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Journal

Volume 89 – No. 17 – 6/30/2018

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Oklahoma Bar Association

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2018 OK 49

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

SCAD-2018-35. June 11, 2018

ORDER

Rule 7.4 of the Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A, is hereby amended as shown with the markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on June 11, 2018.

/s/Noma D. Gurich
VICE CHIEF JUSTICE

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

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

Exhibit "A"

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

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

Exhibit "B"

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

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

2018 OK 50

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

SCAD-2018-37. June 18, 2018

ORDER

Rule 7.7 of the Rules Governing Disciplinary Proceedings, is hereby amended as shown with the markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on June 18th, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit A

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

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

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

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

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

Exhibit B

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

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

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

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

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

2018 OK 51

Juanita Nye, personal representative of the estate of Jeffrey Nye, deceased, Appellee, v. BNSF Railway Company, a foreign corporation, Appellant.

Case No. 113,142. June 19, 2018

APPEAL FROM DISTRICT COURT PONTOTOC COUNTY

Honorable Tom S. Landrith

¶0 The estate of a driver killed in a vehicle/train collision sued a railroad company in a wrongful death action. The District Court, Pontotoc County, Tom S. Landrith, entered judgment on the jury verdict finding the driver and railroad negligent and apportioned fault. The railroad appealed and this Court retained the appeal.

JUDGMENT AFFIRMED.

Douglas W. Poole, McLEOD, ALEXANDER, POWEL & APFFEL, P.C., Galveston, Texas, for Appellant.

George R. Mullican, Christopher D. Wolek, Michael P. Womack, GIBBS, ARMSTRONG, BOROCHOFF, MULLICAN & HART, P.C., Tulsa, Oklahoma, for Appellant.

David E. Keltner, pro hac vice, Marianne M. Auld, pro hac vice, KELLY, HART & HALLMAN, LLP, Fort Worth, Texas, for Appellant.

George W. Braly, William W. Speed, BRALY, BRALY, SPEED & MORRIS, PLLC, Ada Oklahoma, for Appellee.

Grant L. Davis, pro hac vice, Thomas C. Jones, pro hac vice, Timothy C. Gaarder, pro hac vice, DAVIS, BETHUNE & JONES, LLC, Kansas City, Missouri, for Appellee.

Michael M. Blue, BLUE LAW, Oklahoma City, Oklahoma, for Appellee.

COLBERT, J.

¶1 This is a wrongful death action arising from a fatal vehicle/train collision at the County Road 1660 railroad crossing in Pontotoc County. The appellant, Burlington Northern and Santa Fe Railroad Company (BNSF), appeals from the underlying judgment on a jury's verdict in favor of the appellee, Juanita Nye, in her capacity as the wife of Jeffrey Nye, the decedent, and the personal representative of her husband's estate (Nye). BNSF also appeals the post-trial order overruling its motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial. In substance, BNSF contends that federal law preempted Nye's claims, challenges the fairness of the trial proceedings and challenges the amount of damages awarded. Having retained the appeal, this Court now considers the propriety of the jury verdict/award and examines the trial court proceedings below.

I. BACKGROUND

¶2 A more detailed discussion of the disputed facts is provided in the context of the issues presented in section III, infra. On December 29, 2008, Jeffrey Nye (Driver), and his friend H.C. Rackley (Passenger), were transporting feed troughs in a trailer attached to Driver's jeep when a train, operated by BNSF, collided with Driver's jeep. Upon impact, the jeep flipped around behind the trailer and turned over. Driver and Passenger were ejected. Driver later died from his injuries. Passenger, although injured, survived.

¶3 At the time of the collision, the County Road 1660 railroad crossing was described as a "passive grade crossing"[1] equipped with at least one crossbuck sign – the familiar black-and-white, X-shaped sign that reads "RAILROAD CROSSING."

¶4 On October 29, 2009, Passenger sued BNSF, the train crew and Nye for negligence. Passenger ultimately settled his claims. On October 30, 2009, Nye's mother and representative of Nye's estate, filed an answer and a wrongful death cross-claim against BNSF and the train crew for negligence, intentional conduct for maintaining inadequate warning devices at the railroad crossing, failure to clear the right-of-way of vegetation and other obstructions, and failure to sound the train's horn. Ultimately, Juanita Nye, Jeffrey Nye's wife, was substituted as plaintiff and personal representative of Nye's estate.

¶5 BNSF denied Nye's allegations and raised several defenses, including contributory negligence, negligence per se for failing to yield the right-of-way to a plainly visible approaching train at the crossing and asserted that Nye's claim of inadequate warning devices was federally preempted.

¶6 In due course, BNSF filed various pretrial motions. One of the motions argued that federal law preempted several of Nye's claims, including the contention that BNSF failed to install adequate warning signs at the railroad crossing. Nye opposed the requested relief and raised the existence of disputed material facts regarding whether federal funds actually paid for the crossing signs at this particular intersection. In addition, Nye alleged that BNSF's evidentiary materials were insufficient to demonstrate that federal funds were actually used in the erection of the warning signs at the subject crossing. The trial court found that

there was an overwhelming factual dispute concerning whether the warning signs at the subject crossing were federally funded and denied BNSF's motion.

¶7 BNSF immediately filed an application to assume original jurisdiction and writ of prohibition, seeking review by this Court. BNSF and Nye re-urged their respective arguments made below. During oral presentation of the matter, BNSF admitted, however, that it did not have proof that the specific crossbucks at issue, here, were erected with federal funds. Further, in its brief, BNSF only claimed immunity from damages under Nye's warning device claim but not immunity from suit. This Court denied BNSF's requested relief, essentially leaving resolution of the disputed facts for a jury's determination.

¶8 BNSF filed a subsequent motion in limine in the trial court to prevent Nye from introducing evidence and arguments related to their alleged preempted warning device claim. The trial court denied BNSF's motion. BNSF then moved for a ruling in limine to exclude consideration of BNSF's net worth and financial wealth. The trial court granted that motion.

¶9 On December 2, 2013, the parties tried the case to a jury. Nye produced several fact witnesses and expert testimony that the train was not plainly visible from the road. Various witnesses testified that the view of the subject crossing was obstructed by overgrown vegetation, trees and brush. Neither Driver nor Passenger noticed the approaching train until Driver slowed down and drove onto the railroad crossing. It was not until Driver yelled "train," one second before impact, that Passenger became aware of the impending collision.

¶10 Through multiple fact witnesses, Nye contended that BNSF never sounded the train's horn. In furtherance of this contention, Nye produced analysis of the train's event data recorder that the horn was not blown. BNSF refuted this claim.

¶11 On December 17, 2013, the jury returned an 11-1 verdict, finding BNSF and Nye negligent and apportioned 65% fault to BNSF and 35% fault to Nye. The jury awarded $14,813,000 in damages. On April 21, 2014, the trial court entered judgment on the jury's verdict and reduced the jury's award for Nye's contributory negligence to $9,628,450 in damages and $1,103,471.19 in prejudgment interest and costs for a total award of $10,731,921.19 plus post-judgment interest. BNSF, through its own legal strategies, decided not to seek a remittitur.

¶12 Subsequently, BNSF filed a Motion for Judgment Notwithstanding the Verdict (JNOV), and Alternative Motion for New Trial on July 14, 2014. The trial court entered its order overruling BNSF's motion on July 21, 2014. BNSF then filed this appeal. Nye answered contending essentially that the jury verdict/award should be upheld. This Court retained the appeal.[2]

II. STANDARD OF REVIEW

¶13 BNSF's complained errors are nothing more than a futile attempt at a re-trial by appellate brief. Its approach to the numerous questions of material fact presented below is to deem each of them conclusively established as a matter of law and therefore beyond the purview of the jury as the finder of fact. The gravamen of BNSF's appeal is two-fold: (1) whether BNSF is entitled to judgment as a matter of law, or whether instead, the trial court properly submitted the factual issues to the jury; and (2) whether, under the evidence presented, the measure of damages awarded was reasonable.

¶14 When legal actions have been tried to a jury and judgment entered therefrom, this Court is constrained to review the jury's verdict as conclusive to all disputed facts and conflicting statements if "there is any competent evidence reasonably tending to support the verdict." Barnes v. Okla. Farm Bureau Mut. Ins. Co., 2000 OK 55, ¶ 3, 11 P.3d 162, 166; see also, Florafax Int'l, Inc. v. GTE Mkt. Res., Inc., 1997 OK 7, ¶ 3, 933 P.2d 282, 287. In a jury-tried action:

> an appellate court's duty is not to **weigh the evidence** and determine which side produced evidence of greater weight, i.e. it is not an appellate court's function to decide where the **preponderance of the evidence lies** – that job in our system of justice has been reposed in the jury. In a jury-tried case, it is the jury that acts as the exclusive arbiter of the credibility of the witnesses. Finally, the sufficiency of the evidence to sustain a judgment in an action of legal cognizance is determined by an appellate court in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it.

Id. (emphasis added). Thus, "[w]here competent evidence was presented at trial to support reasonable findings as to those material fact questions relating to the claim in suit and no reversible error is otherwise shown, an appellate court must affirm a judgment based on a jury verdict . . . ." Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 3, 121 P.3d 1080, 1088. Stated another way – neither the trial court nor this Court will sit as thirteenth juror and substitute its opinion for that of a jury merely because the court could have decided or viewed disputed material fact questions differently. See Currens v. Hampton, 1997 OK 58, ¶ 9, 939 P.2d 1138, 1141. Those general principles control our review here.

¶15 On appeal, BNSF re-urges the challenges raised in its motion for JNOV. The appellate standard for reviewing the trial court's ruling on a motion for JNOV is identical to the standard utilized by the trial court. See First Nat'l Bank in Durant v. Honey Creek Entm't Corp., 2002 OK 11, ¶ 8, 54 P.3d 100, 103. "We consider as true all evidence favorable to the non-moving party together with all inferences that may be reasonably drawn therefrom, and we disregard all conflicting evidence favorable to the moving party." Id. A motion for JNOV will not be granted unless there is an entire absence of proof on a material issue. Id. We reiterate, we are guided by those principles here.

III. DISCUSSION

A. BNSF's Preemption Defense

¶16 The background and purpose of the federal law relating to the Railroad Safety Act of 1970 (FRSA), codified at 49 U.S.C. § 20101 (2000), et seq., was to promote "safety in every area of railroad operations and reduce railroad-related accidents and incidents." Id. § 20101. The FRSA also directed the Secretary of Transportation to address safety problems at grade crossings and "prescribe regulations and issue orders for every area of railroad safety." Id. § 20103(a).[3]

¶17 In 1973, the Federal Highway Safety Act (FHSA), which created the Federal Railway-Highway Crossings Program (the Crossings Program) 23 U.S.C. § 130 (2012 & Supp. 2015), made federal funds available to participating States for improvements and elimination of hazards at railroad grade crossings. Essentially, a State's receipt of federal aid was conditioned upon a State "conduct[ing] and systematically maintain[ing] a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish[ing] and implement[ing] a schedule of projects for this purpose." 23 U.S.C. § 130(d). In addition, federal aid was conditioned upon a State's compliance with certain standards prescribed in the Federal Highway Administration's Manual. See 23 C.F.R. § § 646, 655, 924.

¶18 The United States Supreme Court and the Tenth Circuit hold uniformly that when federal funds pay for the installation of warning devices at a railroad crossing – that is, when a State participates in a Crossing Program – the FRSA[4] and its regulations preempt any state law tort claim challenging the **adequacy** of those signs and crossbucks as a matter of law. Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 352-54 (2000) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 670-71 (1993)) (emphasis added). The standards for preemption are stringent. CSX Transp., 507 U.S. at 658. But, there is a presumption against a regulation's preemptive effect. Id. at 658-59.

¶19 This Court extensively discussed the U.S. Supreme Court's stringent preemption rationale behind the FRSA and ultimately delineated guidelines for determining the point in time (i.e. what constitutes federal participation) when state law actions challenging the adequacy of railroad crossing devices are preempted in Akin v. Mo. Pac. R.R. Co., 1998 OK 102, 977 P.2d 1040.[5]

¶20 Upon certiorari review, this Court examined Congress's intent to preempt and stated:

> Before pre-emption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers pre-emption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial period of time. . . . To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

Id. ¶ 27, 977 P.2d at 1050. Applying a common sense rationale, this Court concluded that short

of installing fully-funded operational, warning devices as a precondition to triggering preemption, the public would be bereft of either state or federal law protection for the period between federal approval and actual warning device installation. See id. ¶ 28, 977 P.2d at 1051. Surely, Congress did not intend for a "no man's land" to exist at grade crossings for an indefinite amount of time, during which the public is protected neither by the federally mandated or approved warning devices nor by judicial recourse for injuries sustained by their absence. Id. ¶ 31, 977 P.2d at 1053. In so concluding, it was error for the trial court to preempt the widow's inadequate signalization claim sans forensic combat that the crossing consisted of federally funded operational warning devices. See Akin, 1998 OK 102, 977 P.2d 1040. Simply put – the railroad failed to establish the critical elements of the preemption defense as a matter of law.

¶21 This Court's landmark holding in Akin is clear: A railroad cannot avail itself of a regulation's preemptive effect over a state tort claim that the signs, markings and warning devices protecting a crossing were inadequate, unless the railroad can **first demonstrate** that federally funded warning devices were installed and operational before the accident occurred. Id. ¶ 31, 977 P.2d at 1053. Our pronouncement in Akin, conforms to extant Supreme Court jurisprudence. Id. ¶ 30, 977 P.2d at 1052. Here, BNSF seeks to avail itself of the preemption defense against Nye's inadequate signalization claim. As County Road 1660 was a passive, or "crossbuck-only," crossing, the pivotal issue, here, is whether federal funds participated in the installation of the crossbucks.

¶22 The record reveals the existence of a Crossbuck Project Agreement from 1978 to 1980. The standard specifications of the agreement required participating railroad crossings to install two crossbucks. At trial, conflicting evidence was introduced concerning the funding source of the warning signs at the subject crossing. Nye introduced evidence that the characteristics of the crossbucks did not comply with the standard specifications required to participate in the federal program. Specifically, the federally funded project required two crossbucks to be placed at every crossing. Yet, a factual dispute existed (among others) as to whether one or two crossbucks were installed and whether the crossbucks were installed during the federal program. It is undisputed that the federal funds project was completed on February 29, 1980. But, four years following its completion, the Oklahoma Department of Transportation (ODOT) had yet to receive any information from the railroad as to whether or where federally funded crossbucks had been installed. Furthermore, testimony revealed that the crossing inventory from the United States Department of Transportation did not indicate the expenditure of federal funds on the subject crossing as the crossing was only equipped with one crossbuck from 1970 to 1987 which was seven years after the deadline for completion of the federal program.

¶23 BNSF introduced the testimony of two witnesses: Hal Hofener, a retired ODOT engineer; and Ernest Wilson, a former employee of BNSF's predecessor. Mr. Hofener testified that he oversaw the rail crossing program implemented after the passage of the FRSA and the FHSA. Yet, Mr. Hofener was unable to affirm that he had personal knowledge about the crossings; testified that he never visited the subject crossing and admitted that not all crossings in Pontotoc County contained federally funded warning signs. Mr. Hofener also swore by affidavit that the subject crossing only had one crossbuck but later testified that he was mistaken and that the subject crossing had two crossbucks. The jury also heard testimony that Mr. Hofener, a fact witness, was billing BNSF between $125 to $175 an hour throughout the litigation. The other witness, Mr. Wilson, testified that he neither could recall the subject crossing nor had any personal knowledge about the crossing. In addition, Mr. Wilson refused to testify as to the amount he was being paid for his testimony.

¶24 It was uncontested that if the crossbucks were in fact installed after February 29, 1980, the crossbucks could not have been part of the federally funded project. But, there was an evidentiary gap linking FHSA's approval and funding of the federal project to the specific crossing at issue here. So, before BNSF could successfully avail itself of a preemption defense, BNSF had the burden to demonstrate, as a matter of law, that the warning signs erected at County Road 1660 were federally funded. Id. ¶ 31, 977 P.2d at 1053. Considering all the evidence and the parties' testimony, the trial court concluded that material facts existed as to whether federal funds participated in the installation of the warning devices; and, thus, properly submitted this matter to the jury.

B. Train Visibility and Audible Horn

¶25 Although not stated precisely, the essence of BNSF's challenge is that Nye's failure to yield the right-of-way to an approaching train unequivocally constitutes negligence per se and, therefore, insulates BNSF from the legal consequences of its own lack of due care, if any. In support, BNSF relies upon Hamilton v. Allen, 1993 OK 46, 852 P.2d 697, and contends that Nye's alleged negligence per se entitles BNSF to judgment as a matter of law. We disagree.

¶26 The elements of negligence per se are three-fold: (1) the violation of a statute must have caused the injury, (2) the harm sustained must be of the type intended to be prevented by the statute and (3) "the injured party must be one of the class intended to be protected by the statute." Ohio Cas. Ins. Co. v. Todd, 1991 OK 54, ¶ 9, 813 P.2d 508, 510.

¶27 Oklahoma law, Okla. Stat. tit. 47, § 11 – 701, requires any motorist approaching a railroad grade crossing to stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad crossing. Section 11-701(A)(4) imposes a duty upon motorists to yield the right-of-way to a **plainly visible** approaching train **within hazardous proximity** to a railroad crossing.[6] Although the testimony reveals that Nye did not yield the right-of-way to BNSF, Nye defends that the train was not plainly visible, that overgrown vegetation concealed the train and the crossbuck, and that BNSF never sounded its horn to warn of its impending approach.

¶28 In Hamilton, this Court held that a motorist was negligent per se in violating section 11-701 only if the motorist's negligence directly and proximately caused the injury. Id. ¶¶ 11, 15, 852 P.2d at 669-700. It was uncontested that the "flasher warning of the approaching train was on and that the crossing gate was lowered." Id. ¶ 11, 852 P.2d at 669. In addition, it was uncontested that the plaintiff had a wide angle view of the train, the train tracks and that two other vehicles were stopped in front of the closed gate in front of the tracks. Id. ¶¶ 3, 4, 852 P.2d at 698. The plaintiff, however, stopped briefly, crossed the center line into the oncoming traffic lane, drove past the two stopped cars and around the crossing gates. Id. ¶ 4, 852 P.2d at 669. Before the plaintiff's vehicle cleared the tracks, the plaintiff was struck by the approaching train. Id.

¶29 In finding the plaintiff negligent per se, we stated "[t]he general rule is that 'the causal connection between an act of negligence and an injury is broken by the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable.'" Id. ¶ 13, 852 P.2d at 700 (citing Thompson v. Presbyterian Hosp., Inc., 1982 OK 87, 652 P.2d 260). We reasoned that a motorist, nearing a railroad crossing, "must yield the right-of-way to an approaching train, and the operator of the train can assume the vehicle will obey the law." Id. But, because the railroad could not have anticipated that the plaintiff would disregard the statute, ignore the train's warnings and attempt an unsafe crossing, the plaintiff was negligent per se and the plaintiff's negligence directly and proximately caused his injuries. Id.

¶30 Here, it is uncontested that the subject railroad crossing was a passive grade crossing, equipped with at least one crossbuck. But, conflicting evidence was introduced as to the visibility of the train, condition of the subject crossing and the crossbucks. Nye introduced evidence to demonstrate that the overgrown vegetation concealed the view of the crossbucks and the train by more than 90%. Video evidence was introduced demonstrating that a motorist's approach to the subject crossing was obstructed by trees and brush making it difficult to see a train inasmuch as a driver traveling 15 mph could not react in time to stop. Passenger testified that neither he nor Driver was aware of the approaching train until one second before impact. Nye also introduced expert and lay witness testimony that the County Road 1660 crossing was dangerous and put all drivers at risk. BNSF, on the other hand, attempted to refute Nye's claim by introducing photographic evidence of the subject crossing. Despite BNSF's contention that Hamilton is analogous to the action here, we find Hamilton patently, factually distinctive.

¶31 The facts necessary to determine a motorist's liability under section 11-701 in this case are directly in dispute. Whether Driver violated § 11-701(A), and thus, is negligent per se, turns on whether the train was "plainly visible" when Driver approached the railroad crossing. The United States Court of Appeals for the Tenth Circuit recently analyzed the "plainly visible" issue in Ross v. Burlington N. & Santa Fe Ry. Co., 528 Fed.Appx. 960 (10th Cir. 2013), which we find instructive.[7,8] In Ross, whether the plaintiff violated § 11-701(A)(4)

turned "on whether the train was 'plainly visible' when he approached the railroad crossing." Id. Because Oklahoma precedent had yet to define "plainly visible" under this statute, the Tenth Circuit turned to Texas case law noting this Court had previously analyzed § 11-701(A) using Texas case law on an identical statute. Id. at 963 (citing Akin, ¶ 42, 977 P.2d at 1055)(discussing Snodgrass v. Ft. Worth & Denver Ry. Co., 441 S.W.2d 670 (Tex.Civ.App.1969)). Utilizing the same parameters this Court previously employed, the Tenth Circuit found that "a train is not 'plainly visible' . . . unless a reasonably prudent person, situated as was the motorist and exercising ordinary care for his own safety, should have seen it." Id. Such an objective test is consistent with our long-standing jurisprudence that a motorist should "exercise the care an ordinarily prudent person would use for his own safety in the same situation and circumstances . . . ." Missouri-Kansas-Texas RR. Co. v. Harper, 1970 OK 77, ¶ 13, 468 P.2d 1014, 1019.[9]

¶32 According to Nye, the "plainly visible" issue is further compounded by BNSF's alleged failure to adequately clear the brush, trees, debris and otherwise maintain the railroad's right-of-way. Oklahoma law imposes a duty on railroads to maintain "the reasonable abatement at public crossings of trees, shrubs and other obstructions within or encroaching within a sight triangle." Okla. Admin. Code 165:32-1-11 (b). The regulation, 165:32-1-11(b), is instructive. The sight triangle is described as having a,

> beginning point from the center point of the main track and the center point of the grade crossing extending along the center of the street or roadway approach for a distance of 50 feet or to the railroad right-of-way property line, whichever is less, then extend at an angle until arriving at a point on the center of the main track 250 feet from the original beginning point.

OAC 165:32-1-3.

¶33 The parties presented conflicting evidence regarding the visibility of the train within the sight triangle. Passenger testified that there were multiple trees obstructing the crossing. In addition, many local witnesses testified that trains using the subject crossing were not plainly visible. For instance, Joseph Harrison, a life long resident who lived off of County Road 1660 for the majority of his life testified that "[y]ou can't really see through the trees" and that "[y]ou've got to get past the trees to be able to see." Deanna Jo Peterson, a fourteen-year resident testified that she "didn't allow [her three children] to go either direction on [County Road 1660] because of the safety of the crossing." Further, Dr. Kenneth Heathington, Nye's expert witness testified that the crossing was essentially blind and that at least 90% of the crossing was obstructed. According to Heathington,"[i]n my opinion as an engineer, [County Road 1660] is certainly an extra-hazardous crossing." The expert opined that the subject crossing put reasonable drivers at risk. Although BNSF presented photographic evidence of the crossing, the jury did not find that BNSF's evidentiary materials compelled the conclusion that the train was "plainly visible."

¶34 BNSF fared no better in defending Nye's claim that BNSF failed to sound an audible warning. BNSF presented testimony from its three crew member team that they met their responsibility to sound the train's horn at the crossing. However, BNSF's event data recorder indicated that no horn was blown. BNSF claimed that the reason the event data recorder indicated no horn was blown was because the horn was not connected to the event data recorder. Although BNSF presented testimony to the contrary the trooper on the scene testified that he was told by a railroad employee that there was no event data recorder on the train. Further, during the trial, the wrong event data recorder was presented for the jury's inspection. BNSF did not provide the correct event data recorder until the last day of trial.

