Dustin McCabe (Father) appeals a trial court order that adjudicates his paternity to two minor children born during his seven-year relationship with Defendant Brittany Lomeli (Mother), awards sole custody to Mother and standard visitation with Father, and orders him to pay monthly child support. After review of the record and evidence, we AFFIRM the custody decision, REVERSE the child support, and REMAND WITH FURTHER INSTRUCTIONS. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

(Division No. 4)
Thursday, July 12, 2018

116,478 — Stacey Dianne Sanders, f/k/a Stacey Dianne Post, Petitioner/Appellant, v. Leslie Aaron Post, Respondent/Appellee. Appeal from an Order of the District Court of Pittsburg County, Hon. Mindy Beare, Trial Judge, granting Leslie A. Post's motion to modify custody. The parties presented conflicting evidence regarding the child's best interests. Confronted with conflicting evidence, the trial court was in a much better position to decide which parent should be awarded as primary custodial parent. Because Stacey Dianne Sanders has failed to show that the trial court abused its discretion, we affirm the trial court's determination. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Thursday, July 19, 2018

116,496 — Western Sportsman Club, Inc., Plaintiff/Appellee, v. Bigler Jobe Stouffer, Defendant/Appellant, and Transformations Int. Inc., Intervenor/Appellee. Appeal from an Order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. The defendant, Bigler Joe Stouffer (Stouffer), appeals the trial court's Order denying his motion to reconsider the Order of summary judgment for the plaintiff, Western Sportsman Club, Inc. (Club). In summary, under the record before this Court and in light of the applicable review standards, there are questions of fact that precluded this grant of summary judgment. Therefore, the trial court erred by denying the motion to reconsider and the judgment is reversed. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING

(Division No. 1)
Tuesday, July 24, 2018

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. Appellant's Petition for Rehearing, filed July 13, 2018, is *DENIED*.

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. Defendant/Appellee George L. Mothershed's Petition for Rehearing, filed July 2, 2018, is *DENIED.*

(Division No. 2)
Thursday, July 19, 2018

116,185 — In the Matter of the Estate of Frank Nash, Deceased, Hewlett Nash, Appellant, vs. Glendell L. Gaskins, Appellee. Appellant's Petition for Rehearing is hereby *DENIED.*

(Division No. 3)
Tuesday, July 24, 2018

116,569 — Nationstar Mortgage, LLC, Plaintiff/Appellee, vs. Kathalene G. Terrell, Defendant/Appellant. Appellant's Petition for Rehearing and Reconsideration and Brief in Support Thereof, filed July 9, 2018, is *DENIED.*

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OKLAHOMA STATE BUREAU OF INVESTIGATION VACANCY ANNOUNCEMENT POSTING # 2018-12-U POSITION TITLE: ASSISTANT GENERAL COUNSEL. Salary: $50,000- 72,000 with state employment benefits. Final salary commensurate with experience and qualifications Location: OSBI headquarters, Oklahoma City. The position primarily involves representation of the Oklahoma State Bureau of Investigation in expungement of criminal history arrest records litigation and in Self Defense Act representation at the district court and administrative level. Participate as a member of the legal unit staff to assist in addressing agency wide issues such as goals, budgets, legislation, etc. In addition, provide legal assistance to the OSBI chief legal counsel concerning OSBI litigation, draft and file court, legislative and administrative documents and research memoranda. Applicants should have between zero to five years' experience in the practice of law and exhibit an interest and aptitude for criminal justice law. Applicants must be admitted to the Oklahoma Bar Association. This position is established in the unclassified service. The selection process may consist of one or more of the following: oral interviews, performance examinations, written examinations and evaluations of training and/or education. Applicants meeting this criteria may apply by submitting a cover letter, resume, salary requirements and writing sample to Oklahoma State Bureau of Investigation, DeAnna Stillwell, HR Section, 6600 N. Harvey, Oklahoma City, OK 73116. Any qualified applicant with a disability may request reasonable accommodation to complete the application/interview process. The specific nature of the accommodation requested and the reason for the request should be provided at the time of initial application. Successful applicants must be willing to submit to a drug screen, polygraph examination, psychological evaluation (commissioned positions only) and a thorough background investigation. Certain events automatically disqualify an applicant, such as, felony conviction, admission of an undetected crime that, if known, would have been a felony charge, failure to pay federal or state income tax, positive confirmed drug urine test and illegal use of a controlled substance within certain time frames. Equal opportunity employer.

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DOWNTOWN OKC FIRM SEEKS EXPERIENCED FAMILY LAW PARALEGAL with minimum of 3 years' experience. College degree and paralegal certification strongly preferred. Pay is commensurate with experience. Send resume to "Box FF," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITION WANTED

SEEKING OF COUNSEL RELATIONSHIP. Well-seasoned, experienced litigator in business, probate, oil and gas and all areas of contract law, including insurance coverage opinions. Excellent brief writer with outstanding appellate record and many published opinions. Seeking either a full-time or part-time relationship with a firm preferably in the Tulsa area. Send inquires to "Box E," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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Essential "Pressure Hull" Drafting Provisions

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