¶35 Nye presented evidence that directly contradicted BNSF's assertions that the horn was blown. Passenger testified that, with his window rolled down half-way, he was "110 percent sure" that the train did not sound its horn. Further, several witness testimonies revealed that BNSF only sounded the train's horn "[a]bout half the time." Joseph Harrison, a resident local traveling in the vehicle behind Nye testified that he was the first person at the scene of the accident, beating even the train crew members who were walking about from the nose of the train. With his windows rolled down, Harrison stated that he did not hear the train sound its horn even though his vehicle was positioned behind Nye. He further testified that based on his past experiences, the location of his vehicle would have enabled him to hear an audible horn had it been blown. Many other local residents testified that trains

did not always sound their horns when using the crossing in question. And, a thirty-three year resident, testified that "if [she] heard a train coming and [her children] were leaving [the house] at the same time, [she] would call the school to make sure they made it."

¶36 The purpose of abating vegetation and sounding the horn, especially at a passive railroad crossing, is to maintain proper visibility and to warn motorists of an approaching train – neither of which were established here. The facts necessary to determine a violation of section 11-701, along with the issue of proximate cause and whether BNSF gave an audible warning of its impending approach were directly in dispute. The question of proximate cause is for the jury where there is competent evidence demonstrating that a motorist was not warned of a train's impending approach. Hamilton, 1993 OK 46, ¶ 17, 852 P.2d at 700 (quoting Missouri-Kansas-Texas Railroad Co. v. Baird, 1962 OK 82, 372 P.2d 847). Thus, resolution of those issues were squarely within the jury's purview. Id. ¶ 16, 852 P.2d at 700. Even if one assumes that Nye was negligent, this Court has long espoused the view that a railroad's liability is not eradicated unless the motorist's negligence was the proximate cause of the injuries. Akin, 1998 OK 102, ¶ 36, 977 P.2d at 1054.

¶37 Here, there was sufficient evidence presented at trial from which a reasonable jury could find under the circumstances that the train was not plainly visible. Thus, Nye's negligence, as determined by the jury, was not sufficient to break the causal chain and consequently was not the proximate cause of his injuries. We agree and find the existence of "competent evidence reasonably tending to support the verdict." Barnes, 2000 OK 55, ¶ 3, 11 P.3d at 166. To reiterate, this Court will not disturb a trial court's judgment entered upon the jury's resolution of factual disputes, witness credibility and the weight and value allocated to a witness' testimony where there is any competent evidence reasonably tending to support the verdict. See Pine Island RV Resort, Inc. v. Resort Mgmt., Inc., 1996 OK 83, ¶ 18, 922 P.2d 609, 613.

C. Counsel's Alleged Misconduct

¶38 BNSF next contends that Nye's counsel engaged in misconduct thereby prejudicing the jury against BNSF; and thus, resulted in a "grossly excessive verdict." Specifically, BNSF challenges Nye's counsel's statements surrounding (1) the existence and treatment of the train's event data recorder and (2) BNSF's financial wealth.

¶39 A counsel's conduct is "a matter to be left largely within the discretion of the trial judge." Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc., 1985 OK 66, ¶ 33, 713 P.2d 572, 584 (citations omitted). See also Currens, 1997 OK 58, ¶ 2, 939 P.2d at 1140. The litmus test for attorney misconduct then, is whether "counsel's remarks result[ed] in actual prejudice" as adjudged by the trial court. Id. ¶ 33, 713 P.2d at 584 (citations omitted). Ordinarily, a reviewing court will not reverse based upon alleged attorney misconduct unless such conduct "substantially influences the verdict or denies the defendant a fair trial." Id.

1. Opening/Closing Statements

¶40 BNSF contends Nye's counsel made inflammatory statements during his opening and closing remarks. Specifically, BNSF claims that Nye made "accusations" that BNSF tampered with the train's event data recorder, argued during the opening statement that "lots of things went on with this that are strange" and asserted during closing argument that "you can change the data . . ." from the train's event data recorder. "Attorneys have wide latitude in opening and closing statements, subject to the trial court's control, and limitation of the scope of the arguments is within the trial court's discretion." Covel v. Rodriguez, 2012 OK 5, ¶ 22, 272 P.3d 705, 714. It must appear that substantial prejudice resulted from the counsel's alleged misconduct in his/her argument to the jury "and that the jury was influenced thereby to the material detriment of the party complaining[]" "[i]n order for the alleged misconduct to effect a reversal of the judgment . . . ." Id. (citing Okla. Turnpike Auth. v. Daniel, 1965 OK 7, ¶ 13, 398 P.2d 515, 518). "[A]n admonition to the jury to disregard an improper argument cures any prejudice [possibly] created thereby since it cannot be presumed as a matter of law that the jury will fail to heed the admonition given by the court." Middlebrook, 1985 OK 66, ¶ 29, 713 P.2d at 583.

¶41 In reviewing BNSF's allegations in toto, this Court must use a wide lens and survey the totality of the circumstances surrounding the trial. BNSF presented conflicting testimony on how the event data recorder was handled. At the accident scene, BNSF's witness first claimed to State Trooper McKee that the train did not

have an event data recorder. BNSF later recanted and testified that the event data recorder (which did exist) was working properly. Yet, BNSF testified that the event data recorder was sent out for repair because it was not recording the horn. Upon examination, a subsequent report indicated the event data recorder neither had electrical issues nor was unplugged, although BSNF stated that the wires to the horn were not hooked up. Another BNSF witness testified that he "attempted," although unsuccessfully, to download the event data recorder on the night of the collision. It is undisputed that the event data recorder was successfully downloaded on the day following the incident. Yet, BNSF could not produce any record of the first attempted download, successful or not. Further, BNSF was unable to produce the actual event data recorder in question until the final day of trial, after several previous miscues. Finally, in contravention of its own protocol, BNSF's crew members did not provide statements to the investigating authority on the scene on the night of the wreck. These facts are definitely sufficient to create a justification for Nye's counsel to suggest during opening statement that "there's a lot of things that went on that were strange."

¶42 Next, there were multiple areas where differing testimonies were elicited as to whether the data from the event data recorder could be manipulated or misrepresented after the data was downloaded. Nye's expert, Jim Scott, testified unequivocally that the event data recorder's data could be manipulated. BNSF's witnesses generally testified that the downloaded data could not be manipulated, but acknowledged that subsequent representations of the data could vary. And, Nye's counsel highlighted the differences and conflicting evidence and testimonies regarding the same.

¶43 The jury is charged with judging the credibility and assessing the substance and demeanor of each witness. When witnesses from both sides rely on the same evidentiary materials but arrive at differing conclusions, resolution and interpretation of the factual dispute lies solely with the jury. See Covel, 2012 OK 5, ¶ 17, 272 P.3d at 712.

2. Motion in Limine

¶44 Finally, BNSF contends that Nye's counsel violated the trial court's order in limine by purposefully injecting BNSF's finances into the trial. BNSF complains that Nye's counsel asked a witness to confirm that BNSF had "$20 billion, with a 'B', in gross revenues," and elicited other allegedly prejudicial statements to show BNSF is "big and rich." Because punitive damages were not at issue, BNSF believes those statements prejudiced the jury. Nye defends that BNSF opened the door to this type of examination. We agree.

¶45 During opening statements and in presenting its case, BNSF made repeated references to its wealth and the millions of dollars spent on grade crossing programs. At Nye's counsel's request, the parties had a sidebar hearing, outside the jury's presence, on whether BNSF had opened the door and ushered in the topic of its corporate wealth. The trial court determined that BNSF had placed its wealth into evidence; and thus, permitted Nye's counsel to question the witnesses accordingly.

¶46 A motion in limine is a pretrial motion that serves to exclude prejudicial evidence from the jury's consideration. See Middlebrook, 1985 OK 66, ¶ 12, 713 P.2d at 579 (citing Bridges v. City of Richardson, 163 Tex. 292, 354 S.W.2d 366 (1962)). A trial court's ruling in limine is speculative in effect, advisory in nature. Id. We have said:

> Rulings on the motion . . . occur before the point at which the evidence would be admitted or rejected. The motion is therefore preliminary and advisory in nature until the point of trial at which the evidence would have been admitted but for the motion in limine. Only at such time can the trial judge finally determine if the questioned evidence is admissible considering the facts and circumstances of the case before him.

Id. Therefore, a court may revisit its ruling during trial. See id. Also, a motion in limine is not one-sided. A party cannot seek an order in limine to restrain an opposing party on an issue and subsequently present that same issue for the jury's consideration. This Court admonished similar conduct in Middlebrook, stating that when an appealing party invites or provokes errors, that party is not entitled to "a reversal of judgment where it does not plainly appear that the verdict was influenced by the remarks." 1985 OK 66, ¶ 31, 713 P.2d at 584.

¶47 We reiterate, the "trial court is in a better position to appraise the fairness of a proceeding before it than can be gathered by a review of the record by the appellate court . . .. [T]he

trial court is given a wide discretion and it will require a clear showing of manifest error and abuse of discretion before the appellate court will be justified in reversing." Wickham v. Belveal, 1963 OK 227, ¶ 19, 386 P.2d 315, 320. Accordingly, we find no manifest error or abuse of discretion exists here.

¶48 Similarly, a motion for new trial upon the ground of improper conduct of counsel is addressed to the sound legal discretion of the trial court. See Middlebrook, 1985 OK 66, ¶ 33, 713 P.2d at 584. The trial court must exercise its discretion in "accordance with the bounds of reason and recognized principles of law." Davis, 1975 OK 157, ¶ 5, 542 P.2d at 944. "Unless it appears that the trial court erred in some pure, simple question of law or acted arbitrarily, its judgment will not be distur[b]ed on appeal." Id. This Court holds that the record below is devoid of the requisite outrageous conduct that would rise to the level of reversible attorney misconduct.

D. Jury's Verdict on Damages

¶49 BNSF'S next point of contention is a challenge to the damage award. Specifically, BNSF urges this court to reverse and remand arguing that the $14.8 million dollar verdict award was excessive and somehow resulted from passion, partiality or prejudice rather than the evidence presented. A jury verdict cannot be set aside as excessive unless it "strike[s] mankind, at first blush, as being beyond all measure unreasonable and show[s] the jury to have been activated by passion, partiality, prejudice or corruption." Dodson v. Henderson Properties, Inc., 1985 OK 71, ¶ 6, 708 P.2d 1064,1066 (citing Austin Bridge Company v. Christian, 1968 OK 138, ¶ 12, 446 P.2d 46, 49). The issue of damages is left to the jury after hearing all the evidence. See Estrada v. Port City Prop., Inc., 2011 OK 30, ¶ 35, 258 P.3d 495, 508. And, when the record supports the amount of damages awarded, we "will not invade the jury's province and substitute our judgment as a fact-finding tribunal." Id. This Court expects,

> substantial disparities among juries as to what constitutes adequate compensation for certain types of pain and suffering. This is a litigious fact of life of which counsel, clients and insurance carriers are fully aware. Once they place their fate in the hands of a jury, then they should be prepared for the result . . . . They cannot expect the Court to extricate them in all cases where the award is higher or lower than hoped for or anticipated.

Vanskike v. Union Pacific R.R. Co., 725 F.2d 1146, 1150 (8th Cir. 1984) (internal citations omitted).

¶50 Here, BNSF points to no specific evidence to support its claim that the jury decision was a result of bias, passion or prejudice beyond the assertion that the jury's award for non-economic damages far outweighed the amount of the uncontested economic damages. The economic damages agreed to by the parties in this case consisted of $813,516. Nye offered substantial evidence supporting a claim for non-economic damages – namely, the loss suffered by his wife and two daughters – coupled with the loss of the extensive support Nye's mother must now endure. BNSF neither refuted the non-economic loss Nye's family members suffered, nor proffered rebuttal evidence in this regard.

¶51 Oklahoma law provides for recovery of damages in wrongful death actions for:

> B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate.
>
> The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.
>
> The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.
>
> The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.
>
> The grief and loss of companionship of the children and parents of the decedent, which

> shall be distributed to them according to their grief and loss of companionship.

Okla. Stat. tit. 12, § 1053 (B) (2010).

¶52 Following the jury's finding that BNSF was sixty-five percent negligent, the jury was allowed to compensate the spouse, children and parent of the decedent for loss of consortium, grief and loss of companionship pursuant to the Oklahoma statute. This Court finds that the jury was correctly instructed in Oklahoma law.

¶53 As a make-weight argument, BNSF claims that jury awards in other cases pale in comparison to the amount awarded in this case. BNSF points to two cases in support of the assertion that the verdict should be held legally excessive. Moody v. Ford Motor Co., 506 F.Supp.2d 823 (N.D. Okla. 2007) and Chicago, Rock Island & Pac. R.R. Co. v. Am. Airlines, Inc., 1965 OK 190, 408 P.2d 789. Those cases are distinguishable from the present case because the court in each of them found punitive elements in the jury awards that were held as intended to punish the defendant or to send a message to the defendant. Here, there is no evidence that Nye attempted to send such a message. In fact, Nye's attorney never asked the jury to punish or send BNSF a message. The trial court specifically charged the jury here not to allow sympathy or prejudice to influence their decision and not to allow BNSF's annual gross income to weigh in, in the slightest degree.

¶54 BNSF also asserts that the proportional difference between the agreed upon economic damages Nye suffered (approximately $813,000), is evidence, in and of itself, that the non-economic damages awarded ($14,000,000) were excessive. BNSF simply contends that the discrepancy between the economic and non-economic damages demands a finding of bias, passion or prejudice. However, BNSF points to no statutory or case authority to support the proposition that the jury must adhere to some legal standard of proportionality between these two types of damages.[10]

¶55 BNSF cites five prior wrongful death actions to support its argument that the verdict in the current case amounted to an excessive damage award. See Moody, 506 F.Supp 2d 823 (N.D. Okla. 2007); Covel, 2012 OK 5, 272 P.3d 705; West v. Bd. of Cty. Comm'rs of Pawnee Co., 2011 OK 104, 273 P.3d 31; Currens, 1997 OK 58, 939 P.2d 1138; Estate of King v. Wagoner Cty. Bd. of Cty. Commr's, 2006 CIV APP 118, 146 P.3d 833. Of these cases, only one did not affirm the trial court's award for the plaintiff, Moody, in which the trial court remanded for a new trial after the jury awarded a $5 million dollar verdict to plaintiff. The appellate court in that case held that the verdict demonstrated elements of a punitive nature and found serious misconduct by the plaintiff's attorney at trial.[11] However, those elements are not present in this action. This Court affirms the jury's determination of damages.

E. Jury Instructions

¶56 Finally, BNSF challenges several of the trial court's instructions regarding the duties of a motorist at a railroad crossing. Those challenges, however, are warmed-over versions of BNSF's underlying complaints of error as discussed supra. Integral to the resolution of all of BNSF's jury challenges is this Court's decision in Bierman v. Aramark Refreshment Servs., Inc., 2008 OK 29, ¶ 22, 198 P.3d 877, 884-85. There, this Court held:

> [i]nstructions are explanations of the law of a case enabling a jury to better understand its duty and to arrive at a correct conclusion. When reviewing allegedly erroneous jury instructions, this Court must consider the instructions as a whole. We look to whether the instructions reflect the law on the relevant issue, not whether the instructions were perfect.

Id.

¶57 This Court has carefully reviewed the challenged jury instructions, the Oklahoma Uniform Jury Instructions, and examined Oklahoma law. We find that each challenged instruction required resolution of a factual dispute to be determined by the jury and, if any error existed – syntax or otherwise – to be harmless. In examining the trial court's instructions as a whole and for the reasons expressed herein we find no reversible error.

IV. CONCLUSION

¶58 After hearing the evidence, the jury resolved the conflict in favor of Nye. It is not the province of this Court to sit as thirteenth juror and supplant the determination of the trier of fact. Where there is competent evidence in the record reasonably tending to support a jury's verdict and the matter was submitted to the jury upon proper instruction fairly stating the applicable law, the judgment will not be

disturbed. This Court's review of the entire record establishes that each disputed material issue of fact was correctly presented to the jury upon proper instruction. Finding that there is competent evidence to support the jury's verdict, we affirm the trial court's entry of judgment. Similarly, this Court affirms the trial court's denial of BNSF's motion for JNOV or in the Alternative Motion for a New Trial.

JUDGMENT AFFIRMED.

ALL JUSTICES CONCUR.

COLBERT, J.

1. A "passive grade crossing" is a crossing that contains only "passive warning devices." According to 23 CFR § 646.204(I), "passive warning devices" are defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." In contrast, "active warning devices" are those:

> traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

Id. § 646.204(j).

2. During the pendency of this appeal, BNSF filed a Motion for Oral Argument dated July 13, 2015. That motion is denied.

3. 49 U.S.C.A. § 20103 states:

> (a) Regulations and orders. The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970. When prescribing a security regulation or issuing a security order that affects the safety of railroad operations, the Secretary of Homeland Security shall consult with the Secretary.
>
> (b) Regulations of practice for proceedings. The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.
>
> (c) Consideration of information and standards. In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.
>
> (d) Nonemergency waivers. The Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety. The Secretary shall make public the reasons for granting the waiver.
>
> (e) Hearings. The Secretary shall conduct a hearing as provided by section 553 of title 5 when prescribing a regulation or issuing an order under this part, including a regulation or order establishing, amending, or providing a waiver, described in subsection (d), of compliance with a railroad safety regulation prescribed or order issued under this part. An opportunity for an oral presentation shall be provided.
>
> (f) Tourist railroad carriers. In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to Congress not later than September 30, 1995, on actions taken under this subsection.
>
> (g) Emergency waivers. –
>
> (1) In general. The Secretary may waive compliance with any part of a regulation prescribed or order issued under this part without prior notice and comment if the Secretary determines that –
>
> (A) it is in the public interest to grant the waiver;
>
> (B) the waiver is not inconsistent with railroad safety; and
>
> (C) the waiver is necessary to address an actual or impending emergency situation or emergency event.
>
> (2) Period of waiver. A waiver under this subsection may be issued for a period of not more than 60 days and may be renewed upon application to the Secretary only after notice and an opportunity for a hearing on the waiver. The Secretary shall immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this part.
>
> (3) Statement of reasons. The Secretary shall state in the decision issued under this subsection the reasons for granting the waiver.
>
> (4) Consultation. In granting a waiver under this subsection, the Secretary shall consult and coordinate with other Federal agencies, as appropriate, for matters that may impact such agencies.
>
> (5) Emergency situation; emergency event. In this subsection, the terms "emergency situation" and "emergency event" mean a natural or manmade disaster, such as a hurricane, flood, earthquake, mudslide, forest fire, snowstorm, terrorist act, biological outbreak, release of a dangerous radiological, chemical, explosive, or biological material, or a war-related activity, that poses a risk of death, serious illness, severe injury, or substantial property damage. The disaster may be local, regional, or national in scope.

4. 49 U.S.C.A. Section 20106 provides:

> (a) National uniformity of regulation.
>
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order –
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.
>
> (b) Clarification regarding State law causes of action. – (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.
>
> (c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C.A. § 20106.

5. Akin, was a wrongful death action arising from a vehicle/train collision at a railroad crossing. The subject crossing was described as having "certain passive warning signs as well as crossbucks with flashing lights . . . on both sides of the crossing . . ." but lacked automatic gates. Id. ¶ 2, 977 P.2d at 1042. At the time of the collision, the warning lights were flashing to warn motorist of the train's impending approach. Id. Yet, the plaintiff's vehicle continued to approach the crossing and neither stopped nor slowed down. Id. The plaintiff's vehicle was struck by the approaching train and the plaintiff was instantly killed. Id. The widow commenced a wrongful-death action against the railroad and alleged that the warning lights had a history of malfunctioning; and therefore, the "motoring public had ceased to view the flashing lights as a serious and reliable warning of the imminent approach of a train." Id. ¶ 3, 977 P.2d at 1042. Based on the faulty devices, the widow challenged the adequacy of the crossing's warning devices and alleged that "automatic gates were required in order to operate the crossing safely." Id. The railroad urged that the widow's "inadequate signalization theory" was federally preempted and suc-

cessfully moved for an order in limine and partial summary adjudication. Id. ¶ 4, 977 P.2d at 1043.

6. Okla. Stat. tit. 47, § 11-701 states:

> A. Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:
> 1. A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;
> 2. A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;
> 3. A railroad train approaching within approximately one thousand five (1,500) hundred feet of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;
> 4. An approaching railroad train is plainly visible and is in hazardous proximity to such crossing; or
> 5. The tracks at the crossing are not clear.
> B. No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed or fail to obey the directions of a law enforcement officer at the crossing.
> C. The operator of any Class A, B, or C commercial vehicle not required to stop at all railroad crossings, as prescribed in Section 11-702 of this title, shall slow down and check that the tracks are clear of an approaching train.

7. Tenth Circuit jurisprudence is "instructive in providing guidance on similar state law questions." Andrews v. McCall (In re K.P.M.A.), 2014 OK 85, ¶ 35, Fn.8, 341 P.3d 38, 50.

8. Consider the case of Cornwell v. Union Pac. R.R., 2010 WL 3521668, where the court, in construing Okla. Stat. tit. 47, § 11-701(A), held that a crossing must have "a clearly visible electric or mechanical signal device which gives warning of the immediate approach of a railroad train or crossing gate is lowered or when a human flagman which gives or continues to give a signal of the approach or passage of a railroad train," to hold a driver's failure to heed those warnings negligent per se under the statute. But "reflectorized cross bucks which warn of train tracks, however, . . . do not fall under these categories as they do not give an electronic or mechanic signal that warns that a train is immediately approaching." In cases of a passive grade crossing, or "crossbuck-only" crossing, evidence of obstruction is relevant to a plaintiff's defense of negligence per se. See Id. at 6 n.2 (N.D. Okla. Sept. 7, 2010), aff'd sub nom. Cornwell v. Union Pac. R.R. Co., 453 Fed. Appx. 829 (10th Cir. 2012). Consider also, Malinski v. BNSF Ry. Co., 2017 WL 1294438 (N.D. Okla. Mar. 31, 2017) (Where the court held that "evidence of obstruction is indeed relevant . . . under the defense of negligence per se since an element of 47 O.S. § 11 – 701(A) is whether the 'approaching railroad train is plainly visible.'").

9. In addition, this standard of care is supported by Moore v. Burlington N. R.R. Co., 2002 OK CIV APP 23, 41 P.3d 1029. In Moore, the court held that the trial court erred by not giving the requested jury instruction, which stated:

> You are further instructed that a railroad track is of itself a warning of danger and one who attempts to cross it must exercise that degree of care which an ordinarily prudent person would exercise under like circumstances. As to what is ordinary care depends upon surrounding circumstances, but it must be such care as is commensurate with a known danger. Thus, if one attempts to cross a railroad track where his view is obstructed, he would be required to exercise a greater degree of care than he would if he were crossing a railroad track where there were no obstructions.

Id. ¶ 9, 41 P.3d 1032. The court, however, noted that the instruction was based on evidence that "both parties had traveled the road and the railroad track many times and, therefore, knew the line of visibility up and down the track was limited." Id. ¶ 11, 41 P.3d 1033.

Nothing, here, conclusively establishes a finding that Nye "had traveled the road and the railroad track many times" and "knew [that] the line of visibility up and down the track was limited." Although Passenger did not look for the presence of a train as a passenger under ordinary circumstances, he was not required to do so since there were no "conditions [present] that warranted a heightened level of responsibility" to put him on notice "before [he became] a passenger." Snyder v. Dominguez, 2008 OK 53, ¶ 21, 202 P.3d 135, 141. Thus, with no further evidence that Nye should have known of the danger, Nye's standard of care was that of what an ordinarily prudent person would have exercised under like circumstances.

10. The two cases Nye cites in its pleadings resulted in substantial non-economic damages for the plaintiffs. See the wrongful death case of Colony Ins. Co. v. Burke & Jones, 2007 WL 906743 (N.D. Okla.), where the jury awarded $20 million dollars; and the wrongful death case of Drews v. Gobel Freight Lines, Inc., 144 Ill.2d 84, 578 N.E.2d 970 (1991), where the jury awarded $8.3 million dollars.

11. The case of Estate of King is not on point with the current case, focusing instead on other issues. The other three cases cited held that, either the jury verdict was inadequate, as held in West, or that the jury verdict was not excessive, as held in Currens and Covel.

2018 OK 52

STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. DAVID WILLIAM KNIGHT, Respondent.

SCBD 6614. June 19, 2018

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE

¶0 Respondent, a lawyer licensed in Oklahoma, moved to resign his bar membership in the State of Texas pending disciplinary action. Pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2011 (as amended effective September 30, 2014), ch. 1, app. 1-A, the Complainant, Oklahoma Bar Association, filed in this Court documentation showing Respondent's disbarment in Texas. Upon order of this Court, Respondent was directed to show cause why a final order of professional discipline should not be imposed on him by this Court. Respondent did not file a response and Complainant requests a final order of discipline disbarring Respondent in the State of Oklahoma. We hold Respondent's professional misconduct warrants disbarment and he is hereby disbarred from the practice of law upon the date this opinion becomes final.

RESPONDENT DISBARRED

Katherine M. Ogden, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

COMBS, C.J.:

I. Procedural History

¶1 The Respondent, David William Knight, was licensed to practice law in the State of Texas and Oklahoma. In 2017, a Texas bar disciplinary action was commenced in the Supreme Court of the State of Texas (Misc. Docket No. 17-9143). Knight filed a Motion For Acceptance Of Resignation As Attorney And Counselor At Law in the State of Texas in lieu of disciplinary action. The Chief Disciplinary Counsel of the State Bar of Texas filed a response to the motion wherein detailed alle-

gations were made of Knight's professional misconduct and a recommendation was made to accept Knight's resignation. Knight also filed an acknowledgment of receipt of the response and waived the ten-day period for withdrawing his motion to resign. The acknowledgment also expressly stated Knight had reviewed the response in its entirety. On November 30, 2017, the Supreme Court of Texas held the professional misconduct de-tailed in the response of the State Bar of Texas was conclusively established for all purposes. Knight's law license was immediately canceled, he was prohibited from practicing law, and was required to notify in writing each client, opposing counsel and court in which he had pending matters. As a condition for reinstatement, Knight was required to pay $10,300.00 to former clients.

¶2 On January 9, 2018, the Complainant, Oklahoma Bar Association (OBA), filed with this Court a Notice of Order of Discipline pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011 (as amended effective September 30, 2014), Ch. 1, App. 1-A.[1] Attached to the notice was a certified copy of the Order of the Supreme Court of Texas as well as certified copies of the motion, response, and acknowledgment. Complainant notified this Court of the discipline imposed in Texas and that Knight did not inform the Complainant of the Texas discipline as required by Rule 7.7 (a), RGDP. On January 10, 2018, this Court issued an order acknowledging receipt of the notice and its contents. The order informed Knight that a failure to report discipline imposed in another jurisdiction is grounds for discipline in this jurisdiction and the Texas order imposing discipline is prima facie evidence he committed the acts therein. Knight was also informed he could request a hearing on or before January 31, 2018, pursuant to Rule 7.7 (b), RGDP and he could file a brief and any evidence supporting his conduct to mitigate the severity of discipline including a certified copy of the transcript of evidence taken by the trial tribunal in the Supreme Court of Texas. Any such brief or evidence was to be submitted on or before January 31, 2018. The order was mailed to Knight at his official OBA roster address. It was returned to sender. This Court did not receive any documentation from Knight on or before January 31, 2018. The Complainant then hired a process server which successfully served Knight on March 16, 2018, the Notice of Order of Discipline, Entry of Appearance by Katherine Ogden, Complainant's Brief in Support of a Recommendation of Discipline and this Court's original Order advising Knight of the deadline to respond to the recommendation. Thereafter, a revised Order was issued by this Court amending deadlines for Knight to respond to the recommendation. It was mailed to his official roster address as well as two other addresses, including the address where he was served. Each order was returned to sender. Notice by mail to a lawyer's official roster address is sufficient to satisfy due process. State ex rel. Oklahoma Bar Association v. Gaines, 2016 OK 80, ¶9, 378 P.3d 1212; State ex rel. Oklahoma Bar Ass'n v. Haave, 2012 OK 92, ¶13, 290 P.3d 747.

II. Facts

A. Texas Bar Discipline

¶3 Knight's disbarment in Texas was based on his misconduct related to representation of clients in five separate matters. The Response of the Chief Disciplinary Counsel identified each of the five separate matters as follows:

> 1. **Rachel Lowery**: In March 2016, Lowery hired Knight for representation in a divorce matter. Lowery paid a $4,000.00 fee. Knight neglected Lowery's case and failed to adequately communicate with her. In June 2016, Knight's license to practice law in the State of Texas was suspended for one year. Knight failed to notify Lowery of the suspension and in fact, engaged in the practice of law while suspended. When Knight closed his practice, he failed to notify Lowery of the same. Knight also failed to respond to Lowery's grievance with the State Bar of Texas. Knight's actions were in violation of Rules 1.01(b)(1), 1.03(a), 8.04(a)(7), 8.04(a)(8), 8.04(a)(10) and 8.04(a)(11) of the Texas Disciplinary Rules of Professional Conduct ("TDRPC").
>
> 2. **Elmer Hayes**: In January 2016, Hayes hired Knight for representation in a family law matter and paid Respondent a $1,000.00 fee. Knight neglected Hayes' case and failed to communicate with him. Knight also failed to notify Hayes of his June 2016 suspension and engaged in the practice of law while suspended. Knight also failed to notify Hayes that his office was closed. Knight failed to respond to Hayes' grievance with the State Bar of Texas. Knight's actions were in violation of Rules 1.01 (b)(1), 1.03(a), 8.04(a)(7), 8.04(a)(8), 8.04(a)(10) and 8.04(a)(11) of the TDRPC.

3. **Jason and Ann Griffin**: In February 2016, the Griffins hired Knight to represent them in an interstate child custody matter that they wanted transferred to Texas. The Griffins paid Knight $2,500.00 for this matter. Knight neglected their matter and failed to communicate with his clients. Knight failed to respond to the Griffins' request for a return of any unearned fees. Knight also failed to notify the Griffins of his June 2016 suspension and engaged in the practice of law while suspended. Knight also failed to notify the Griffins that his office was closed. Knight failed to respond to the Griffins' grievance with the State Bar of Texas. Knight's actions were in violation of Rules 1.01(b)(1), 1.03(a), 1.15(d), 8.04(a)(7), 8.04(a)(8), 8.04(a)(10) and 8.04(a)(11) of the TDRPC.

4. **Ashley Langioni**: In February 2016, Langioni hired Knight for representation in a family law matter and paid him a $1,600.00 fee. Knight neglected Langioni's case and failed to communicate with her. Knight failed to respond to Langioni's request to return any unearned portion of his fee to her. Knight also failed to notify Langioni of his June 2016 suspension and engaged in the practice of law while suspended. Knight also failed to notify Langioni that his office was closed. Knight failed to respond to Langioni's grievance with the State Bar of Texas. Knight's actions were in violation of Rules 1.01 (b)(1), 1.03(a), 1.15(d), 8.04(a)(7), 8.04(a)(8), 8.04(a)(10) and 8.04(a)(11) of the TDRPC.

5. **Kelley Marie Johnson**: In September 2015, Johnson hired Knight for representation in a family law matter. Johnson paid Knight a $1,200.00 fee. Knight neglected Johnson's case and failed to communicate with her. Knight failed to respond to Johnson's request that he return any unearned portion of the fee to her. Knight also failed to notify Johnson of his June 2016 suspension and engaged in the practice of law while suspended. Knight also failed to notify Johnson that his office was closed. Knight failed to respond to Johnson's grievance with the State Bar of Texas. Knight's actions were in violation of Rules 1.01(b)(1), 1.03(a), 1.15(d), 8.04(a)(7), 8.04(a)(8) and 8.04(a)(11) of the TDRPC.

The Supreme Court of Texas held the professional misconduct detailed in the response was conclusively established for all purposes and Knight would have to pay restitution to each of these clients as an "absolute condition precedent" for reinstatement.

¶4 The pertinent Texas Disciplinary Rules of Professional Conduct ("TDRPC") Knight was held to have violated are as follows:

1. Rule 1.01 (b) (1):

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

2. Rule 1.03 (a):

(a) A lawyer shall keep a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information.

3. Rule 1.15 (d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

4. Rule 8.04:

(a) A lawyer shall not:

....

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the

lawyer's right to practice has been suspended or terminated including but not limited to situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

The OBA asserts these rules are substantially similar to the following Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, Ch. 1, App. 1-A, (RGDP) and the Oklahoma Rules of Professional Conduct, (ORPC) 5 O.S. 2011, Ch. 1, App. 3-A in Oklahoma:

1. Rule 1.3, ORPC:

A lawyer shall act with reasonable diligence and promptness in representing a client.

2. Rule 1.4 (a) (3) & (4), ORPC:

(a) A lawyer shall:

. . . .

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable re-quests for information; and

3. Rule 1.15 (d), ORPC:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

4. Rule 1.16 (d), ORPC:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expenses that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

5. Rule 3.2, ORPC:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

6. Rule 5.5, ORPC:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

7. Rule 5.2, RGDP:

After making such preliminary investigation as the General Counsel may deem appropriate, the General Counsel shall either (1) notify the person filing the grievance and the lawyer that the allegations of the grievance are inadequate, incomplete or insufficient to warrant the further attention of the Commission, provided that such action shall be reported to the Commission at its next meeting, or (2) file and serve a copy of the grievance (or, in the case of an investigation instituted on the part of the General Counsel or the Commission without the filing of a signed grievance, a recital of the relevant facts or allegations) upon the lawyer, who shall thereafter make a written response which contains a full and fair disclosure of all the facts and circumstances pertaining to the respondent lawyer's alleged misconduct unless the respondent's refusal to do so is predicated upon expressed constitutional grounds. Deliberate misrepresentation in such response shall itself be grounds for discipline. The failure of a lawyer to answer within twenty (20) days after service of the grievance (or recital of facts or allegations), or such further time as may be granted by the General Counsel, shall be grounds for discipline. The General Counsel shall make such further investigation of the grievance and response as the General Counsel may deem appropriate before taking any action.[2]

In addition, Rule 9.1, RGDP is similar to the Texas Rules of Disciplinary Procedure Rule 13.01[3] mentioned in Rule 8.04 (a) (10), TDRPC that Knight was found to have violated. Rule 9.1, RGDP provides:

When the action of the Supreme Court becomes final, a lawyer who is disbarred or

suspended, or who has resigned membership pending disciplinary proceedings, must notify all of the lawyer's clients having legal business then pending within twenty (20) days, by certified mail, of the lawyer's inability to represent them and the necessity for promptly retaining new counsel. If such lawyer is a member of, or associated with, a law firm or professional corporation, such notice shall be given to all clients of the firm or professional corporation, which have legal business then pending with respect to which the disbarred, suspended or resigned lawyer had substantial responsibility. The lawyer shall also file a formal withdrawal as counsel in all cases pending in any tribunal. The lawyer must file, within twenty (20) days, an affidavit with the Commission and with the Clerk of the Supreme Court stating that the lawyer has complied with the provisions of this Rule, together with a list of the clients so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. Proof of substantial compliance by the lawyer with this Rule 9.1 shall be a condition precedent to any petition for reinstatement.

B. Prior Oklahoma Discipline

¶5 Knight has a lengthy history of prior disciplinary actions in Oklahoma. In 2009, Knight received a partially probated suspension for one year by the State Bar of Texas. The suspension was based on allegations of improper communications and neglect of a legal matter in violation of Rules 1.01 (b) (1), 1.03 (a) and 4.02 (a) of the Texas Disciplinary Rules of Professional Conduct. Knight failed to inform the Oklahoma Bar Association of the suspension as required by Rule 7.7 (a), RGDP. The Complainant informed the Professional Responsibility Commission after receiving notice of the suspension from the State Bar of Texas. The Commission thereafter privately reprimanded Knight. On July 16, 2014, this Court suspended Knight's license to practice law for one year in a Rule 7, RGDP reciprocal disciplinary action; State ex rel. Oklahoma Bar Association v. David William Knight, 2014 OK 71, 330 P.3d 1216. One year later, Knight was again suspended for failure to pay his 2015 OBA membership dues; SCBD 6272, 2015 OK 46. On September 29, 2015, this Court suspended Knight for two years and one day in a Rule 6, RGDP, attorney discipline action; State Bar Association v. David William Knight, 2015 OK 59, 359 P.3d 1122. On June 27, 2016, Knight's name was stricken from the roll of attorneys for his failure to pay his 2015 OBA membership dues. SCBD 6272, 2016 OK 76. On June 7, 2016, Complainant initiated a Rule 7, RGDP action against Knight for discipline imposed in the State of Texas. On September 12, 2016, this Court noted Knight's name had been stricken from the Roll of Attorneys for nonpayment of dues and dismissed the Rule 7 matter without prejudice; State ex rel. Oklahoma Bar Association v. David William Knight, SCBD 6403.[4]

STANDARD OF REVIEW

¶6 This Court is vested with exclusive and original jurisdiction over attorney disciplinary proceedings. State ex rel. Okla. Bar Ass'n v. Cooley, 2013 OK 42, ¶4, 304 P.3d 453; State ex rel. Okla. Bar Ass'n v. Hart, 2014 OK 96, ¶6, 339 P.3d 895. It is this Court's constitutional responsibility to regulate the practice of law and the licensure, ethics, and discipline of legal practitioners in this state. State ex rel. Oklahoma Bar Ass'n v. Wintory, 2015 OK 25, ¶14, 350 P.3d 131; State ex rel. Okla. Bar Ass'n v. Wilcox, 2014 OK 1, ¶2, 318 P.3d 1114; State ex rel. Okla. Bar Ass'n v. McArthur, 2013 OK 73, ¶4, 318 P.3d 1095; State ex rel. Okla. Bar Ass'n v. Farrant, 1994 OK 13, ¶18, 867 P.2d 1279. We exercise the responsibility to decide whether attorney misconduct has occurred and what discipline is appropriate, not for the purpose of punishing the attorney, but to assess his or her continued fitness to practice law and to safeguard the interests of the public, the courts, and the legal profession. State ex rel. Oklahoma Bar Association v. Friesen, 2016 OK 109, ¶8, 384 P.3d 1129; State ex rel. Okla. Bar Ass'n v. Wilburn, 2006 OK 50, ¶3, 142 P.3d 420. In a reciprocal disciplinary proceeding, "it is within this Court's discretion to visit the same discipline as that imposed in the other jurisdiction or one of greater or lesser severity." State of Oklahoma ex rel. Oklahoma Bar Association v. Patterson, 2001 OK 51, ¶ 33, 28 P.3d 551; State ex rel. Oklahoma Bar Association v. Kleinsmith, 2013 OK 16, ¶4, 297 P.3d 1248.

ANALYSIS

¶7 The certified documents provided to this Court by the Complainant which includes the Order of the Supreme Court of Texas canceling Knight's Texas law license constitutes the charge and is prima facie evidence Knight committed the acts described therein. Rule 7.7

(b), 5 O.S. 2011, (as amended effective September 30, 2014) ch. 1, app. 1-A. Rule 7.7, RGDP allows a lawyer in a reciprocal disciplinary matter to file documentation to support a defense that the discipline imposed by another jurisdiction was not supported by the evidence or that it does not provide sufficient grounds for discipline in Oklahoma. Knight has been served the above mentioned documents and has failed to defend or provide any documentation to this Court. His resignation pending disciplinary proceedings in the State of Texas and the resulting disbarment are deemed an admission of the facts alleged therein. State of Oklahoma ex rel. Oklahoma Bar Association v. Bransgrove, 1998 OK 93, ¶6, 976 P.2d 540.

¶8 In determining appropriate discipline it is proper to compare the matter at hand with previous disciplinary matters. State ex rel. Okla. Bar Ass'n v. Doris, 1999 OK 94, ¶38, 991 P.2d 1015. We consider the current misconduct, past misconduct and discipline as well as the purposes of discipline. State ex rel. Oklahoma Bar Association v. Knight, 2014 OK 71, ¶11, 330 P.3d 1216. The extent of discipline must, however, be decided on a case-by-case basis because each situation will usually involve different transgressions and different mitigating circumstances. State ex rel. Okla. Bar Ass'n v. Doris, 1999 OK 94 at ¶38.

¶9 In State ex rel. Oklahoma Bar Association v. O'Laughlin, an attorney requested to resign from the practice of law in the State of Texas pending disciplinary action which was accepted by the Supreme Court of Texas. 2016 OK 56, ¶4, 373 P.3d 1005. O'Laughlin's professional misconduct was found to have been conclusively established. The professional misconduct included his failure to act for years in providing services to clients, failure to communicate with clients, failure to return advance fees not earned and withholding of client papers and property after termination. State ex rel. Oklahoma Bar Association v. O'Laughlin, 2016 OK 56 at ¶¶ 20-21. In addition, O'Laughlin failed to inform the Oklahoma Bar Association of the Texas discipline. He was found by this Court to have violated Rules 1.1, 1.3, 1.4 (a) (3)-(4), 1.15 (d), 1.16 (d) and 3.2 ORPC as well as Rule 7.7, RGDP. This Court noted there was no indication O'Laughlin had taken steps to remedy the harm he had caused his clients nor did he produce any mitigating evidence for his actions. State ex rel. Oklahoma Bar Association v. O'Laughlin, 2016 OK 56 at ¶ 21, ¶¶ 25-26. We determined his actions showed a lack of respect for his clients, this Court and the Supreme Court of Texas and his failure to even acknowledge his misconduct presented a danger to the public. O'Laughlin, 2016 OK 56 at ¶ 25. The Oklahoma Bar Association requested he be suspended for thirty to sixty days, however, this Court found his actions warranted stricter discipline and disbarred him from the practice of law in Oklahoma. O'Laughlin, 2016 OK 56 at ¶ 26.

¶10 As in O'Laughlin, it was conclusively established Knight neglected his various client's cases, failed to communicate with his clients, failed to return unearned fees upon request, failed to notify clients of his suspension and the closing of his law office and engaged in the practice of law while suspended. Further, Knight failed to contact the Oklahoma Bar Association concerning his Texas discipline. These actions violated Rules 1.3, 1.4 (a) (3)-(4), 1.15 (d), 1.16 (d), 3.2, 5.5, ORPC, and Rules 5.2 and 9.1, RGDP. Knight's prior history of discipline in this state is also troubling and shows an indifference to the requisite responsibilities necessary to practice law in Oklahoma. He has further failed to respond or attempt to mitigate any discipline we may impose in this matter. His professional misconduct and disregard for the disciplinary process presents a danger to the interests of the public, the courts and the legal profession. The Complainant submits Knight's prior discipline by this Court, together with the misconduct at issue, warrants the discipline of disbarment. We are compelled to agree.

¶11 Knight is hereby disbarred effective upon the date this opinion becomes final. The Complainant did not file an application to recover costs of this disciplinary proceeding, therefore, no costs are assessed.

RESPONDENT DISBARRED

¶12 CONCUR: COMBS, C.J., GURICH, V.C.J., WINCHESTER, EDMONDSON, COLBERT, REIF, WYRICK, and DARBY, JJ.

¶13 CONCUR IN RESULT: KAUGER, J.

COMBS, C.J.:

1. Rule 7.7, RGDP, 5 O.S. 2011 (as amended effective September 30, 2014), ch. 1, app. 1-A provides:

(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 in a disciplinary proceeding, except contempt proceedings, by the highest court of another State or by a Federal Court, 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. 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 transcript of the evidence taken 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 lawyer may also submit, in the interest of explaining his/her conduct or by way of mitigating the discipline which may be imposed upon him/her, a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting a recommendation of discipline.

2. The OBA, however, is not pursuing a claim against Knight for his failure to respond to the Chief Disciplinary Counsel's office as required by the Texas Rules of Disciplinary Procedure. State ex rel. Oklahoma Bar Association v. O'Laughlin, 2016 OK 56, ¶23, 373 P.3d 1005.

3. Rule 13.01 of the Texas Rules of Disciplinary Procedure provides: When an attorney licensed to practice law in Texas dies, resigns, becomes inactive, is disbarred, or is suspended, leaving an active client matter for which no other attorney licensed to practice in Texas, with the consent of the client, has agreed to assume responsibility, written notice of such cessation of practice shall be mailed to those clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or entity having reason to be informed of the cessation of practice. If the attorney has died, the notice may be given by the personal representative of the estate of the attorney or by any person having lawful custody of the files and records of the attorney, including those persons who have been employed by the deceased attorney. In all other cases, notice shall be given by the attorney, a person authorized by the attorney, a person having lawful custody of the files of the attorney, or by Chief Disciplinary Counsel. If the client has consented to the assumption of responsibility for the matter by another attorney licensed to practice law in Texas, then the above notification requirements are not necessary and no further action is required.

4. The reasoning behind the dismissal was based upon an interpretation that once the lawyer's name was stricken from the roll of attorneys no further discipline was warranted. However, on January 9, 2017, Rule 1.1, RGDP, 5 O.S. 2011, ch. 1, app. 1-A, was amended and now provides "[t]his Court retains jurisdiction to impose discipline for cause on a lawyer whose name has been stricken from the Roll of Attorneys for non-payment of dues or for failure to complete mandatory continuing legal education." 2017 OK 1.

2018 OK 53

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JOEL LAWRENCE KRUGER, Respondent.

SCBD 6419. June 19, 2018

BAR DISCIPLINARY PROCEEDING

¶0 In this attorney-discipline proceeding, Respondent was charged with four counts of professional misconduct, which contain multiple allegations that he neglected his clients and misappropriated their money. The trial panel of the Professional Responsibility Tribunal (PRT) found clear and convincing evidence that Respondent committed professional misconduct in three out of the four counts, and also found that Respondent committed professional misconduct during the course of these proceedings. The PRT ultimately recommended that Respondent be disbarred. Upon *de novo* review, we agree.[1]

RESPONDENT IS DISBARRED AND ORDERED TO PAY COSTS.

Debbie Maddox, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Joel L. Kruger, Kruger Law Firm, PC, Tulsa, Oklahoma, for Respondent.

Wyrick, J.:

¶1 In response to grievances from three of his clients, Tanya Adams, Anna Harjo, and Shelly McCarroll, the Oklahoma Bar Association (the Bar) brought a formal complaint against Respondent, Joel Lawrence Kruger, in which it alleges four counts of professional misconduct. Counts 1, 2, and 3 relate to his representation of these women; count 4 is for bringing a retaliatory lawsuit against one of them. Following a lengthy trial, the PRT found that Kruger had committed professional misconduct in three of the four counts, including numerous violations of the Oklahoma Rules of Professional Conduct. The PRT further found that Kruger's deceptive and dilatory behavior during the disciplinary proceedings constituted professional misconduct. The PRT ultimately recommended that Kruger be disbarred for his actions and ordered to pay the costs of these proceedings. We reach the same conclusion.

I

¶2 This Court is responsible for regulating the practice of law in our state.[2] This responsibility comes with the power both to establish rules of professional conduct for practitioners and to discipline those practitioners that violate those rules.[3] These powers are exclusive to this Court and, as such, our review in disciplinary proceedings is *de novo* – without deference to either the stipulations of the parties or the findings, conclusions, and recommendations of the PRT.[4] To impose discipline, we must find clear and convincing evidence of misconduct.[5] Based on our review of this record, we find that such evidence exists.

A. Count 1: Tanya Adams

¶3 Tanya Adams hired Kruger's firm, Kruger & Associates, P.C., in 2004 to collect child-support arrearages from her ex-husband. In exchange for the firm's services, Adams agreed to allow the firm to retain 38% of the collected

arrearages. Ms. Adams's case was initially the responsibility of two associates within Kruger's firm, and while her case was primarily in the hands of those associates, Ms. Adams received regular monthly payments. In 2014, however – after those associates had left the firm and Kruger assumed responsibility for collecting and remitting Adams's share of the arrearages – payments to Adams became sporadic and unpredictable, despite the regular flow of payments from Adams's ex-husband.

¶4 Adams attempted to confront Kruger about these missing payments by mail, telephone, and email, but was largely unsuccessful. When Kruger did communicate with Adams, he would inform her that he would "look into" the matter and, on occasion, would even remit a payment. But, invariably, communication would break down thereafter and payments would again lapse. Ultimately, on November 16, 2014, Adams sent a certified letter to Kruger requesting that he either send her the money she was owed or withdraw from representing her in the matter. Kruger did not respond; so Adams was forced to file a grievance with the OBA on December 15, 2014.

¶5 In total, the record demonstrates that Kruger withheld approximately $3,000 of Ms. Adams's share of the child-support payments. The record also clearly demonstrates that those payments were deposited in the client trust account, and then withdrawn from the trust account for purposes other than Ms. Adams's benefit.

¶6 Over the course of his representation of Ms. Adams, Kruger failed to diligently and promptly handle his client's matters, failed to communicate and respond to the client's requests for information, and failed to safeguard his client's funds to such an extent as to constitute a misappropriation of those funds. We therefore conclude that Kruger violated Rules 1.3,[6] 1.4,[7] and 1.15[8] of the Oklahoma Rules of Professional Conduct.

B. Count 2: Anna Harjo

¶7 Anna Harjo's experience with Kruger resembles that of Ms. Adams. Ms. Harjo hired Kruger's firm in 2004 to collect past-due child support, and she agreed to a 38% contingency fee for collected arrearages. Ms. Harjo's case was initially the responsibility of the same two associates within Kruger's firm, and while those associates handled her representation, Ms. Harjo received regular payments. Once those associates left the firm and Kruger began managing her case, communication broke down and payments stopped.

¶8 But then on October 25, 2013, Kruger texted Ms. Harjo about the possibility of settling her case. The two then met the following January, at which time Ms. Harjo rejected the settlement offer Kruger had suggested, explained that she would not accept anything less that the full amount owed, and requested that Kruger supply her with a complete copy of her file. Communication ceased again following that meeting, and Ms. Harjo was never given a copy of her file, despite numerous attempts to contact Kruger. Ms. Harjo ultimately filed her grievance on June 19, 2015.

¶9 During its investigation, the Bar uncovered that Kruger had settled Ms. Harjo's case about a week after their January meeting. When the Bar told this to Ms. Harjo, it was the first time she had heard of it. In total, Kruger had accepted $28,000 in settlement of Ms. Harjo's claim, yet remitted none of it to his client. Kruger's explanation is that all $28,000 is owed to him in attorney's fees – despite the fact that his firm had already been retaining 38% of every child-support payment collected on Ms. Harjo's behalf. The record is unclear as to just how much of this money is owed to Ms. Harjo – it's somewhere between $12,000 and $19,000, and much of the difficulty is due to Kruger's incoherent recordkeeping – but it is quite clear that she is owed. It is also clear, just as it was in Ms. Adams's case, that most if not all of Ms. Harjo's money has already been spent.

¶10 Over the course of his representation of Ms. Harjo, Kruger failed to diligently and promptly handle his client's matters, failed to communicate and respond to the client's requests for information, failed to adequately safeguard his client's funds to such an extent as to constitute a misappropriation of those funds, and charged a grossly unreasonable fee for his services. We therefore conclude that Kruger violated Rules 1.3,[9] 1.4,[10] 1.5,[11] and 1.15[12] of the Oklahoma Rules of Professional Conduct.

C. Counts 3 & 4: Shelly McCarroll

¶11 Around May of 2012, Kruger and Shelly McCarroll entered into, what would prove to be, a highly dysfunctional romance. A few months later, in August of 2012, Ms. McCarroll was involved in a car accident. That same month, Kruger began to keep a "ledger," in which he would record every charge he claimed

to incur on Ms. McCarroll's behalf – everything from medical bills to energy drinks, cigarettes, and cat food. Then in September, Kruger had Ms. McCarroll execute three agreements with him:

(1) An "Assignment of Proceeds from Personal Injury Recovery" that would allow Kruger to collect the amount reflected in his "ledger" out of any recovery Ms. McCarroll obtained in connection with the August car accident;[13]

(2) An "Agreement for Legal Services-PI" that allowed Kruger to collect a 38% contingency fee in exchange for his representation in the car-accident matter;[14] and

(3) Another "Agreement for Legal Services" that allowed Kruger to charge $225 per hour to represent Ms. McCarroll in "several matters pending, including, but not necessarily limited to, COBRA, Unemployment Compensation, Automobile Collision Personal Injury (on a contingency fee arrangement), and any other matter that the parties agree that Attorney will handle."[15]

Ms. McCarroll was not provided with copies of these agreements.

¶12 Almost two years later, in June of 2014, Kruger collected a $50,000 check in settlement of Ms. McCarroll's personal injury claims arising out of the 2012 accident. Of that $50,000, approximately $3,800 went to various third parties, either at Ms. McCarroll's direction or on her behalf, and $1,700 went to Ms. McCarroll herself. The rest of the money – some $44,000 – went to Kruger, and by the end of that year, that money had been spent. Nevertheless, Kruger maintains that Ms. McCarroll still owes him in excess of $100,000.

¶13 By summer of the following year, the personal relationship between Kruger and Ms. McCarroll had permanently soured and, as with the other two complainants in this case, the channels of communication between lawyer and client had shut down. Ms. McCarroll requested an accounting and other information and documents pertaining to her case, and Kruger refused to comply. Thus, in August of 2015, Ms. McCarroll filed her grievance with the Bar.

¶14 In April of the following year, Ms. McCarroll also filed a lawsuit against Kruger, raising many of the same problems with his representation as she did in her bar grievance. Kruger responded with a lawsuit of his own in the following June.

¶15 Over the course of his representation of Ms. McCarroll, Kruger failed to communicate and respond to the client's requests for information, charged a grossly unreasonable fee for his services, provided financial assistance to a client in connection with contemplated litigation in excess of court costs, acquired a proprietary interest in the subject matter of that contemplated litigation beyond that required to secure his authorized fee in the case, and failed to safeguard his client's funds to such an extent as to constitute a misappropriation of those funds. We therefore conclude that Kruger violated Rules 1.4,[16] 1.5,[17] 1.8(e) and (i),[18] and 1.15[19] of the Oklahoma Rules of Professional Conduct. We also agree with the PRT's conclusion, however, that the record *does not* establish that Kruger's lawsuit against Ms. McCarroll was filed in violation of the Rules of Professional Conduct or the Rules Governing Disciplinary Proceedings. While the merit of, and impetus for, that suit appear dubious, we find that it is not clearly retaliatory based on this record.

II

¶16 This Court has also warned that an Attorney's conduct during the course of the disciplinary process can be cause for discipline in itself.[20] This record gives us ample reason to reiterate that warning.

A. Conduct in Response to Complaints

¶17 Ms. Adams filed her grievance against Kruger on December 15, 2014. The Bar then sent a letter to Kruger on January 5, 2015, advising him that an informal investigation had been opened in response to the grievance and requesting that he respond within the next two weeks. Kruger did not respond. The Bar then sent him another letter on February 20, 2015, requesting a response by March 6. Kruger did not respond. The Bar then sent him a third letter on April 9, 2015, advising him that a formal investigation had been opened in the matter and that, by Rule 5.2 of the Rules Governing Disciplinary Proceedings, Kruger was to respond within 20 days. Kruger did not respond. On May 7, 2015, the Bar then sent him a fourth letter, this time by certified mail, giving him another five days to respond. Kruger did not respond, and on June 15, 2015, that certified letter was returned as "unclaimed."

¶18 Ms. Harjo filed her grievance on June 19, 2015. The Bar then sent a letter to Kruger on June 23, 2015, advising him that an informal investigation had been opened in response to the grievance and requesting that he respond within the next two weeks. Kruger did not respond. The Bar then sent him another letter on September 1, 2015, advising him that a formal investigation had been opened in the matter and that, by Rule 5.2 of the Rules Governing Disciplinary Proceedings, Kruger was to respond within 20 days. Kruger did not respond. On September 28, 2015, the Bar then sent him a third letter, this time by certified mail, giving him another five days to respond. Kruger did not respond, and on November 23, 2015, that certified letter was returned as "unclaimed."

¶19 Ms. McCarroll filed her grievance on August 19, 2015. The Bar then sent a letter to Kruger on September 3, 2015, advising him that a formal investigation had been opened in the matter and that, by Rule 5.2 of the Rules Governing Disciplinary Proceedings, Kruger was to respond within 20 days. Kruger did not respond. On September 29, 2015, the Bar sent him another letter, this time by certified mail, giving him another five days to respond. Kruger did not respond, and on November 23, 2015, that certified letter was returned as "unclaimed."

¶20 The Bar then changed its tactics and issued a subpoena compelling Kruger to appear for a deposition and to bring his client's files with him. The deposition was set for 9:30 a.m. on January 14, 2016. Kruger did not appear on time, but he did meet with the Bar that afternoon and brought some documents with him. He did not, however, provide a written response to any of the grievances. During that meeting, the two sides discussed the serious nature of these grievances and the Bar's need for a more fulsome explanation of Kruger's behavior. The Bar described the documentation it needed in order to evaluate Kruger's case and, together, they agreed upon a date by which Kruger would produce those documents (January 28, 2016) and a new time at which he would appear for his formal deposition (February 29, 2016). The Bar then issued a second subpoena to that effect. The January 28 deadline then came and went without Kruger producing the documents requested; so, on February 8, the Bar sent him another letter to remind him of his obligation to appear for deposition on the 29th. February 29 then came and went; Kruger never showed up.

¶21 On March 9, however, the Bar finally received Kruger's written response to Ms. McCarroll's grievance. Then, on April 6 and May 19, respectively, the Bar received written responses to Ms. Adams's and Ms. Harjo's grievances. In total – from the date the Bar mailed its first letters to the time he sent his responses – it took Kruger more than 6 months to respond to Ms. McCarroll's complaint, over 10 months to respond to Ms. Harjo's complaint, and well over a year to respond to Ms. Adams's complaint.

¶22 And what Kruger gave the Bar in response to its investigation was far from acceptable. He failed to provide answers to crucial allegations (like why he settled Ms. Harjo's case without her permission), provided responses that were patently untrue (like that Ms. Adams had in fact been overpaid), and provided information that was entirely irrelevant (like sordid details of his relationship with Ms. McCarroll). He also attempted to support his statements with piles of internal records that he knew were either unverifiable, duplicative, incomplete, or simply false.

¶23 This sort of behavior during a Bar investigation is unacceptable and clearly warrants discipline under Rule 5.2 of the Rules Governing Disciplinary Proceedings.[21]

B. Conduct During the Trial Proceedings

¶24 Kruger's conduct did not improve once the case reached the PRT. This is how the PRT describes the experience:

> The case at bar is an extreme example of how the trial panel's effort to provide due process to a respondent provides fertile ground for a respondent inclined to mischief to abuse the process.
>
> . . . .
>
> . . . [A]s is readily apparent in the 3083 page transcript, the Respondent routinely ignored deadlines and Orders all the while complaining that he wasn't being treated fairly. He was late to virtually every day of hearing. He falsified evidence. His disdain and contempt for the disciplinary process was palpable by his actions.
>
> Respondent's utter failure to recognize that the door of due process swings both ways is punctuated by his application to this Court for Extraordinary Relief complaining that the Presiding Master had con-

cluded that Respondent would not be permitted to elicit the testimony of his expert witness because of his failure to comply with the most fundamental of multiple orders and clear statutory mandate requiring that documents upon which his expert relied be produced to the Complainant.

Respondent's evolving defense as to Counts One and Two is that[,] to properly know whether he had accurately accounted to his clients[,] records going back to 2006 had to be considered (records he alternately claimed to not have but necessarily furnished to his expert). As the record became more and more confused because of Respondent's late production and manipulation of data, the Complainant asked leave to have yet another expert (in addition to the investigator for the Complainant) review and testify. Respondent agreed to this before he disagreed. . . .

The Trial Panel and the Presiding Master have been called upon throughout these proceedings to balance the need for an orderly proceeding and due process to all in accordance with fundamental rules of civil procedure as over and against the Respondent's seemingly endless quiver of obfuscatory tactics – all in the interest of providing an adequate record for this Court. It is the Byzantine abuse of the process by the Respondent which provides the clearest record in establishing the appropriate discipline in this matter.[22]

We cannot agree more.[23]

¶25 But what is even more insulting than Kruger's lack of respect for this institution is his lack of respect for his clients, as evidenced by his utter failure to express remorse or acknowledge the gravity of his wrongdoing. For example, at one point in his testimony – after hearing days of evidence demonstrating his mishandling of thousands of dollars of his clients' money – Kruger said: "you know, we're talking about nickels and dimes really."[24] And at another point, in describing his work in representing Ms. McCarroll and her family, he stated: "So I should receive some kind of award from the Bar, I would think, like lawyer of – of the universe."[25] We find this irreverence particularly disturbing.

¶26 In light of this evidence, we conclude that Kruger breached his duty of candor owed to the tribunal, breached his duty to act fairly to the opposing party and counsel, and knowingly made false statements of fact in connection with a bar matter, thereby violating Rules 3.3,[26] 3.4,[27] and 8.1[28] of the Oklahoma Rules of Professional Conduct.

* * *

¶27 Based on the foregoing, it is clear that Kruger has committed professional misconduct as that term is defined in Rule 8.4 of the Rules of Professional Conduct.[29] It is also quite clear that the only appropriate response to Kruger's misconduct is to disbar him.[30] The possibility of Mr. Kruger continuing to practice law in our State poses too great a danger to its courts and to its people.

¶28 Respondent Joel Lawrence Kruger is therefore disbarred and, pursuant to Rule 6.16 of the Rules Governing Disciplinary Proceedings, ordered to pay the costs of this proceeding in the sum of $47,363.01. Respondent's motion for an evidentiary hearing on the matter is denied.

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

Reif, J., recused.

Wyrick, J.:

1. Mr. Kruger is currently suspended from membership in the Oklahoma Bar Association for failure to comply with mandatory legal-education requirements. *In re Suspension of Members of the OBA,* 2018 OK 45.

2. 5 O.S.2011 § 13; RGDP Rule 1.1, 5 O.S.2011 ch. 1, app. 1-A.

3. 5 O.S.2011 § 13; RGDP Rule 1.1, 5 O.S.2011 ch. 1, app. 1-A; *State ex rel. OBA v. Braswell*, 1998 OK 49, ¶ 6, 975 P.2d 401, 404; *State ex rel. OBA v. Eakin*, 1995 OK 106, ¶ 8, 914 P.2d 644, 648; *State ex rel. OBA v. Downing*, 1990 OK 102, ¶ 12, 804 P.2d 1120, 1122-23; *State ex rel. OBA v. Raskin*, 1982 OK 39, ¶ 11, 642 P.2d 262, 265-66.

4. *State ex rel. OBA v. Boone*, 2016 OK 13, ¶¶ 2-3, 367 P.3d 509, 511 (citing *State ex rel. OBA v. Conrady*, 2012 OK 29, ¶ 6, 275 P.3d 136; *State ex rel. OBA v. Wilcox*, 2009 OK 81, ¶ 2, 227 P.3d 642, 647; *State ex rel. OBA v. Kinsey*, 2009 OK 31, ¶ 12, 212 P.3d 1186, 1192; *State ex rel. OBA v. Taylor,* 2003 OK 56, ¶ 2, 71 P.3d 18, 21; *State ex rel. OBA v. Todd*, 1992 OK 81, ¶ 2, 833 P.2d 260, 262). We also note that we are not bound by the specific rule violations listed in the complaint. *See State ex rel. OBA v. Bedford*, 1997 OK 83, ¶ 15, 956 P.2d 148, 152 ("The Bar need only plead sufficient facts that will put the accused attorney on notice of the charges and give him an opportunity to respond to the facts alleged. RGDP Rule 6.2, which governs the contents of disciplinary complaints, requires only that the specific facts be set forth, and does not require the lawyer to be notified of the specific disciplinary rule that such conduct violates." (citations and internal quotation marks omitted) (quoting *State ex rel. OBA v. Perry*, 1997 OK 29, ¶ 16, 936 P.2d 897, 900-01)).

5. RGDP Rule 6.12(c), 5 O.S.2011 ch. 1, app. 1-A.

6. ORPC Rule 1.3, 5 O.S.2011 ch. 1, app. 3-A.

7. ORPC Rule 1.4, 5 O.S.2011 ch. 1, app. 3-A.

8. ORPC Rule 1.15, 5 O.S.2011 ch. 1, app. 3-A.

9. ORPC Rule 1.3, 5 O.S.2011 ch. 1, app. 3-A.

10. ORPC Rule 1.4, 5 O.S.2011 ch. 1, app. 3-A.

11. ORPC Rule 1.5, 5 O.S. 2011 ch. 1, app. 3-A.

12. ORPC Rule 1.15, 5 O.S.2011 ch. 1, app. 3-A.

13. Compl't's Ex. 56 at 2.

14. *Id*. at 8. The fee would have gone up to 40% had Kruger initiated formal proceedings – 45% had the case gone to trial.

15. *Id*. at 4.
16. ORPC Rule 1.4, 5 O.S.2011 ch. 1, app. 3-A.
17. ORPC Rule 1.5, 5 O.S. 2011 ch. 1, app. 3-A.
18. ORPC Rule 1.8(e), (i), 5 O.S. 2011 ch. 1, app. 3-A.
19. ORPC Rule 1.15, 5 O.S.2011 ch. 1, app. 3-A.
20. *See* RGDP Rule 5.2, 5 O.S.2011 ch. 1, app. 1-A; *Braswell*, 1998 OK 49, ¶¶ 80-103, 975 P.2d at 422-31.
21. RGDP Rule 5.2, 5 O.S.2011 ch. 1, app. 1-A.
22. Trial Panel Report at 10-11.
23. Kruger now argues that the PRT's leniency was prejudicial to him because it resulted in the ten days of trial being spread out over several months. In light of Kruger's conduct during these proceedings, however, we find the time and process required to compile this ample record was neither unreasonable nor prejudicial.
24. Tr.Vol.IX at 2479:10-11.
25. *Id*. at 2543:6-8.
26. ORPC Rule 3.3, 5 O.S.2011 ch. 1, app. 3-A.
27. ORPC Rule 3.4, 5 O.S.2011 ch. 1, app. 3-A.
28. ORPC Rule 8.1, 5 O.S.2011 ch. 1, app. 3-A.
29. ORPC Rule 8.4, 5 O.S.2011 ch. 1, app. 3-A.
30. *See, e.g., State ex rel. OBA v. Leonard*, 2016 OK 11, 367 P.3d 498; *State ex rel. OBA v. Trenary*, 2016 OK 8, 368 P.3d 801; *State ex rel. OBA v. Parker*, 2015 OK 65, 359 P.3d 184; *State ex rel. OBA v. Raynolds*, 2015 OK 17, 348 P.3d 208.

2018 OK 54

COMPSOURCE MUTUAL INSURANCE COMPANY, Protestant/Appellant, v. STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Appellee. OKLAHOMA ASSOCIATION OF ELECTRIC SELF INSURERS FUND Protestant/Appellant, v. STATE OF OKLAHOMA TAX COMMISSION, Respondent/Appellee.

No. 116,337; 116,341. June 26, 2018

NO. 116,337 - APPEAL FROM THE OKLAHOMA TAX COMMISSION TAX COMMISSION ORDER NO. 2017-08-01-13

NO. 116,341 - APPEAL FROM THE OKLAHOMA TAX COMMISSION TAX COMMISSION ORDER NO. 2017-08-01-11

¶0 The CompSource Mutual Insurance Company and the Oklahoma Association of Electric Self Insurers requested rebates from the Oklahoma Tax Commission based upon previously paid Multiple Injury Trust Fund assessments. The requests were denied as an Executive Order by the Governor stated the authority for the rebates had been repealed by implication and directed no rebates be funded. The parties seeking rebates filed a protest with the Oklahoma Tax Commission. The protests were consolidated and an administrative law judge concluded the Protestants were entitled to the rebates. The Tax Commission, with two Commissioners voting, denied both protests and directed the administrative law judge to issue findings, conclusions and recommendations consistent with the denial. The protestants appealed to this Court by filing separate appeals. Protestants filed motions to retain which were granted and their appeals were made companion appeals by prior order of the Court. We adjudicate both appeals with a single opinion. We hold: no repeal by implication occurred, the statute at issue was not expressly repealed by the Legislature, no due process violation occurred when the requests for rebates were denied, protestants are not entitled to payment of interest on their rebates, and the causes are remanded to the Tax Commission for processing the protestants' requests for rebates.

TAX COMMISSION ORDER NO. 2017-08-01-11 VACATED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION ON PROTESTANT'S REQUEST FOR REBATE

TAX COMMISSION ORDER NO. 2017-08-01-13 VACATED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION ON PROTESTANT'S REQUEST FOR REBATE

Robert G. McCampbell, Travis V. Jett, Gable Gotwals, P.C., Oklahoma City, Oklahoma, for Protestant/Appellant, CompSource Mutual Insurance Company, No. 116,337.

Darren B. Derryberry, Derryberry & Naifeh, LLP, Oklahoma City, Oklahoma, for Protestant/Appellant, Oklahoma Association of Electric Self Insurers Fund, No. 116,341.

Lee Pugh, General Counsel; Elizabeth Field, Deputy General Counsel; and Mary Ann Roberts, Deputy General Counsel, of the Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Respondent/Appellee, No. 116,337 and No. 116,341.

EDMONDSON, J.

¶1 Protestants requested statutory rebates from assessments paid to the Tax Commission. Tax Commission denied the requests arguing the statutory authority for the rebate, 68 O.S. 2011 § 6101, had been repealed by implication when 85A O.S.Supp. 2014 § 31 was amended in 2015. We conclude the 2015 amendment to 85A O.S. § 31 did not repeal 68 O.S.2011 § 6101 by implication. We also conclude no substantive due process violation is shown on the appellate records. We deny protestants' requests for payment of interest on their rebates.

¶2 The CompSource Mutual Insurance Company filed with the Oklahoma Tax Commission a request for a Multiple Injury Trust Fund rebate. The request was filed on May 25, 2016, and sought a rebate in the amount of $10,777,247.00 based upon the Multiple Injury Trust Fund assessment CompSource paid in 2015.

¶3 In March 2016, the Oklahoma Association of Electric Self Insurers Fund filed with the Oklahoma Tax Commission a request for a Multiple Injury Trust Fund rebate based upon the Multiple Injury Trust Fund assessment it paid in 2015. This rebate request was for the amount of $136,754.82.

¶4 An administrative law judge for the Oklahoma Tax Commission granted an unopposed motion to consolidate the protests of CompSource and the Oklahoma Association of Electric Self Insurers Fund, and they were adjudicated together, but adjudicated separately when reviewed by the Commissioners who issued separate orders for each protest. The administrative law judge concluded the rebates should be paid to the protestants. The Tax Commission, with two Commissioners voting, denied both protests and directed the administrative law judge to issue findings, conclusions and recommendations consistent with the denial.

¶5 Protestants brought appeals from both orders of the Tax Commission.[1] They filed motions for the Court to retain the appeals and those motions were granted by a prior order of the Court. We have treated the appeals as companion appeals and we adjudicate both of them with a single opinion.

¶6 The Oklahoma Association of Electric Self Insurers and CompSource Mutual Insurance Company filed separate motions for an oral argument before the Court. A motion for oral argument must set forth "the exceptional reason that oral argument is necessary."[2] The Tax Commission opposed the motions. The motions state the Court's decision will have an impact on several workers' compensation insurance carriers. Workers' compensation statutes are part of a public-law regulatory scheme,[3] and the rebates sought by Protestants, if authorized, would be paid from the general income taxes collected by the Tax Commission pursuant to 68 O.S. § 2355.[4] This controversy has attributes of both a private and public nature. Oral argument would not materially assist the Court and the motions for oral argument are denied.

Statutes Raised by the Parties

¶7 The legal issue presented by these cases is whether certain parties are entitled to a rebate of funds previously paid to the Tax Commission. The controversy involves statutory construction and the intent of the Legislature concerning the rebate. Protestants state they are entitled to a refund pursuant to 68 O.S. §§ 6101-6102, and the Tax Commission argues these statutes have been repealed citing an Executive Order issued by the Governor. A short history of the relevant statutes provides a context for the present controversy.

¶8 The Multiple Injury Trust Fund, previously known as the Special Indemnity Fund, was established to compensate an injured worker for his or her statutorily recognized work-related injury after having had a previous worker's compensation injury. Workers' compensation insurance carriers, CompSource, employers self-insured for workers' compensation, and other entities fulfilling the same role have been statutorily required to pay annual assessments to the Multiple Injury Trust Fund.

¶9 In 2001, 85 O.S. § 173 required annual assessments made upon each mutual or interinsurance association, stock company, CompSource Oklahoma, an insurance carrier writing workers' compensation insurance, and from employers carrying their own risk including group self-insurance associations.[5] These assessments were paid to the Oklahoma Tax Commission.[6] The Tax Commission paid to the State Treasurer monies collected pursuant to these assessments "to the credit of the Multiple Injury Trust Fund" minus specified amounts paid to the Department of Labor, Office of the Attorney General, and the Oklahoma Department of Career and Technology Education.[7] In 2001, these assessments had been part of a tax incentive program and involved an income tax credit provided by 68 O.S. § 2357.44.[8]

¶10 In 2002, the Legislature passed House Bill No. 2752 which (1) amended § 173 and specified one-third of the assessment could be charged to policy holders and two-thirds could not be so charged, (2) repealed the income tax credit for the assessment,[9] and (3) created a statutory rebate, 68 O.S. §§ 6101-6102,[10] based upon two-thirds of the assessment previously paid pursuant to § 173. In summary, the tax credit was replaced with a rebate based upon the assessment and the two-thirds ratio pro-

vided in 85 O.S. § 173. From 2002 to 2011, and in accordance with 85 O.S. § 173, now expressly repealed, only one-third (1/3) of the assessments could be charged by the carriers against their policyholders, and the remaining two-thirds (2/3) of assessments could not be included in any rate, premium, charge, fee, assessment or other amount collected from a policy-holder.[11]

¶11 In 2011, 85 O.S.Supp. 2005 § 173 was repealed by Laws 2011, c. 318, § 87.[12] The "Workers' Compensation Code" was created by this change in order to replace the previous "Workers' Compensation Act."[13] The new Workers' Compensation Code created 85 O.S. 2011 § 403 and for our purposes its application was identical to repealed § 173.[14] *Section 403 continued the assessment against the same entities, and continued to state one-third (1/3) of the assessments could be charged against the policyholders, and the remaining two-thirds (2/3) of assessments could not be included in any rate, premium, charge, fee, assessment or other amount collected from a policy-holder.*

¶12 Section 403 had a minor amendment in 2012,[15] and then one year later the Legislature amended § 403 as part of the new "CompSource Mutual Insurance Company Act," and *appeared* to remove CompSource Oklahoma from the designated insurers required to pay the assessment formerly referenced in § 403(A)(1), (3), (5), & (D),[16] and simultaneously the 2013 version of § 403(A)(1) stated: "The Board of Directors of CompSource Mutual Insurance Company shall have the power to disapprove the rate established by the MITF Director until the Multiple Injury Trust Fund repays in full the amount due on any loan from CompSource Mutual Insurance Company or its predecessor CompSource Oklahoma." During this same legislative session, § 403 was expressly repealed effective February 1, 2014, the date the new Administrative Workers' Compensation Act was effective.[17]

¶13 The new Administrative Workers' Compensation Act created 85A O.S.Supp.2013 § 31, enacted language similar to the previous 85 O.S. § 403, and again expressly included "CompSource Oklahoma"[18] in the designated list of insurers required to pay the annual assessments.[19] The new Act continued to state the assessment against the same entities, and *continued to state one-third (1/3) of the assessments could be charged against the policyholders, and the remaining two-thirds (2/3) of assessments could not be included in any rate, premium, charge, fee, assessment or other amount collected from a policy-holder*.[20]

¶14 In 2015, the Legislature amended 85A O.S.Supp.2014 § 31. The amendment removed the language in § 31 (A)(3) which had created the one-third and two-thirds split in the assessment, removed the prohibition of collecting two-thirds of the assessment from policyholders, and also removed the allocations to the Office of the Attorney General and the Department of Labor granted by the previous version of § 31(I).[21]

¶15 Title 68 O.S. § 6101 states a party required to pay an assessment *pursuant to 85 O.S. § 173 is entitled to receive a rebate equal to two-thirds (2/3) of the amount of the assessment actually paid,* subject to application to and approval by the Oklahoma Tax Commission.[22] In 68 O.S. § 6102, the Legislature created a special fund within the State Treasury for the Workers' Compensation Assessment Rebate Fund."[23] Section 6102 states the Tax Commission is authorized and directed to withhold a portion of the taxes levied and collected pursuant to 68 O.S. § 2355 (income tax) for deposit into the Rebate Fund. The 68 O.S. § 6101 rebate to insurers was also referenced in 36 O.S. Supp.2002 § 1501(12) for the purpose of calculating the assets of an insurer.[24] This language in § 1501 was subsequently codified in the current version of § 1501 located in the 2011 statutes.[25] Sections 6101 and 6102 have not been *expressly* repealed by the Legislature.

¶16 Governor Fallin issued an Executive Order upon conclusion of the Legislature's Session in 2015, a portion of which states the following.

> Today with the signing of House Bill 2238, the intent of the Legislature is made clear as to the rebate provisions contained within 68 O.S. § 6101. Based on increased funding included in the budget, language in section 3 of the bill which removes billing restrictions, and discussions of legislative intent during budget negotiations with this office, recognize and concur with the Legislature that the Oklahoma Tax Commission should no longer process the rebate of the Multiple Injury Trust Fund assessments pursuant to 68 O.S. § 6101. It appears that previous legislative intent may well have been for the rebate to have been paid between 2011 and this date. However, that is no longer the case.

Executive Order 2015-28 (June 1, 2015).

The Tax Commission argues the rebate provisions in sections 6101 & 6102 were impliedly repealed by 2015 Okla. Sess. Laws Ch. 344 (H.B. 2238), and this implied repeal was recognized by the Governor in her Executive Order.

General Reference and Specific Reference Statutes

¶17 The Tax Commission argues no rebate is allowed for 2015 because: The statute authorizing a rebate, § 6101, states "All parties required to pay an assessment pursuant to *Section 173 of Title 85* of the Oklahoma Statutes" are entitled to a rebate, § 173 was repealed in 2011, and assessments paid in 2015 were not an assessment required by § 173 necessary for a § 6101 rebate in 2015. The Protestants argue § 6101 has not been repealed and they are entitled to a rebate equal to two-thirds of their paid assessments.

¶18 In summary, the issues presented by the parties' arguments are: (1) Whether § 173 was incorporated into § 6101 regardless of subsequent amendments to § 173 or if that section referenced in § 6101 was one to general law concerning insurers' rebates and billing practices with the effect that subsequent legislative amendments may alter the application of § 173 (and 85 O.S.2011 § 403 and 85 O.S.Supp. 2013 § 31) to § 6101; and (2) Whether the amendment to section 31 may repeal section 6101 by implication.

¶19 We start with this analysis because: (1) The parties' include an argument based on the nature or type of reference to 85 O.S. 173 which is made in 68 O.S. 6101; (2) If the reference statute is one of specific reference rather than general, then the repeal of section 173 and the removal of the language in section 31 would have no effect on the section 6101 rebate, because (a) enacted law is neither repealed nor diminished in its force by the passage or rejection of an act that would be duplicative of a statute already "on the books,"[26] and (b) a general rule that a "repeal of a referred statute has no effect on the reference statute unless the reference statute is repealed by implication with the referred statute;"[27] and (3) A general rule is that repeal of a statute by implication is not favored.[28]

¶ 20 When a statute refers to another for the purpose of the powers given by the former, the statute referred to is considered as incorporated in the one making the reference.[29] A reference statute adopts another statute or a part thereof and makes it wholly or partially applicable to the subject of the reference statute.[30] A reference statute may refer to another existing statute to prescribe the rule, manner, or procedure a particular thing is done to avoid encumbering the statute books by unnecessary repetition; and "the effect generally is not to revive or continue in force the statute referred to for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made."[31] A statute of specific reference adopts only the particular parts of the statute to which it refers.

¶21 Generally, if a reference statute adopts or incorporates another statute or a portion thereof, then the adoption takes the statute existing at the time of the adoption and does not include subsequent amendments or modifications unless express legislative intent or a strong implication exists which indicates otherwise.[32] However, if a reference to a statute is for the purpose of referring to the general law on the subject, which may include a reference to a *specific* statutory practice or procedure, then the reference to the statute is construed as including amendments to the referenced statute as well as changes to other applicable law which occurred after adoption of the reference.[33]

¶22 For example, in 1990 the Supreme Court of New Jersey relied upon the same 1977 opinion from the United States Court of Appeals for the Seventh Circuit as the Tenth Circuit in 2016 for the observation that courts have had a common practice of construing a specific statutory reference in context as referencing general law when "the surface specificity of the incorporating language dissolved upon close judicial scrutiny."[34] In other words, specificity in the statutory reference is not sufficient, by itself, to make the reference an incorporation of the statute referenced so as to exclude subsequent statutory amendments as opposed to merely being a reference to general law relating to the subject of the statute referenced and thereby allowing the application of subsequently enacted law.

¶23 The interpretation of these statutes as requested by the parties presents a question of law and on appeal we exercise a nondeferential *de novo* standard of review for the purpose of determining and applying legislative intent.[35] We must first determine if the reference to § 173 is a specific incorporation of that section or a part thereof into § 6101 or if the reference is general to law relating to insurers' rebates. We

look first to the plain language of the statute, § 6101, to determine if any ambiguity exists on the issue whether a specific or general reference is made therein to § 173.[36] Rules of construction are applied to determine legislative intent when the statutory language is ambiguous or its meaning uncertain.[37]

¶24 Section 6101 states: "All parties required to pay an assessment pursuant to Section 173 of Title 85 of the Oklahoma Statutes shall be entitled to receive a rebate equal to two-thirds (2/3) of the amount of the assessment actually paid, subject to application to and approval of the same by the Oklahoma Tax Commission." The test for ambiguity in a statute is whether the language is susceptible to more than one reasonable interpretation.[38] As previously explained, the mere citation of a specific statute, 85 O.S. § 173, is insufficient by itself to create a statute of specific versus general reference. This language in section 6101 does not *expressly* incorporate language in 85 O.S § 173 into 68 O.S. § 6101. The plain language of 68 O.S. 6101 is susceptible to more than one reasonable interpretation on the issue of which type of statutory reference is created by citing section 173.

¶25 The language in section 6101 states two conditions must exist to receive a rebate. The first condition is whether a party paid an assessment pursuant to the procedure and requirements of § 173, and the second is the approval of the Oklahoma Tax Commission. Section 6101 refers to the entity entitled to receive a rebate in terms of that entity having previously paid an assessment. The reference to § 173 in § 6101 may be characterized as containing a procedural component to a condition for a rebate by its language indicating when rebates are authorized, and as a reference to a procedure such demonstrates a general reference as opposed to a specific reference by incorporation.

¶26 One reason for this conclusion is that if a reference statute pertains only to a method of procedure and refers generally to some statute which defines how certain things may be done, then the ordinary construction is that such reference statute will be expanded, modified, or changed every time the statute referred to is changed by the Legislature.[39] When such legislative changes or statutory amendments may be applied, then the reference is general and not a specific reference statute. The Tax Commission and the Governor have taken a legal position which assumes the reference in section 6101 is general because they rely on the 2015 amendment to section 31, as we now explain.

¶27 One question necessarily implied by the arguments of the parties on this issue[40] is whether every insurance carrier rebate from 2002 to the present, and specifically in our case for 2015, requires giving effect to § 173 as it existed in 2002 when § 173 was referenced in § 6101. This reasoning is based upon the well-known principle that a statute with a specific reference incorporates the law existing at the time of incorporation and does not include subsequent amendments.[41] The Tax Commission also makes an argument that the reference in 6101 to section 173 is a *specific* reference to section 173 in 2002, and it argues this type of reference means that after repeal of section 173 a rebate pursuant to section 6101 can no longer occur. This view is incorrect.[42]

¶28 Generally, statutes on the same subject matter are viewed *in pari materia* and construed together as a harmonious whole giving effect to each provision, and we have applied this concept when construing tax statutes as well as construing workers' compensation statutes when we have looked to the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent.[43] This analysis includes looking at antecedent legislative enactments for certain purposes.[44]

¶29 The 2005 version of §173 was repealed in 2011 and the newly enacted Workers' Compensation Code created 85 O.S.2011 § 403 which was identical to repealed § 173 for our purposes today. Generally, repeal of a statute combined with its new codification by renumbering with no substantive change will result in no change in judicial construction of the statute; *i.e.*, repeal followed by mere renumbering and recodification is not usually construed as altering the meaning of a statute.[45]

¶30 The Oklahoma Tax Commission continued providing the rebates after the repeal of section 173 in 2011. The language in 85 O.S.2011 § 403 was identical to former section 173 for the purpose of insurance carrier assessments with two-thirds of that assessment not chargeable to policyholders, and that same two-thirds of the assessment being the amount authorized for a rebate in 68 O.S.2011 § 6101.[46] Section 403 was in effect from 2011 until 2014. The Legislature created 85A O.S. § 31 in 2013 and again included the same language concerning the insurance carrier assessments and two-thirds not charge-

able to policyholders. The Tax Commission processed rebates for 2014 when § 31 was effective. When the language in 85A O.S § 31 was amended in 2015 it removed the prohibition of collecting two-thirds of the assessment from policyholders, and both the Tax Commission and the Governor stated the rebate of the assessment was no longer authorized. This conduct by the Tax Commission during the four years 2011-2014 which continued the rebate when combined with the Commission's conduct in stopping the rebate in 2015, shows that the Commission construed the reference in 6101 to 173 as a general reference and not a specific reference incorporating the 2002 version of § 173; *i.e.*, after the repeal of § 173 the authority for a rebate of two-thirds of the assessment was 85 O.S. § 403 and then 85A O.S. § 31, when joined in combination with section 6101.

¶31 A court's construction of ambiguous statutory language will give great weight to the construction or meaning used by officials charged with execution of the statute.[47] The construction by the Tax Commission and the Governor agrees with our conclusion that the reference to 173 in section 6101 is to a workers' compensation carrier's compliance with the assessment procedure and is a general reference; and language in the 2002 version of section 173 was not specifically incorporated into section 6101.

Repeal By Implication

¶32 Our conclusion that section 6101 contains a general reference to the procedure for workers' compensation carrier assessments does not answer an issue briefed by the parties. Does the amendment to 85A O.S. § 31 in 2015 create an implied repeal of 68 O.S. §§ 6101 and 6102? The Tax Commission by its briefs and the Governor by her Executive Order indicate section 6101 was repealed by the 2015 amendment to section 31.

¶33 In 2015 when 85A O.S. § 31 was amended by House Bill No. 2238, the following language *was removed from section 31*.

> Only one-third (1/3) of assessments against insurance carriers and CompSource Oklahoma may be charged to policyholders and shall not be considered in determining whether any rate is excessive. The remaining two-thirds (2/3) of assessments against insurance carriers and CompSource Oklahoma may not be included in any rate, premium, charge, fee, assessment or other amount to be collected from a policyholder. Insurance carriers and CompSource Oklahoma shall not separately state the amount of the assessment on any invoice or billing assessment.

2015 Okla. Sess. Laws, Ch. 344, §3 (H.B. No. 2238).

Section 6101 of Title 68 also referred to this one-third and two-thirds split and was not expressly repealed by H.B. No. 2238. Section 6101 states in part as follows.

> A. All parties required to pay an assessment pursuant to Section 173 of Title 85 of the Oklahoma Statutes shall be entitled to receive a rebate equal to two-thirds (2/3) of the amount of the assessment actually paid, subject to application to and approval of the same by the Oklahoma Tax Commission. This rebate shall only apply to assessments due after January 15, 2002. This rebate shall not be considered in determining tax liability of an insurer pursuant to Section 629 of Title 36 of the Oklahoma Statutes.

68 O.S.2011 § 6101(A).

The amount of the rebate in section 6101 is two-thirds of the workers' compensation carrier's assessment pursuant to section 31. Prior to 2015, this rebate of "two-thirds (2/3) of the amount of the assessment" in section 6101 is equal to two-thirds of the assessment specified in former sections 85 O.S. §§ 173 and 403, and 85A O.S. § 31. Pursuant to § 31 this two-thirds amount could not be included in any rate, premium, charge, fee, assessment or other amount to be collected from a policyholder. Further, section 6101 referenced 36 O.S.2001 § 629 and prohibited this same two-thirds amount from being considered when determining the premium tax required of section 629.

¶34 The general rule is that (1) repeals by implication are never favored, (2) it is not presumed that the legislature in the enactment of a subsequent statute intended to repeal an earlier one, unless it has done so in express terms, and (3) all provisions must be given effect unless irreconcilable conflicts exist.[48] Our approach to this issue is not unique.[49] We must *initially* construe the meaning of section 6101 with the statute it references 36 O.S. 629 and with section 31 before the 2015 amendment. One reason for this is that the language in all three sections arose from the same House Bill

in 2002, and construction of a statutory provision by reference to its structure, purpose *and the text of the entire enactment* is a method familiar to Oklahoma courts.[50]

¶35 We must also consider the relevant statutory language, sections 31, 6101, and 629 in context after the amendment to section 31 to construe present legislative intent because one Legislature cannot bind a subsequent Legislature.[51] Of course, legislative amendments other than clarifying amendments[52] express new or amended legislative policy and intent concerning the text which is amended as such relates to other statutes which remained legislatively unaltered. When construing a legislative act, whether constitutional or statutory, our primary goal is to ascertain and follow legislative intent.[53]

¶36 Previous to 2002 the paid assessments were subject to an income tax credit for a workers' compensation insurance carrier. In 2002, section 6101 was initially created in House Bill No. 2752 with the two-thirds split in 85 O.S. §173 (later 85A O.S. § 31), and these two statutes worked together and with 36 O.S. § 629 so that the premium tax would not include the two-thirds recovered in the rebate and this amount would not be collected from a policyholder in the form of a premium or other policyholder fee, charge or assessment.

¶37 The 2015 amendment to 85A O.S. § 31 removed language which had prohibited a workers' compensation insurance carrier from collecting two-thirds of the assessment from its policyholders. Protestants' view of the statutes after the 2015 amendment is essentially: (1) The insurance carrier assessment is paid by the insurer pursuant to the amended version of section 31; (2) The amended version of section 31 contains no restriction on billing or collecting from a policyholder the amount of the assessment; (3) Section 6101 was not expressly repealed and continued to authorize a rebate in the amount of two-thirds of the insurer's assessment; and (4) Two-thirds of the assessment is not subject to a section 629 premium tax if the assessment amount was previously collected from its policyholder as a premium. CompSource Mutual Insurance Company also argues, in reply to the Tax Commission, that the nature of its organization as a mutual company means it has no "policyholders," it cannot receive a "windfall" as a result of obtaining a section 6101 rebate, and that the Court should not attempt to determine when or if insurance rates are excessive in light of the change in billing practices as a result of the 2015 amendment.[54]

¶38 We conclude the workers' compensation insurer assessments remained the same after the 2015 amendment except for the former billing restrictions which were removed by the amendment. House Bill No. 2752, which in 2002 created the two-thirds assessment split in 85 O.S. § 173 and the two-thirds rebate in 68 O.S. § 6101, *also expressly repealed the former tax credit* in 68 O.S. § 2357.44.[55] The Legislature knows how to expressly repeal a statute, and our recognition of this fact is one reason for the general rule that it will not be presumed that a legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms.[56] The Legislature did not expressly repeal 68 O.S.2011 § 6101.

¶39 There must be conflicting language, public policy, or legislative intent in the statutes at issue in order to support the Tax Commission's conclusion that § 6101 has been repealed by implication. We conclude no conflict is present, and § 6101 was not repealed by implication.

Governor's Executive Order

¶40 The Governor's Executive Order, 2015-28, states the intent of the Legislature in removing the billing restrictions was to repeal § 6101, and this conclusion is supported by her understanding of statements made during budget negotiations. The Governor may certainly speak on her intent concerning legislation with which she is involved. But the Legislature communicates its intent as a body, and testimony of individuals involved in the legislative process of creating a statute is not competent on the intent of the Legislature as a whole.[57]

¶41 Officials' expressions of legislative intent when they participate in the law-making process may be especially well informed concerning legislative intent, and upon judicial review of their administrative construction a court may give deference to that construction. This deference springs from a previous official construction where the Legislature has acquiesced in the administrative action, and we have often noted that the administrative construction was not transitory but long-standing.[58]

¶42 It is not the Governor's expression of legislative intent in her executive order which raises the issue of deference on the issue of legislative intent, but an apparent legislative acquiescence to the executive order and Tax

Commission interpretation by the passing of the 2016, 2017, and 2018 legislative sessions without any legislation in the form a clarifying amendment to § 6101. However, we find significant that the executive order and Tax Commission construction of § 6101 has occurred continuously and simultaneously with public administrative and judicial challenges to the Tax Commission's construction of § 6101. We cannot determine whether the collective will of the Legislature has acquiesced in the last three years to the ongoing administrative construction of § 6101 or to the ongoing public judicial challenges and ultimate resolution of the controversy in this Court.

¶43 Protestants object to the Governor issuing the executive order. The power exercised by the Governor, by executive order or otherwise, may be limited or granted by statute.[59] The power of the Governor to direct how executive officials will execute statutory law is limited by the nature of the constitutional power vested in the Governor.[60] We have concluded contrary to the substance of the executive order that 68 O.S. § 6101 was not repealed by the 2015 amendment 85A O.S. § 31. The exercise of legislative power via a state statute may not divest a person's already vested property interest in the absence of certain recognized exceptions such as when procedural protections are constitutionally required or when a legislature exercises certain police powers;[61] and similarly, the Governor's executive power concerning a matter beyond the scope of one of the Governor's express constitutional powers does not supersede the authority of statute which has been created by the legislature and approved by a governor.

¶44 The Governor's Executive Order refers to no constitutional or statutory power possessed by the Governor for directing the Tax Commission to stop processing the § 6101 rebates, but no such express requirement for executive orders is created in the Oklahoma Constitution. The Constitution does provide as follows.

> The Governor shall cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States, and he [or she] shall be a conservator of the peace throughout the State.

Okla. Const. Art. 6 § 8 (explanatory phrase added).

The Governor has the power to issue executive orders to executive officials directing them to faithfully execute the law, subject of course to other provisions of our Constitution such as the due process clause.[62] She possessed the power to issue an executive order, but the content of that order stating § 6101 had been repealed was simply an incorrect legal conclusion.

¶ 45 Protestants argue they have been denied "due process" because they have "a vested right to a tax refund" which they have not received at this time. No distinction is made in the briefs between procedural and substantive due process, or between pre-deprivation and post-deprivation remedies and their adequacy for the right allegedly infringed. Several years ago we relied on an opinion from the U.S. Supreme Court and explained due process requires a "clear and certain" remedy for taxes collected in violation of federal law, and a State has the flexibility to provide that remedy before the disputed taxes are paid (pre-deprivation), after they are paid (post-deprivation), or both.[63] However, a simple assertion is made by protestants that "process is not the problem." We construe this to assert they do not challenge the process for a tax remedy.

¶46 The Oklahoma Association of Electric Self Insurers Fund states "it has complied with the statutory prerequisites set forth in 68 O.S. § 6101" and argues it has a vested right to the rebate. Its brief does not set forth all of the statutory requirements to which it refers or the locations in the appellate record showing where those requirements are satisfied. For example, section 6101 states the rebate is "subject to application to and approval of the same by the Oklahoma Tax Commission." The brief does not explain how this condition either was fulfilled or should be deemed to be fulfilled by the actions of the protestants and the actions of the Tax Commission for the purpose of showing fulfillment of required statutory conditions. We note 68 O.S. § 6102 states "The liability of the State of Oklahoma to make the rebate payments under Section 2 (§ 6101) of this act shall be limited to the balance contained in the fund created by this section." The parties do not brief and point to the records on appeal for the purpose of showing money was in the "Workers' Compensation Assessment Rebate Fund," when they sought their assessment rebates. Generally, a legal interest will not vest

when a condition precedent for vesting has not occurred.[64] Fiscal policy is exclusively within the Legislature's power.[65] However, if a taxpayer has demonstrated compliance with taxpayer's statutory requirements to receive a right to a tax refund, due process is violated when government funds are not adequate and available to pay the refund.[66] The parties do not discuss whether for the purpose of due process the applications for a rebate filed before the date of the executive order should be distinguished from applications for a rebate filed after the executive order.

¶47 The CompSource Mutual Insurance Company states the Tax Commission's refusal to pay the rebate "violates due process as an unconstitutional taking. . . that cannot be extinguished without just compensation."[67] A regulatory taking with an unjust compensation constitutional claim should be separated from a due process constitutional claim because, for example, the constitutional injury of a state regulatory taking of property without just compensation does not occur when the state provides an adequate postdeprivation remedy,[68] as distinguished from substantive due process which bars *certain* governmental action despite the adequacy of procedural protections[69] where the regulatory action is so arbitrary and irrational as to violate due process.[70] Substantive due process does not protect from erroneous regulatory action, but *arbitrary and irrational* actions.[71] The Tax Commission and Governor asserted the 2015 amendment created an implied repeal by operation of law and the Governor's understanding of legislative intent. The Tax Commission relied upon a legally erroneous executive order issued by the Governor which controlled the Tax Commission's discretion. We conclude no substantive due process violation is present by the Tax Commission's erroneous legal understanding of ambiguous statutory language.

¶48 We also note the protestants were denied their requests for rebates and filed protests before the Tax Commission which eventually resulted in the present appeals before this Court, and we have directed herein the Tax Commission orders be reversed and the proceedings remanded for the Tax Commission to process their requests for rebates.

Interest

¶49 The protestants ask the Court to award interest pursuant to 68 O.S. 225(E) commencing on August 30, 2017. Section 225(E) provides interest from the date the petition in error was filed in this Court.[72] However, the next paragraph in that section states the refund and interest shall be paid by the Tax Commission out of monies in the Tax Commission clearing account *from subsequent collections from the same source as the original tax assessment*.[73]

¶50 The legislature has specified that the insurance carrier rebates come from income tax collections and not the monies collected from the insurance carrier assessments, and the statute authorizing the rebates does not authorize interest. Before its repeal, 85 O.S. § 173 provided for Multiple Injury Trust Fund *refunds* to be paid from the Multiple Injury Trust Fund, and the general refund provisions of 68 O.S. sections 227 - 229 applied. 85 O.S.Supp.2005 § 173 (H). Section 403 continued this language in 2011.[74] Section 31 in the new Administrative Workers' Compensation Act includes the same language.[75] This language does not expressly include either 68 O.S. § 225 or the *assessment rebates* in 68 O.S. § 6101. During this time 68 O.S. § 6102 has been in effect and has expressly provided the *workers' compensation assessment rebates* would be paid *from income tax collections*.[76] Funds collected pursuant to 85A O.S. Supp.2015 § 31 are paid by the Tax Commission to the State Treasurer to the credit of the Multiple Injury Trust Fund.[77] The Multiple Injury Trust Fund is not used for assessment rebates which are paid from income tax collections as authorized by 68 O.S. § 6102.

¶51 The Court applies the specific tax statute authorizing interest which is applicable to the specific controversy.[78] Protestants rely on 68 O.S. § 225. Section 225 is part of the Uniform Tax Procedure Code codified in Article 2, Ch. 1 of Title 68, Oklahoma Statutes, (68 O.S.2011 § 201 through § 291, inclusive as amended). The purpose of the uniform procedure is to provide, so far as is possible, uniform procedures and remedies with respect to all state taxes, unless otherwise expressly provided in any state tax law.[79]

¶52 The language in 68 O.S. § 225 provides a general procedure concerning payments for refunds and interest from the collecting fund *of the same tax type* and conflicts with the language in 68 O.S. § 6102 which is more specific and states an assessment rebate is paid from the fund used for income tax collections. A specific statute controls a more general statute on the same subject.[80] If a specific tax statute con-

flicts with a provision of the Uniform Tax Procedure Code, then the specific statute controls the general.[81] The requests for interest on the rebates are denied.

Conclusion

¶53 We conclude the 2015 amendment to 85A O.S. § 31 did not repeal 68 O.S.2011 § 6101 by implication. The rebates authorized by the Legislature in section 6101 have not been expressly repealed by the Legislature. No substantive due process violation is shown in the appellate records for these two appeals. The protestants' requests for payment of interest on their rebates are denied.

¶54 The two orders of the Tax Commission are reversed and the proceedings are remanded to the Tax Commission for the appropriate processing of section 6101 rebates for protestants.

¶55 COMBS, C.J.; KAUGER, WINCHESTER, EDMONDSON, COLBERT, REIF, and DARBY, JJ., concur.

¶56 GURICH, V. C. J. (by separate writing); and WYRICK, J., dissent.

GURICH, V.C.J., with whom WYRICK, J., joins dissenting:

¶1 I must respectfully dissent from this Court's decision to award rebates in the above-captioned matters. The plain and unambiguous language of 68 O.S. 2011 § 6101(A) permits a rebate, but only for Multiple Injury Trust Fund assessments paid in accordance with "Section 173 of Title 85 of the Oklahoma Statutes." Section 173 was repealed by the Legislature in 2011.[1] Consequently, the taxpayers do not qualify for a rebate of the 2015 MITF assessments.

¶2 Moreover, the Legislature created the MITF assessment and rebate scheme in 2002, codifying 68 O.S. § 6101(A) and 85 O.S. § 173 (A)(2) together in H.B, No. 2753. *See* 2002 Okla. Sess. Laws, Ch. 31, §§ 2-4, pp. 191-192. As originally enacted, the Tax Code authorized a rebate equal to two-thirds (2/3) of MITF assessments paid under 85 O.S.Supp. 2002 § 173 to the MITF. To prevent Oklahoma insurance carriers from passing on one-hundred percent (100%) of the MITF assessment to policyholders ***and*** claiming the rebate, Section 173 limited the sums which could be shouldered by policyholders:

> Only one-third (1/3) of assessments against insurance carriers and CompSource Oklahoma may be charged to policyholders and shall not be considered in determining whether any rate is excessive. The remaining two-thirds (2/3) of assessments against insurance carriers and CompSource Oklahoma may not be included in any rate, premium, charge, fee, assessment or other amount to be collected from a policyholder.

85 O.S. 2002 § 173(A)(2). When reading both § 6101(A) and § 173(A)(2) in harmony, the legislative rationale behind allowing a two-thirds (2/3) rebate is obvious – to protect policyholders from bearing the entire tax burden and to make insurers paying the MITF assessment whole without bestowing a windfall.[2]

¶3 In 2015, when the Legislature removed the limit on amounts insurance carriers and CompSource could pass on to its policyholders, the justification for providing a rebate was likewise removed. A reading of the statute as interpreted by the majority would allow insurers to pass 100% of assessment costs to policyholders, while still allowing a rebate of two-thirds (2/3) of monies paid to the MITF. Such a handout and absurd result is surely not the outcome intended by our Legislature.

EDMONDSON, J.

1. *CompSource Mutual Insurance Company v. State of Oklahoma, ex rel. Oklahoma Tax Commission*, Okla. Sup. Ct. No. 116,337: CompSource Mutual Insurance Company appealed Tax Commission Order No. 2017-08-01-13, August 1, 2017, issued in Tax Commission Cause No. P-16-159-H.

Oklahoma Association of Electric Self Insurers Fund v. State of Oklahoma, ex rel. Oklahoma Tax Commission, Okla. Sup. Ct. No. 116,341: Oklahoma Association of Electric Self Insurers Fund appealed Tax Commission Order No. 2017-08-01-11, August 1, 2017, issued in Tax Commission Cause No. P-16-092-H.

2. 12 O.S.2011 Ch. 15, App. 1, Okla. Sup. Ct. R. 1.9.

3. *Young v. Station 27, Inc.*, 2017 OK 68, ¶ 20, 404 P.3d 829, 839-840, citing *Red Rock Mental Health v. Roberts*, 1996 OK 117, 940 P.2d 486, 492 and *Benning v. Pennwell Pub. Co.*, 1994 OK 113, n. 20, 885 P.2d 652, 656.

4. 68 O.S.2011 § 6102 states that rebate assessments shall be paid from the Workers' Compensation Assessment Rebate Fund, and § 6102 also states this Fund shall be funded by taxes levied and collected pursuant to 68 O.S. § 2355, an income tax statute. *See* § 6102 at note 23 *infra*.

5. 85 O.S.2001 § 173 (A)(1) ("each mutual or interinsurance association, stock company, CompSource Oklahoma, or other insurance carrier writing workers' compensation insurance in this state shall be assessed and pay to the Oklahoma Tax Commission a sum equal to two per cent (2%) of the total gross direct premiums written for workers' compensation on risks located in this state . . . [and] the Oklahoma Tax Commission shall assess and collect from employers carrying their own risk including group self-insurance associations, a temporary assessment at the rate of four percent (4%) of the total compensation for permanent total disability awards, permanent partial disability awards and death benefits paid out....").

6. 85 O.S.2011 § 173(B)(2), (D).

7. 85 O.S.2001 § 173 (H).

8. 68 O.S. 2001 § 2357.44, provided an income tax credit for amounts shown on a premium bill or invoice stating the additional insurance premium paid for the purpose of funds used by the Multiple Injury Trust Fund for payment of claims against the Fund. Section 2357.44 was repealed by 2002 Okla. Sess. Laws, Ch. 31, § 5.

9. 2002 Okla. Sess. Laws, Ch. 31 § 5 (H.B. No. 2752).

10. 2002 Okla. Sess. Laws, Ch. 31, § 2, creating 68 O.S. § 6101, and § 3 of Ch. 31 creating 68 O.S. § 6102.

11. 85 O.S.Supp.2010 § 173 (A)(2).

12. 2011 Okla. Sess. Laws, Ch. 318, § 87 (S.B. No. 878).

13. *Hogg v. Oklahoma County Juvenile Bureau*, 2012 OK 107, n. 3 & ¶ 4, 292 P.3d 29, 31.

14. Section 173(A)(3)(b) of 85 O.S. Supp. 2010 contained a reference to 68 O.S. § 6101 for the 2002 assessment and 85 O.S. 2011 § 403 omitted this reference, but § 403 contained the same restrictions on billing policyholders.

15. The 2011 version of § 403 had been amended in 2012 to replace the language "Department of Central Services" with "Office of Management and Enterprise Services." 2012 Okla. Sess. Laws, Ch. 304, § 1082.

16. 85 O.S.Supp.2013 § 403. *See* 2013 Okla. Sess. Laws, Ch. 254, § 1 (stating title of the Act) § 47 (amending § 403) (H.B. 2201).

17. 2013 Okla. Sess. Laws, Ch. 208, § 1 (specifying provisions of the Act to be known as the Administrative Workers' Compensation Act), § 171 (repealer provision), § 172 (creating effective date).

18. The amendment also provided that "if CompSource begins operating as a mutual insurance company" then the Board of Directors of CompSource Mutual Insurance Company shall have the power to disapprove the rate established by the MITF Director until the Multiple Injury Trust Fund repays in full the amount due on any loan from CompSource Mutual Insurance Company or its predecessor CompSource Oklahoma. 85A O.S.Supp.2013 § 31(A)(1) (effective February 1, 2014).

19. 85A O.S.Supp.2013 § 31 (2013 Okla. Sess. Laws, Ch. 208, § 31) (S.B. No. 1062) (effective Feb. 1, 2014).

20. 85A O.S.Supp.2013 § 31 (A)(3) (effective February 1, 2014).

21. 85A O.S.Supp.2015 § 31 (2015 Okla. Sess. Laws, Ch. 344, §3) (In 2015, H.B. No. 2238 amended 85A O.S.Supp.2014 § 31 which was identical to § 31 codified at 85A O.S.Supp.2013 § 31.).

22. 68 O.S.2011 § 6101:

> A. All parties required to pay an assessment pursuant to Section 173 of Title 85 of the Oklahoma Statutes shall be entitled to receive a rebate equal to two-thirds (2/3) of the amount of the assessment actually paid, subject to application to and approval of the same by the Oklahoma Tax Commission. This rebate shall only apply to assessments due after January 15, 2002. This rebate shall not be considered in determining tax liability of an insurer pursuant to Section 629 of Title 36 of the Oklahoma Statutes.
>
> B. Beginning January 1, 2003, the Oklahoma Tax Commission shall accept applications for rebates from all eligible parties for assessments paid pertaining to the previous calendar year. If any party fails to apply for a rebate on or before May 31 of each year, the Tax Commission shall reduce the amount of the rebate in the application by ten percent (10%). No rebates shall be paid until after July 1 of each year.
>
> C. The Oklahoma Tax Commission may promulgate rules as necessary to effectuate the provisions of this act.

23. 68 O.S.2011 § 6102:

> There is hereby created within the State Treasury a special fund for the Oklahoma Tax Commission to be designated the Workers' Compensation Assessment Rebate Fund. The Oklahoma Tax Commission is hereby authorized and directed to withhold a portion of the taxes levied and collected pursuant to Section 2355 of Title 68 of the Oklahoma Statutes for deposit into the fund. The amount deposited shall be appropriate to pay the rebates provided for in Section 2 of this act. All of the amounts deposited in such fund shall be used and expended by the Oklahoma Tax Commission solely for the purpose of payment of rebates authorized by Section 2 of this act. The liability of the State of Oklahoma to make the rebate payments under Section 2 of this act shall be limited to the balance contained in the fund created by this section.

24. 36 O.S.Supp.2002 § 1501: "In determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of: ... (12) Rebates determined and accrued pursuant to Section 2 of this act." The phrase "section 2 of this act" refers to section 2 of Laws 2002, c. 31, § 2, (H.B. No. 2752) where 68 O.S.Supp. § 6101 was created. 2002 Okla. Sess. Laws Ch. 31, §§ 1, 2.

25. 36 O.S. 2011 § 1501 (12).

26. *Allen v. State ex rel. Bd. of Trustees of Oklahoma Uniform Retirement Sys. for Justices & Judges*, 1988 OK 99, 769 P.2d 1302, 1306 (rule stated) (If language from section 173 is "on the books" as a specific reference incorporating language into section 6101, as if set forth therein, then repeal of § 173 and removal of the language at issue in section 31 would not change the assessment rebate pursuant to 6101.).

27. Norman J. Singer & J.D. Shambie Singer, 2B *Sutherland Statutory Construction* § 51:8 (7th ed. 2015) (discussing construction of reference statutes).

28. See the discussion of repeal by implication herein and application of the general rule from *Fent v. Henry*, 2011 OK 10, 257 P.3d 984.

29. *City of Pond Creek v. Haskell*, 1908 OK 153, 97 P. 338, 357 (Statutes which refer to, and by reference adopt wholly or partially, pre-existing statutes; and the statute referred to is treated as if it were incorporated into and formed part of that which makes the reference.), relying in part on *Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law,* 229 (1857), *Turney v. Wilton*, 36 Ill. 385 (1865), and *Knapp v. Brooklyn*, 97 N.Y. 520 (1884).

30. *Pentagon Academy, Inc. v. Independent School Dist. No. 1 of Tulsa County*, 2003 OK 98, ¶ 17, 82 P.3d 587, 591.

31. *State v. Rasmussen*, 14 Wash.2d 397, 128 P.2d 318, 320 (1942); *State v. Waller*, 143 Ohio St. 409, 55 N.E.2d 654, 657 (1944) quoting *Heirs of Ludlow v. Johnston*, 3 Ohio 553, 572, 17 Am. Dec. 609 (1828); *State v. Armstrong*, 31 N.M. 220, 243 P. 333, 353 (1924).

32. *Dabney v. Hooker,* 1926 OK 751, 249 P. 381, 384, quoting *Nampa & Meridian Irr. Dist. v. Barker et al.*, 38 Idaho 529, 223 P. 529, 530 (1924) (explaining one difference between (1) adoption by reference to particular statute or part of a statute with application of law existing at the time of the adoption and (2) adoption by reference to the law generally when subsequent application of law is based upon the law as it exists at the time the exigency arises to which the law is applied); *Ex parte McMahan*, 1951 OK CR 146, 237 P.2d 462, 466 (In 1923 the Legislature enacted a law [47 O.S. § 93, prohibiting driving under the influence of an intoxicating liquor] which referred to a second statute [47 O.S. § 91, setting forth a definition for highways]; and our Court of Criminal Appeals relied on *Dabney v. Hooker, supra*, and explained that the former statute was in effect although the latter referenced statute had been repealed.). *See also Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 322 (7th Cir. 1977) citing *George Williams College v. Village of Williams Bay*, 242 Wis. 311, 7 N.W.2d 891 (1943) and 2A *Sutherland Statutory Construction*, §§ 51.07, 51.08 (4th ed.1973). *Cf. Hassett v. Welch*, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858 (1938) (A well-settled canon states that adoption by reference takes the statute as it exists at the time of adoption and does not include subsequent additions.).

33. *El Encanto, Inc., v. Hatch Chile Company*, Inc., 825 F.3d 1161, 1164 (10th Cir. 2016) citing *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 322 (7th Cir. 1977); Norman J. Singer & J.D. Shambie Singer, 2B *Sutherland Statutory Construction* § 51:8 (7th ed. 2015).

34. *Matter of Commitment of Edward S.*, 118 N.J. 118, 570 A.2d 917, 925 (1990) quoting *Director, Office of Workers' Compensation v. Peabody Coal Co.*, 554 F.2d 310, 324 (7th Cir.1977), (courts have treated a specific reference as a general one); *El Encanto, Inc., v. Hatch Chile Company, Inc.*, 825 F.3d at 1164 (10th Cir. 2016) citing *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d at 322 (well-settled canons of statutory construction distinguish statutes of specific and general reference).

35. *Farmacy LLC v. Kirkpatrick*, 2017 OK 37, ¶ 13, 394 P.3d 1256, 1259-1260, citing *State ex rel. Dept. of Transportation v. Little*, 2004 OK 74, ¶ 10, 100 P.3d 707, 711 and *The Pentagon Academy, Inc. v. Independent Sch. Dist. No. 1 of Tulsa County,* 2003 OK 98, ¶ 19, 82 P.3d 587, 591.

36. If the language of the statute is plain and unambiguous, the legislative intent is deemed to be expressed by the statutory language. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 11, n. 8, 373 P.3d 1057, 1065, citing *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 9, 130 P.3d 213, 219.

37. *Brown v. Claims Management Resources, Inc.*, 2017 OK 13, ¶ 20, 391 P.3d 111, 118; *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 11, 373 P.3d 1057, 1065.

38. *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656, 658.

39. *S. S. Bowser & Co. v. Garwitz*, 185 Mo. App. 420, 170 S.W. 927, 928 (1914) quoting *State v. Rogers,* 253 Mo. 399, 408, 161 S. W. 770, 772 (1913).

40. Also addressed herein is the related issue, according to protestants a § 6101 rebate is authorized even with 85 O.S. §§ 173 and 403 repealed and 85A O.S. § 31 amended, and according to the Tax Commission, the rebate is not allowed considering these same statutes.

41. *Dabney v. Hooker*, 1926 OK 751, 249 P. 381, 384. *See also Cagiva North America, Inc. v. Schenk*, 239 Conn. 1, 690 A.2d 964, 969 (1996) (arguing for an incorporation of a specific referenced statute is a claim that the statute was incorporated as it existed in the year of incorporation regardless of any subsequent amendments to the referenced statute).

42. *See* authority cited in note 41 *supra*.

43. *Shepard v. Oklahoma Department of Corrections*, 2015 OK 8, ¶ 15, 345 P.3d 377, 382 (workers' compensation statutes); *Samson Hydrocarbons Co. v. Oklahoma Tax Commission*, 1998 OK 82, ¶ 15, 976 P.2d 532, 537-538 (tax statutes).

44. *See, e.g., Samson Hydrocarbons Co. v. Oklahoma Tax Commission,* 1998 OK 82, ¶ 15, 976 P.2d 532, 538 (Antecedent legislative enactments may be considered in the construction of amendatory acts *in pari materia* so that words and phrases employed in the original or antecedent act will be presumed to be used in the same sense in the amendatory enactment.).

45. *See, e.g., Sudbury v. Deterding*, 2001 OK 10, ¶ 16, 19 P.3d 856, 859-860 (in the context of a statute having been amended three times we explained if a statute is reenacted in the same or substantially the same terms after a judicial construction, then the court's meaning of the statute is presumed to have been adopted by the Legislature); Norman J. Singer & J.D. Shambie Singer, 2B *Sutherland Statutory Construction* § 22:27 (7th ed. 2015) ("If a statute goes through a revision or is codified without being changed, the legislature is presumed to have adopted the construction which had already existed."); *Fourco Glass Co. v. Transmirra Products Corp*., 353 U.S. 222, 227, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957) (moving language to a statute with a different number without any substantive change in the language "cannot be regarded as altering the scope and purpose of the enactment.").

Due to the nature of our analysis herein, we need not explain the several various contexts where legislative numbering, or statutory placement for codification, or some other legislative classification does or does not have a role in judicial construction. *See, e.g., Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 2005 OK 71, ¶ 12, 123 P.3d 5, 8 (substantive effect of a statute determined the nature or kind of tax enacted and its legislatively-supplied name was not controlling); *Harber v. Shaffer,* 1988 OK 45, 755 P.2d 640, 642 (the fact that statutes involving contempt were numbered and placed in a particular statutory title was not controlling for the issues before the Court).

46. The Tax Commission's construction of 85 O.S.2011 § 403 as taking the place of former section 173 for the purpose of the rebate is consistent with language in *Fourco Glass Co. v. Transmirra Products Corp., supra*, at note 45.

47. *State ex rel. State Bd. of Agriculture of Okla. v. Warren*, 1958 OK 245, 331 P.2d 405, 408. *Cf. Tinker Inv. Mortg. Corp. v. City of Midwest City,* 1994 OK 41, 873 P.2d 1029, 1038 (application of rule to judicial construction of municipal ordinances).

48. *Fent v. Henry,* 2011 OK 10, ¶ 11, 257 P.3d 984, 991.

49. For example, a similar analysis was used in *National Ass'n of Homebuilders v. Defenders of Wildlife,* 551 U.S. 644, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007), where Justice Alito in writing for the High Court explained repeals by implication are not favored and the Court would not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all. *Id*. 551 U.S. at 662-663, quoting previous opinions of the Court and T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law,* 98 (2d ed. 1874).

50. *Anderson v. Eichner,* 1994 OK 136, n. 25, 890 P.2d 1329, 1337-1338 (A fundamental proposition is that a statute should not be read in isolation from the context of the entire act of which it forms a part.).

51. *Torres v. Seaboard Foods, LLC,* 2016 OK 20, 373 P.3d 1057, 1080, citing *State ex rel. Wright v. Oklahoma Corp. Com'n,* 2007 OK 73, ¶ 28 & n. 17, 170 P.3d 1024, 1034. *Cf. Reichelderfer v. Quinn*, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331 (1932) (per Stone, J., for the Court) (the will of a particular Congress may not be imposed upon a subsequent Congress).

52. A clarifying amendment is one that explains ambiguous law in order to remove doubt concerning the original legislative intent in the original text. *Polymer Fabricating, Inc. v. Employers Workers' Compensation Ass'n,* 1998 OK 113, n. 18, 980 P.2d 109, citing *Magnolia Pipe Line Company v. Oklahoma Tax Commission*, 1946 OK 113, 167 P.2d 884, 888.

53. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 18, 184 P.3d 546 (The Court follows the intent of the framers when construing the Constitution.); *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*, 1988 OK 117, 764 P.2d 172, 179 (The primary goal of statutory construction is to ascertain and follow the intention of the legislature.).

54. For a few examples of the Insurance Commissioner regulating "insurance rates" and premiums *see* 36 O.S.Supp.2015 § 902.3 (involving workers' compensation and high-wage-paying and low-wage-paying employers in the same job classification); 36 O.S.2011 § 900.1-905, 907-908, 932 (as amended), 1204 (as amended), 3610, and 3611; 36 O.S. 2011 § 901.1(Oklahoma Insurance Rating Act regulating insurance rates "to the end they shall not be excessive, inadequate or unfairly discriminatory"); 36 O.S.2011 § 902 (Insurance Commissioner "shall not approve rates for insurance which are excessive, inadequate or unfairly discriminatory"); 36 O.S.Supp.2015 § 924.2 (involving self-insureds).

55. *See* note 8 *supra*.

56. *Mustain v. Grand River Dam Authority*, 2003 OK 43, ¶ 23, 68 P.3d 991, 999.

57. *Haynes v. Caporal*, 1977 OK 166, 571 P.2d 430, ("Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote."), citing *Davis v. Childers*, 1937 OK 728, 74 P.2d 930; *State v. Sandfer*, 1951 OK CR 4, 226 P.2d 438 (1951), and *Barlow v. Jones,* 37 Ariz. 396, 294 P. 1106 (1930).

58. *See, e.g., Branch Trucking Co. v. State ex rel. Oklahoma Tax Comm'n,* 1990 OK 41, 801 P.2d 686, 689 (A long-standing administrative interpretation must be given great weight by the courts.). *Cf. Davis v. United States*, 495 U.S. 472, 484, 110 S.Ct. 2014, 2022, 109 L.Ed.2d 457 (1990) (" . . . we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.").

59. *Hall v. Tirey,* 1972 OK 118, 501 P.2d 496 (controversy determined by whether Governor's power to remove an official was limited by relevant statutes); *Schmitt v. Hunt*, 1960 OK 257, 359 P.2d 198 (Governor possessed power to issue executive orders when statute required Governor to take action).

60. *See, e.g., Holliman v. Cole*,1934 OK 381, 34 P.2d 597 (Court held the Governor was without authority to remit statutory penalties and interest on delinquent taxes by executive order).

61. *City of Edmond v. Wakefield*, 1975 OK 96, 537 P.2d 1211, 1213 ("state statutes which attempt to take away vested property interests ... are unconstitutional as violations of due process."); *Shepard v. Oklahoma Dept. of Corrections,* 2015 OK 8, ¶ 19, 345 P.3d 377, 384-385 ("It is certainly correct that the Legislature's use of the legislative police power may have the result of altering vested contractual rights.").

62. *Russell Petroleum Co. v. Walker*, 1933 OK 75, 19 P.2d 582, 586-587 (Governor's exercise of the Article 6 § 8 power is subject to the Oklahoma Constitution's Due Process Clause in Art. 2, section 7.).

63. *Redbird v. Oklahoma Tax Commission*, 1997 OK 126, ¶ 12, 947 P.2d 525, 528 quoting *Reich v. Collins*, 513 U.S. 106, 108, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994).

64. *See Franklin v. Margay Oil Corporation*, 1944 OK 316, 153 P.2d 486, 499, where we explained a condition subsequent operates upon an estate already created and opens it to defeat while a condition precedent is a condition which must be performed before an estate can vest. *See also Fraley v. Wilkinson*, 1920 OK 244, 191 P. 156, 157.

65. *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature,* 2007 OK 30, ¶ 23, 158 P.3d 1058, 1066 (rule stated in context of explaining Legislature's power pursuant to Okla. Const. Art. 5, section 55).

66. *Cf. State v. Lynch*, 1990 OK 82, 796 P.2d 1150 (inadequate government funding to pay a lawyer representing an indigent criminal defendant denied the constitutionally guaranteed private property rights of the lawyer appointed to represent the defendant); *Sholer v. State ex rel. Oklahoma Dept. of Public Safety,* 1995 OK 150, 945 P.2d 469, 475, citing *Estate of Kasishke v. Oklahoma Tax Comm'n*, 1975 OK 133, 541 P.2d 848, 853 (although a tax refund is typically prosecuted as an administrative action and subject to administrative procedures, the underlying nature of a tax refund request is an action for money had and received where the law provides a remedy for wrongfully retained property).

67. Okla. Const. art 2, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend. XIV, § 1 provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

68. *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (Part IV A 1 of the opinion for the Court).

69. *Baby F. v. Okla. County Dist. Court*, 2015 OK 24, ¶ 16, 348 P.3d 1080, 1085-1086.

70. *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 22, 369 P.3d 1079, 1091 ("The due process clause of the Oklahoma Constitution protects citizens from arbitrary and unreasonable action by the state.") quoting *City of Edmond v. Wakefield*, 1975 OK 96, ¶ 6, 537 P.2d 1211, 1213. *See also Mustang Run Wind Project, LLC v. Osage County Board of Adjustment,* 2016 OK 113, n. 40, 387 P.3d 333 (discussing the arbitrary exercise of government power).

71. *Cf. Crider v. Board of County Com'rs of County of Boulder,* 246 F.3d 1285, 1289-1290 (10th Cir. 2001) ("We have noted that the arbitrary and capricious standard [for substantive due process] in the context of zoning "does not mean simply erroneous.") quoting *Norton v. Village of Corrales,* 103 F.3d 928, 932 (10th Cir.1996).

72. 68 O.S. Supp. 2014 § 225(E):

> If the appeal is from an order of the Tax Commission or a district court denying a refund of taxes previously paid and if upon final determination of the appeal, the order denying the refund is reversed or modified, the taxes previously paid, together with interest thereon from the date of the filing of the petition in error at the rate provided in subsection A of Section 217 of this title, shall be refunded to the taxpayer by the Tax Commission.

73. 68 O.S. Supp. 2014 § 225(F):

Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter provided. There is hereby created within the official depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

74. 85 O.S.2011 § 403 (H): "The refund provisions of Sections 227 through 229 of Title 68 of the Oklahoma Statutes shall be applicable to any payments made to the Multiple Injury Trust Fund. Refunds shall be paid from and out of the Multiple Injury Trust Fund."

75. 85A O.S.Supp.2015 § 31 (H): "The refund provisions of Sections 227 through 229 of Title 68 of the Oklahoma Statutes shall be applicable to any payments made to the Multiple Injury Trust Fund. Refunds shall be paid from and out of the Multiple Injury Trust Fund." The same language is found in 85A O.S.Supp.2017 § 31(H).

76. See 68 O.S. § 6102 quoted in note 23 supra.

77. 85A O.S.Supp.2015 § 31(I) states in part: "The Tax Commission shall pay, monthly to the State Treasurer to the credit of the Multiple Injury Fund all monies collected pursuant to the provisions of this section."

78. *Price v. State ex rel. Oklahoma Tax Commission*, 1998 OK 99, 968 P.2d 1227.

79. 68 O.S.2011 § 201:

The purpose of this Article, which may be cited as the "Uniform Tax Procedure Code", is to provide, so far as is possible, uniform procedures and remedies with respect to all state taxes. Unless otherwise expressly provided in any state tax law, heretofore or hereafter enacted, the provisions of this article shall control and shall be exclusive.

80. *Multiple Injury Trust Fund v. Coburn*, 2016 OK 120, ¶ 23, 386 P.3d 628, 636 ("In summary, when there is a conflict between two statutes, one specific [or special] and one general, the statute enacted for the purpose of dealing with the subject matter controls over the general statute.").

81. *In re O'Carroll,* 1998 OK 6, ¶¶ 6-7, 952 P.2d 45, 48-49 (Court agreed with party that 68 O.S.1991 § 2375(H) created a narrow exception to application of 68 O.S.1991 § 223, a provision of the Uniform Tax Procedure Code).

GURICH, V.C.J., with whom WYRICK, J., joins dissenting:

1. In 2011, the Legislature enacted 85 O.S. § 403 with essentially the same language. Section 403 was later repealed in 2013. The new Administrative Workers' Compensation Act (85A O.S. §§ 1-401.1), enacted in 2013, contained a similar provision in 85A O.S. § 31. Section 31 was amended in 2015, eliminating the restriction on pass through of MITF assessments to policyholders. The rebate provision in 68 O.S. § 6101 referring to 85 O.S. § 173 was never amended. The fact that the OTC followed the trail and continued to pay rebates until 2015, does not change the fact that once 85 O.S. § 173 was repealed, OTC no longer had authority to issue rebates pursuant to 68 O.S. § 6101.

2. Prior to 2002, insurers and CompSource could pass on one-hundred percent (100%) of the MITF assessments to policyholders. After the enactment of the rebate program, policy holders benefitted by no longer shouldering the entire amount of MITF assessment, while insurers continued to be made whole for the actual out-of-pocket expenses incurred as a result of the MITF assessments.

2018 OK 55

OKLAHOMA'S CHILDREN, OUR FUTURE, INC.; THE OKLAHOMA EDUCATION ASSOCIATION; THE OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; THE COOPERATIVE COUNCIL FOR OKLAHOMA SCHOOL ADMINISTRATION; THE ORGANIZATION OF RURAL OKLAHOMA SCHOOLS; THE OKLAHOMA ASSOCIATION OF CAREER AND TECHNOLOGY EDUCATION; THE UNITED SUBURBAN SCHOOLS ASSOCIATION; OKLAHOMA PTA; THE TULSA CLASSROOM TEACHERS ASSOCIATION; DR. KEITH BALLARD; JOELY FLEGLER; and TERANNE WILLIAMS, Petitioners/Protestants, v. DR. TOM COBURN, BROOKE MCGOWAN, and RONDA VUILLEMONT-SMITH, Respondents/Proponents.

No. 117,020. June 22, 2018

ORIGINAL PROCEEDING TO DETERMINE THE LEGAL SUFFICIENCY OF REFERENDUM PETITION NO. 25, STATE QUESTION NO. 799

¶0 This is an original proceeding protest to determine the legal sufficiency of Referendum Petition No. 25, State Question No. 799. The referendum petition seeks to refer House Bill No. 1010xx, passed by the 56th Legislature of the State of Oklahoma, during the second special session of that Legislature, to the people of Oklahoma for their approval or rejection at the regular election to be held on November 6, 2018. The protestants allege the gist of the petition is insufficient and misleading. Further, the protestants allege the referendum petition is legally insufficient for failure to include an exact copy of the text of the measure, in violation of 34 O.S. Supp. 2015 § 1. Upon review, we hold that the petition is legally insufficient and invalid.

REFERENDUM PETITION NO. 25, STATE QUESTION NO. 799, IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

D. Kent Meyers and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, Oklahoma, for Petitioners/Protestants.

Stanley M. Ward, Barrett T. Bowers, and Tanner B. France, Ward & Glass, L.L.P., Norman, Oklahoma, for Respondents/Proponents.

Mithun Mansinghani, Solicitor General, Randall J. Yates, Assistant Solicitor General, and Michael K. Velchick, Assistant Solicitor General, Oklahoma Attorney General's Office, for the State of Oklahoma.

COMBS, C.J.:

¶1 On May 1, 2018, Respondents/Proponents Dr. Tom Coburn, Brooke McGowan, and

Ronda Vuillemont-Smith (collectively, Proponents) timely filed Referendum Petition No. 25, State Question No. 799 (the petition) with the Oklahoma Secretary of State. The petition seeks to refer HB 1010xx, passed by the 56th Legislature of the State of Oklahoma during its second special session, to the people of Oklahoma for their approval or rejection at the regular election to be held on November 6, 2018.

¶2 On May 17, 2018, several educators and organizations purporting to represent Oklahoma educational interests (collectively, Protestants) timely filed an original action protesting the legal sufficiency of the petition.[1] Protestants assert the gist of the petition is legally insufficient for several reasons, and further assert the petition is legally insufficient for failure to include an exact copy of the text of the measure as required by 34 O.S. Supp. 2015 § 1.

¶3 There appears to be no dispute that HB 1010xx, the bill the petition seeks to refer to the people for approval or rejection, is a revenue bill. The primary effect of HB 1010xx is to raise revenue through tax changes imposed by five different mechanisms. Section 2 of HB 1010xx imposes an additional tax on cigarettes of 50 mills per cigarette. Sections 3-5 of HB 1010xx alter the taxes on little cigars to match those on cigarettes, a change from the lower rate at which they are currently taxed. Section 6 of HB 1010xx increases the motor fuel tax on gasoline and diesel fuel. Sections 7-8 of HB 1010xx raise the gross production tax incentive rate from 2% to 5% in the first 36 months of a well's production. Finally, Sections 9-15 of HB 1010xx impose an additional $5 per night occupancy tax on certain hotel and motel stays.[2]

¶4 There further appears to be no dispute that HB 1010xx was adopted in accordance with the requirements of Okla. Const. art. 5, § 33.[3] It received the requisite three-fourths majority of both houses and was acted upon by the Governor. HB 1010xx has no emergency clause, and so cannot become effective until 90 days after its approval by the Legislature and it being acted upon by the Governor. Okla. Const. art. 5, § 33.

¶5 Some of the revenue raised by HB 1010xx was evidently intended to provide the funding source for increases to teacher compensation found in another bill passed during the second special session, HB 1023xx. HB 1023xx, often referred to as the "teacher pay raise" bill, was made explicitly contingent on the "enactment" of HB 1010xx. The parties to this protest have raised questions concerning what effect a referendum petition against HB 1010xx might have on the effectiveness of HB 1023xx. The answer is none. Okla. Const. art. 5, § 3 provides that any measure referred to the people shall not take effect until approved by a majority. HB 1023xx was not made contingent on HB 1010xx's effectiveness, however, but rather on its enactment. A bill is enacted (and becomes an enactment) when it is passed by the Legislature and all of the formalities required to make it a law have been performed. *Norris v. Cross*, 1909 OK 316, ¶23, 105 P. 1000. As this Court implied in *Norris*, the process of enactment is completed prior to any referendum on the subject enactment. *See* 1909 OK 316 at ¶¶20-25. HB 1010xx has been enacted. The contingency requirement of HB 1023xx has been met, and it will become effective on its specified date.

¶6 This Court set a briefing schedule and invited the Attorney General to file a brief on the issues raised. Oral argument in this matter was held before the Court en banc on June 11, 2018. On the same date, the matter was assigned to this office for disposition.

I.
STANDARD OF REVIEW

¶7 The right to a referendum on legislation is the second of two specific and important powers explicitly reserved to the people by the Oklahoma Constitution in Article 5, Sections 1 & 2.[4] *See In re Referendum Petition No. 1*, 1938 OK 131, ¶4, 77 P.2d 1152. This Court has called the right to petition for a vote of the people by initiative and referendum "a sacred right, to be carefully preserved." *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, ¶5, 820 P.2d 772 (quoting *In re Referendum Petition No. 18, State Question No. 437*, 1966 OK 152, ¶11, 417 P.2d 295). The Court has a duty to protect this right as a function of the people of Oklahoma's right to govern themselves:

> "It is the duty of the courts to construe and preserve this right as intended by the people in adopting the Constitution, and thereby reserve unto the people this power. Ours is a government which rests upon the will of the governed. The initiative and referendum is the machinery whereby self-governing people may express their opinion in concrete form upon matters of public concern. If the people are to be self-governed, it is essential that they shall have a

right to vote upon questions of public interest and register the public will."

In re Referendum Petition No. 348, 1991 OK 110 at ¶6 (quoting *Ruth v. Peshek City Clerk*, 1931 OK 674, ¶25, 5 P.2d 108.

¶8 However, much like the right of initiative, the right of referendum is not absolute. *See In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. There are limits – constitutional and statutory – that guide the proper exercise of both rights. *In re Initiative Petition No. 344,* 1990 OK 75, ¶14, 797 P.2d 326. *See Comty. Gas and Service Co. v. Walbaum*, 1965 OK 118, ¶¶7-9, 404 P.2d 1014.

¶9 In order to assure these limits are observed and the right to Referendum is **properly** executed, 34 O.S. Supp. 2015 § 8[5] provides that any citizen may protest the legal sufficiency of an initiative or referendum petition. *McDonald v. Thompson*, 2018 OK 25, ¶5, 414 P.3d 367; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 384*, 2007 OK 48 at ¶2. Upon such a protest, this Court will review a petition to ensure that it complies with the rights and restrictions established by: the Oklahoma Constitution; legislative enactments; and this Court's own jurisprudence. *McDonald,* 2018 OK 25 at ¶5; *In re Initiative Petition No. 384*, 2007 OK 48 at ¶2; *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32.

II.
THE LEGAL REQUIREMENTS OF THE REFERENDUM PETITION PROCESS

¶10 The basic requirements for a referendum petition are set out in the text of the Oklahoma Constitution itself. Okla. Const. art 5, § 1 notes that the people "reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Const. art 5, § 2 provides restrictions on how this power is to be exercised: "The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted." Finally, Okla. Const. art. 5, § 3 expands on the procedural requirements and provides in pertinent part:

> Referendum petitions shall be filed with the Secretary of State not more than ninety (90) days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to the people of the state shall be had at the next election held throughout the state, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the initiative or referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.
>
> ...
>
> Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State and addressed to the Governor of the state, who shall submit the same to the people. The Legislature shall make suitable provisions for carrying into effect the provisions of this article.

¶11 Other requirements of the referendum petition process are statutory in nature. In addition to providing for protests, 34 O.S. Supp. 2015 § 8 contains the procedural framework guiding how referendum petitions are filed, publicized, signed, and submitted. Of particular note is 34 O.S. Supp. 2015 § 8(F), which sets the deadline for signature gathering and provides: "Signature-gathering Deadline for Referendum Petitions. All signed signatures supporting a referendum petition shall be filed with the Secretary of State not later than ninety (90) days after the adjournment of the legislative session in which the measure, which is the subject of the referendum petition, was enacted."[6]

¶12 Two statutory requirements for referendum petitions are particularly salient to this protest. Title 34 O.S. Supp. 2015 § 1 provides the form referendum petitions must follow and further requires "an exact copy of the text of the measure" be attached to the referendum petition. Title 34 O.S. 2011 § 3 requires that "[a] simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet" for a referendum petition, just as it requires for initiative petitions. Protestants assert that failure to meet these two statutory

requirements, specifically, result in a petition that is legally insufficient for submission to the people of Oklahoma. This Court will address the two requirements in turn.

III.
THE GIST OF REFERENDUM PETITION NO. 25 IS LEGALLY INSUFFICIENT

¶13 Before delving into Protestants' arguments as to why the gist of the petition is legally insufficient, it is beneficial to first discuss this Court's jurisprudence concerning what a proper gist requires and the purpose the gist is meant to serve.[7] This Court has previously explained the requirements for the gist on several occasions. Recently, the Court considered a protest to the gist of an initiative petition where we noted:

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

McDonald v. Thompson, 2018 OK 25, ¶6, 414 P.3d 367 (quoting *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶14, 797 P.2d 326).

We have also explained:

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

In re Initiative Petition No. 409, State Question No. 785, 2016 OK 51, ¶3, 376 P.3d 250 (footnotes omitted) (quoting primarily *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, 164 P.3d 125).

¶14 Further, in *In re Petition No. 409*, this Court discussed how changes to Title 34 made in 2015 granted enhanced significance to the gist, because the ballot title is no longer printed on the petition. We concluded "the gist is now the only shorthand explanation of the proposal's effect. The gist alone must now work to prevent fraud, corruption, and deceit in the initiative process." *In re Petition No. 409*, 2016 OK 51 at ¶4.

¶15 The gist of Referendum Petition No. 25 is printed at the top of its signature page, and reads as follows:

> The Proposition is to repeal House Bill 1010XX which raised the gasoline taxes from 16 cents to 19 cents per gallon; raised the diesel fuel tax from 13 cents to 19 cents per gallon; raised the cigarette tax rate fifty (50) mills per cigarette; and raised the tax on the gross production of oil, gas, or oil and gas in the first 36 months of a well's production from 2% to 5%. This measure would restore those taxes to their original rates before House Bill1010XX [sic] increased them when it was passed.

Referendum Petition No. 25, Protestants' App., Tab 1.

Protestants assert there are three flaws in the gist that in combination make it legally insufficient to inform potential signatories and voters of the effect of the petition. According to Protestants the gist is legally insufficient because: 1) it fails to inform voters of the little cigar tax; 2) it fails to inform voters of the hotel/motel tax; and 3) it is written in such a manner to suggest that approval of the measure would repeal HB 1010xx, when the opposite is true.

A. The gist fails to inform signatories of the measure's effect on the little cigar tax

¶16 HB 1010xx primarily serves to increase revenue through the use of five different tax mechanisms. The gist printed on the signature pages mentions only three of those five mechanisms: 1) the gasoline and diesel fuel taxes; 2) the cigarette tax; and 3) the gross production tax. Proponents do not deny that the gist makes no mention of the change to the tax framework for little cigars.

¶17 Proponents assert the failure to mention the tax changes to little cigars is not a fatal flaw in the gist, because a gist is "not required to contain every regulatory detail so long as its outline is not incorrect." *In re Initiative Petition No. 409*, 2016 OK 51 at ¶3. It is enough, according to Proponents, for the gist to inform potential signatories of all the major changes proposed, even if the gist omits a substantive detail. *See McDonald v. Thompson*, 2018 OK 25 at ¶¶9. Proponents assert the little cigar tax will account for less than $1 million of the increased revenue resulting from HB 1010XX; increased revenue estimated to be an additional $474,696,000. Fiscal Impact Statement for HB 1010xx, Protestants' App., Tab 9.

¶18 Protestants, on the other hand, assert that the "little cigar" tax is not a mere regulatory detail, being one of the only five tax increases that are the primary purpose of HB 1010xx. Protestants also assert that the comparatively small amount of revenue generated by the little cigar tax does not somehow make it insignificant or immaterial enough to justify its exclusion from the gist, especially given that one of the primary purposes of the gist is specifically to put signatories on notice of the changes being made to the law. *In re Initiative Petition No. 342, State Question No. 628,* 1990 OK 76, ¶14, 797 P.2d 331.

¶19 The failure to include any mention of the little cigar tax in the gist is troublesome. Proponents rely on this Court's decision in *McDonald* for the proposition that not all substantive details must be included in the gist. *See* 2018 OK 25 at ¶12. However, Proponents' reliance on that case in this instance is misplaced, as the situation is distinguishable. In *McDonald*, this Court found the gist of an initiative petition to be sufficient despite allegations of omissions. *McDonald* concerned Initiative Petition No. 416, which would have created a new article in the Oklahoma Constitution to increase the gross production tax and provide a pay increase for certified personnel, including teachers. 2018 OK 25 at ¶2. This Court rejected an argument that the gist of Initiative Petition No. 416 was misleading because it mentioned only teachers specifically as the recipients of the pay raise put in place by the proposed article, and did not discuss the other certified personnel individually. *McDonald,* 2018 OK 25 at ¶9. The Court determined:

> [N]either the gist, nor the petition itself mentions only teachers. In fact **the gist properly mirrors the petition** by stating that the new article "increases compensation for all certified personnel, including teachers." The gist further notes, in keeping with the petition, that superintendents and assistant superintendents are excluded. This language is not deceiving or misleading, but informative of the purpose behind IP 416 itself and properly describes the effect the new article will have. This situation, where the gist **highlights one part of a larger category in the same manner the petition itself does**, is factually distinguishable from *In re Initiative Petition No. 344,* where this court determined a gist to be insufficient because it did not address all the major changes proposed by the petition. *See* 1990 OK 75 at ¶¶12-15. Protestants' reliance on that case is misplaced.

McDonald, 2018 OK 25 at ¶9 (emphasis added).

¶20 Central to the above determination was not the fact that the gist emphasized one part of a larger category, but the fact that it accurately mirrored the petition in describing the changes to the law. The language "all certified personnel, including teachers" did not leave out the fact that the effect of Initiative Petition No. 416 would be to increase compensation for all certified personnel.

¶21 In contrast, Referendum Petition No. 25, by quoting the title of HB 1010xx, clearly notes **all** of the tax increases put into place by HB 1010xx including the little cigar tax. The relevant language in the petition itself, taken from the title of HB 1010xx, notes the bill is: "amending 68 O.S. 2011, Sections 402, 402-1 and 402-3, which relate to tax levies on tobacco products; providing that little cigars be taxed in the same rate and manner as cigarettes...." The gist, however, fails to make any mention of the little cigar tax whatsoever. The gist and the petition itself do not match when it comes to describing one of the five new revenue sources put into place by HB 1010xx. The gist does not take the approach this Court found acceptable in *McDonald* of emphasizing cigarette taxes as part of a larger category of tobacco taxes impacted by a potential yes or no vote.

¶22 Similarly, Proponents cite *McDonald* to argue that exclusion of a substantive detail is not fatal to the gist. *See* 2018 OK 25 at ¶9. In that instance, this Court considered arguments that failure to include all details about the gross production tax increase in the gist was

fatal to Initiative Petition No. 416. Specifically, while the gist generally explained the tax, the protestants in *McDonald* argued the failure to include in the gist that the tax would be applied retroactively to all wells drilled after July 1 of 2015 was a fatal flaw. However, we determined that other information in the gist, including that the tax would apply to "wells during the first thirty-six months of production" was sufficient for the gist to accurately summarize the petition's effect on the law. *McDonald*, 2018 OK 25 at ¶12.

¶23 Once more, the situation we are confronted with in this cause is distinguishable. The gist at issue in *McDonald* did not include every regulatory detail about how a new proposed tax would operate. That is true of the gist in this cause, which makes no attempt to explain how the taxes imposed by HB 1010xx are actually levied, collected, and dispersed. The failure to include those details is not at issue here and not what causes this Court grave concern. What is troublesome is the failure to make any mention one of the five revenue sources at all. Potential signatories may be aware that by signing the petition and then rejecting HB 1010xx at the polls, they would be removing some tax increases. But without even a brief mention in the gist of all of the taxes they will be rejecting, they are fundamentally unable to cast an informed vote, because they are not being put on notice of the changes being made and will not be aware of the entire practical effect of the petition. *See McDonald*, 2018 OK 25 at ¶6; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶3; *In re Initiative Petition No. 344*, 1990 OK 75 at ¶14.

¶24 Fundamentally, the need for voters to be given enough information to make an informed decision is why this Court has historically taken a dim view of excluding important changes made to the law from the gist of a petition. While distinguishable from *McDonald*, this cause bears similarities to others where this Court has declared the gist of a petition insufficient for failure to fully describe changes being made to the law in a manner sufficient to alert potential signatories of those changes and provide potential signatories with enough information to make an informed decision.

¶25 For example, in *In re Initiative Petition No. 409*, this Court declared the gist of a petition to be insufficient for entirely failing to include certain changes made to the law. We explained:

> The petition makes significant changes to the liquor laws of this state; however, certain changes are recognizably absent from the gist. Pursuant to the petition, no Retail Package Store license or Retail Grocery Wine Store license can be issued to any grocery store, warehouse club, or supercenter located within 2,500 feet of an existing Retail Package Store or Retail Grocery Wine Store, making many grocery stores ineligible for a Retail Grocery Wine Store license. Only one Retail Grocery Wine Store license will be issued by ABLE to entities with multiple stores, again limiting a grocery store's eligibility for a Retail Grocery Wine Store license. Finally, only Retail Package Store licenses that have been in existence for more than two years from the date the ABLE Commission issues the first Retail Grocery Wine Store license shall be eligible for purchase for the purpose of converting to a Retail Grocery Wine Store license, again restricting the number of grocery store wine retailers.
>
> The gist fails to alert potential signatories of the changes being made to the law and does not provide a potential signatory with sufficient information to make an informed decision about the true nature of the proposed constitutional amendment. *See In re Initiative Petition No. 384*, 2007 OK 48, ¶¶ 11-12, 164 P.3d at 129-30. We hold that the gist of the petition does not fairly describe the proposed constitutional amendment and is invalid. The gist is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition from the ballot

In re Initiative Petition No. 409, 2016 OK 51, ¶¶6-7.

Further examples include: *In re Initiative Petition 384*, 2007 OK 48 (holding the gist in an education-related petition insufficient for not discussing certain important changes made by the petition) and *In re Initiative Petition No. 342*, 1990 OK 76 ("The statement on the Petition, as well as the ballot title, reflect only a few of the changes. The statement on the Petition does not contain the gist of the proposition....").

¶26 Failure to include mention of the little cigar text in the gist of Referendum Petition No. 25 would on its own be fatal to the sufficiency of the gist. However, when combined with other flaws, there can be no question that

the gist is misleading and confusing to potential signatories.

B. The gist fails to inform potential signatories of the issues surrounding the hotel/motel tax

¶27 Protestants in this matter also assert that omitting any mention of the hotel/motel tax from the gist is fatal to its sufficiency. The hotel/motel tax would raise roughly $50 million annually, and is a far more robust revenue generator than the little cigar tax Proponents dubbed a minor regulatory detail. Based on our analysis of the little cigar tax, *supra*, exclusion of another of the five major revenue generating portions of HB 1010xx would also be fatal to the gist of Referendum Petition No 25. However, there are additional issues surrounding the hotel/motel tax provisions of HB 1010xx that differentiate it from the little cigar tax and that require additional consideration.

¶28 On April 10, 2018, the Governor signed HB 1012. Signed into law after HB 1010xx, HB 1012 repealed Sections 9-15 of HB 1010xx, effective immediately. Sections 9-15 of HB 1010xx contain the hotel/motel tax provisions of the bill. Because of this repeal, Proponents assert exclusion of the hotel/motel tax from the gist of the petition is proper. Specifically, Proponents assert:

> The Oklahoma Legislature *repealed the hotel/motel tax*, and it is no longer even a part of the tax raises in HB 1010xx (Pet. App. Tab 7). The omission of this tax from the gist and the ballot title is therefore not misleading, but accurate, because the hotel/motel tax will never take effect. It would be misleading to include the hotel/motel tax in the gist.

Proponents' Response in Opposition, p.7

¶29 However, Referendum Petition No. 25 itself specifically includes mention of the hotel/motel tax, because it includes the title of HB 1010xx which describes: "enacting the Oklahoma Occupancy Tax Act; stating purpose of tax; defining terms; providing for rate of tax; imposing duty for remittance of tax and prescribing procedures related thereto...." The petition asks voters "[s]hall the following bill of the legislature be approved?" The attached bill, HB 1010xx, includes Sections 9-15, the hotel/motel tax provisions.

¶30 Title 34 O.S. Supp. 2015 § 1 provides the form a petition for referendum must substantially follow, and beyond providing for inclusion of the title of the bill to be subjected to referendum, makes no provisions for including explanations to ease voter confusion under circumstances such as these. It is true that the question of what effect a yes vote on the referendum might have on the hotel/motel tax is a hypothetical one. However, the issue creates uncertainty that the form of the petition itself cannot alleviate. It would be very easy for a potential signatory and voter to closely examine the petition and conclude that a yes vote in a referendum on HB 1010xx would result in the entirety of the bill becoming law, including the hotel/motel tax provisions.[8]

¶31 This confusion could easily have been avoided had Proponents drafted a referendum petition that excluded Sections 9-15 of HB 1010xx, since they argue it has been repealed and this referendum petition would have no effect on it either way. Oklahoma law expressly permits a referendum on only part or parts of an act of the Oklahoma Legislature. Okla. Const. art. 5, § 4 provides:

> § 4. Referendum against part of act.
>
> The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislature in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of such act from becoming operative.

Title 34 O.S. Supp. 2015 § 1 itself provides instructions on how to delineate only a portion of an act if the petition is against less than the whole act. Any confusion as to the effect of the referendum on the hotel/motel tax provisions could have been avoided by excluding Sections 9-15 of HB 1010xx from Referendum Petition No. 25 itself. Proponents did not do this.

¶32 Because of the limitations on the form of the referendum petition and Proponents' decision to target all of HB 1010xx, the only vehicle available at the signature-gathering stage to alleviate the confusion concerning the inclusion of the hotel/motel tax provisions is the gist, which exists specifically to be "descriptive of the effect of the proposition, not deceiving but informative and revealing of the design

and purpose of the petition." *In re Initiative Petition No. 344*, 1990 OK 75 at ¶14.

¶33 Protestants could have included in the gist a description of why the intervening repeal of the hotel/motel tax provisions by the Legislature would mean the referendum petition would have no effect on those provisions despite their inclusion in the petition and attached bill. Such an explanation would at least have put voters on notice of what Protestants believed the practical effect of the petition to be upon those tax provisions. Instead the gist's absolute silence does the opposite of helping voters make an informed choice and accurately describe the effect of the petition. It fosters confusion caused by the petition itself, by simply ignoring it.

¶34 This Court is cognizant of the fact that the gist is not meant to contain every regulatory detail. *In re Initiative Petition No. 409*, 2016 OK 51 at ¶3. Nor is the gist required to be incredibly lengthy or mirror word for word the petition itself. However, the gist of this petition is only roughly 90 words. The ballot title, which is also important for notifying voters of the effect of a petition, may be up to 200 words. 34 O.S. Supp. 2015 § 9. It is impossible to justify under these circumstances the omission of the practical effect the petition will have upon two of the five taxes originally included in HB 1010xx.[9]

C. The gist of the petition incorrectly characterizes the proposition to be put before the people

¶35 Finally, Protestants assert the gist is fundamentally misleading because it incorrectly suggests that a yes vote would repeal HB 1010xx. We agree. Okla. Const. art. 5, § 3 provides in pertinent part: "Any measure referred to the people by the initiative or referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise."

¶36 In *In re State Question No. 216, Referendum Petition No. 71*, 1937 OK 309, 68 P.2d 424, this Court applied Okla. Const. art. 5, § 3 and specifically addressed the question of whether the ballot title of a referendum petition should be phrased in the affirmative or the negative. In that cause, the ballot title submitted by proponents of a referendum petition read, in reference to the act in question, "[s]hall it be repealed?" The ballot title submitted by the Attorney General read "[s]hall it be adopted?" *In re State Question No. 216*, 1937 OK 309 at ¶¶6-7. In resolving the issue of how the question should be phrased on the ballot title, this Court looked to the text of Okla. Const. art. 5, § 3 itself and determined:

> Irrespective of the title, the real question is, "Shall the act be approved?" If it is not approved by a majority vote, it stands inoperative.
>
> Under the Constitution and law the filing of the petition signed by the requisite number of legal voters within the time provided by law operates to stop or suspend the operative effect of an act passed by the Legislature and referred by it to the people. Such an act when duly referred never becomes operative until approved by a majority of the voters.
>
> The proper question to place on the ballots is: "Shall it be approved?" Since there is a controversy in the matter, we deem it best to follow the plain wording of the Constitution and state the question in accordance therewith.

In re State Question No. 216, 1937 OK 309 at ¶10-12.

¶37 Title 34 O.S. Supp. 2015 § 1, which provides the form for referendum petitions, requires the question be phrased similarly in the referendum petition itself, and provides in pertinent part: "The question we herewith submit to our fellow voters is: Shall the following bill of the legislature (or ordinance or resolution-local legislation) be approved?" It is not disputed that the petition itself follows the requirements of Okla. Const. art. 5, § 3 and 34 O.S. Supp. 2015 § 1. The petition reads: "The question we herewith submit to our fellow voters is: Shall the following bill of the legislature be approved?"

¶38 The gist of Referendum Petition No. 25, however, is worded differently from the petition itself. The relevant language, in pertinent part, states:

> The Proposition is to repeal House Bill 1010XX .... This measure would restore those taxes to their original rates before House Bill1010XX [sic] increased them when it was passed.

Protestants assert this language is backwards, insofar as it indicates a "yes" vote would constitute a rejection of HB 1010XX and its changes

to tax law. Protestants are fundamentally correct in their assertion, and the gist of the petition is not in keeping with the language of the petition itself, or the requirements of Okla. Const. art. 5, § 3 this Court initially applied to referendum petition ballot titles in *In re State Question No. 216*, 1937 OK 309.

¶39 Proponents of the petition assert the gist is not misleading. They focus on their interpretation of the word "proposition" and assert that the underlying proposition of every referendum is to repeal the bill in question. Proponents argue:

> Petitioners/Protestants' argument hinges on the belief that the "proposition" of every referendum is that *the bill should be approved*. This is the exact opposite of the proposition of every referendum. The proponents of a referendum are obviously opposed to the bill at issue.
>
> Consistent with the purpose of a referendum, the proposition of RP 25 is that *HB 1010xx should be repealed*. (Pet. App. Tab 1). Therefore, it is fully appropriate to phrase the gist and ballot title in such a manner that a "Yes" vote is a vote in favor of the referendum to repeal, while a "No" vote is a vote against the referendum to repeal. The Proponents' suggested ballot title makes this perfectly clear. (Pet. App. Tab 2). The voters will be answering the question *as phrased on the ballot title*, not the referendum petition.

Proponents' Response in Opposition, p. 9.

Proponents' argument is not in accord with this Court's determination in *In re State Question No. 216*, 1937 OK 309, with the text of Okla. Const. art. 5, § 3 itself, or with 34 O.S. Supp. 2015 § 1's requirement that the question on the petition be phrased as shall a bill of the legislature "be approved."

¶40 Regardless of the intent of those proposing a referendum petition, the underlying proposition is to subject an act of the legislature to a referendum where a "Yes" vote means approval and a "No" vote means the bill shall never "take effect and be in force." Okla. Const. art. 5, § 3; *In re State Question No. 216*, 1937 OK 309 at ¶11. While the petition itself properly reflects this question, the gist does not and is poorly worded to such an extent that it implies a yes vote on the referendum will accomplish the opposite of what the petition itself states. In that regard, the gist's outline is incorrect, it is fundamentally misleading to potential signatories, and is insufficient. *See In re Initiative Petition No. 409*, 2016 OK 51 at ¶3; *In re Initiative Petition No. 384*, 2007 OK 48 at ¶9; *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶20, 927 P.2d 558.

IV.
REFERENDUM PETITION NO. 25 IS LEGALLY INSUFFICIENT BECAUSE IT FAILS TO INCLUDE AN EXACT COPY OF THE TEXT OF THE MEASURE AS REQUIRED BY 34 O.S. SUPP. 2015 § 1

¶41 Protestants also assert that the petition is legally insufficient because it fails to include an exact copy of the text of the measure, HB 1010xx. This requirement is found in 34 O.S. Supp. 2015 § 1, which provides in pertinent part: "The question we herewith submit to our fellow voters is: Shall the following bill of the legislature (or ordinance or resolution-local legislation) be approved? **(Insert here an exact copy of the text of the measure.)**" (Emphasis added). The parties do not dispute that the copy of HB 1010xx attached to the petition is missing the bill's section numbers. It is also missing pagination, as well as the final page noting when the bill was acted upon by both houses of the Legislature, the Governor, and received by the Secretary of State.

¶42 Protestants urge that strict compliance with the exact copy requirement is necessary, and nothing less than an actual exact copy will suffice. Proponents, however, assert that only substantial compliance is necessary, and they have met this requirement despite the missing elements because the copy of HB 1010xx attached to the petition contains all the substantive language of the bill. Proponents assert the issues with the copy are clerical and technical errors, and do not rise to the level of a substantive problem with petition.

¶43 In general, substantial compliance with the statutory requirements for referendum petitions is sufficient. Title 34 O.S. Supp. 2015 § 1 opens with "[t]he referendum petition shall be substantially as follows...." Title 34 O.S. 2011 § 24 is even more expansive and provides that "[t]he procedure herein prescribed is not mandatory, but if substantially followed will be sufficient. If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded."

¶44 The language of 34 O.S. 2011 § 24 has been part of the statutory requirements for initiative and referendum petitions since the early twentieth century, and was examined and applied by this Court in *Norris v. Cross*, 1909 OK 316, 105 P. 1000. In that cause, the Court considered whether the duties assigned to the Secretary of State with regard to petitions were mandatory, and explained:

> The act contains no expressions specifically declaring the provision under consideration, or any other provision of said act of April, 1908, shall be mandatory. On the other hand, by section 21 of the act (Sess. Laws, 1907-1908, p. 452, c. 44) it is said: "The proceeding herein described is not mandatory, but if substantially followed, will be sufficient. If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded." If the provision of the statute now under consideration is mandatory, it must be so by implication. To determine from the statute whether it is mandatory, it is necessary that we look to the subject--matter of the statute, consider the importance of the provision to be applied, and the relation of that provision to the general object intended to be secured by the act. The general purpose of the act is to provide a procedure for the exercise of the powers of the initiative and referendum, and to make effective the provisions of the Constitution relative to such powers. In so far as the act re-enacts constitutional provisions it is mandatory. By the mere re-enactment of a constitutional provision into a statute its character or force cannot be changed. But the provision of the statute which the Secretary has not obeyed does not exist as a part of the Constitution.

Norris, 1909 OK 316 at ¶¶11-12.

¶45 After *Norris*, this Court continued to refine and apply its jurisprudence concerning substantial compliance with the statutory requirements for initiative and referendum petitions. *See In re Initiative Petition No. 2 of Cushing*, 1932 OK 124, 10 P.2d 271 (holding the procedure is not mandatory, but, if substantially followed, will be sufficient); *In re Initiative Petition No. 176, State Question No. 253*, 1940 OK 214, 102 P.2d 609 (finding only technical defects and de-claring substantial compliance sufficient).[10]

¶46 In 1960, this Court decided *In re Referendum Petition No. 130, State Question No. 395*, and determined there was no requirement in Title 34 that a referendum petition contain the full text of the bill being referred to the voters and that the title of the act was sufficient to reveal the full intention of the legislative enactment to signatories. 1960 OK 185, ¶¶7-11, 354 P.2d 400. The Court explained:

> Finally protestant argued that the petition in order to be valid must contain and include the text of Senate Bill No. 153. In support of this contention protestant cites *Townsend v. McDonald*, 184 Ark. 273, 42 S.W.2d 410; *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 44 S.W.2d 331, and *Shepard v. McDonald*, 188 Ark. 124, 64 S.W.2d 559. These cases construe the provisions of the Arkansas statute (Acts 1911, Ex.Sess., p. 582) which requires a full and correct copy of the measure to be attached to the petition. There is no such requirement either in our constitution or the laws enacted in pursuance thereof as to a referendum petition despite the argument of protestant that 34 O.S. 1951 § 4 [34-4] does make this requirement.
>
> ...
>
> We are of the opinion that a substantial compliance with the legislative requirement is sufficient.
>
> ...
>
> The title of the Act reveals the full intention of the legislative enactment.

In re Referendum Petition No. 130, 1960 OK 185 at ¶¶7-11.

¶47 At the time *In re Referendum Petition No. 130* was decided, the exact copy language currently at issue was not part of 34 O.S. § 1. The Court in that case was interpreting 34 O.S. 1951 § 1, which read in pertinent part: "The question we herewith submit to our fellow voters is: Shall the following bill of the Legislature be vetoed...." Less than a year after *In re Referendum Petition No. 130* was decided, the Legislature amended 34 O.S. § 1. *See* Laws 1961, SB 64, p. 263, § 1, emerg. eff. May 17, 1961. It is at that point the exact copy language was added. 34 O.S. 1961 § 1 reflected the change and provided in pertinent part: "The question we herewith submit to our fellow voters is: Shall the following bill of the legislature (or ordinance or reso-

lution-local legislation) be approved? (Insert here an exact copy of the title and text of the measure.)".[11]

¶48 In *Polymer Fabricating, Inc. v. Employers Workers' Comp. Ass'n*, 1998 OK 113, 980 P.2d 109, this Court set out how it determines legislative intent when a statue is amended. We explained:

> By amending a statute the legislature may have intended (a) to change existing law or (b) to clarify ambiguous law. Its precise intent is ascertained by looking to the circumstances that surround the change. If the earlier statute definitely expressed an intent or had been judicially interpreted, the Legislature's amendment is presumed to have changed an existing law, but if the meaning of the earlier statute was in doubt, or where uncertainty as to the law's meaning did exist, *a presumption arises that the amendment was designed to more clearly express the legislative intent that was left indefinite by the earlier text.*

Polymer Fabricating, Inc., 1998 OK 113 at n.18. *See Dean v. Multiple Injury Trust Fund*, 2006 OK 78, ¶16, 145 P.3d 1097; *Magnolia Pipeline Co. v. Okla. Tax Com'n*, 1946 OK 113, ¶11, 167 P.2d 884.

¶49 This Court has also explained that if there is a conflict between two statutes on the same subject and the language in one statute is general while the language in the other is specific, the specific statute will control over the general statute. *Glasco v. State ex rel. Okla. Dept. of Corrections*, 2008 OK 65, ¶17, 188 P.3d 177; *Phillips v. Hedges*, 2005 OK 77, ¶12, 124 P.3d 227. Further, the general rule of statutory construction is that later-enacted legislation controls over the earlier-enacted provisions, and in the case of an irreconcilable conflict in statutory language, the later enacted statute modifies the earlier statute. *See* 75 O.S. 2011 § 22; *City of Sand Springs v. Dep't of Pub. Welfare*, 1980 OK 36, ¶¶27-28, 608 P.2d 1139.

¶50 Applying the above jurisprudence, it is evident that the 1961 amendment to 34 O.S. § 1, coming as it did right after a decision of this Court determining that substantial compliance was sufficient and an exact copy of the text of the measure was not required, represents legislative intent to change existing law. Further, this newer and very specific addition trumps the more general substantial compliance requirements; concerning the form of the petition in 34 O.S. Supp. 2015 § 1, and expressed generally in 34 O.S. 2011 § 24.

¶51 The Court of Civil Appeals correctly reached this same conclusion in *In re: Referendum Petitions No. 0405-1, 0405-2 and 0405-3,* 2007 OK CIV APP 19, 155 P.3d 841 (cert. denied Nov. 20, 2006). The Court of Civil Appeals held:

> We will presume the Legislature was aware of the Supreme Court's holding in *Referendum Petition No. 130* when it amended § 1. *Oglesby v. Liberty Mut. Ins. Co*., 1992 OK 61, 832 P.2d 834. We further presume the Legislature intended what it expressed in the amendment requiring an *exact copy* of the measure to be inserted. *Id.*, at p. 832. "Except when a contrary intention plainly appears, the words used are given their ordinary and common definition." *Id*. For the foregoing reasons, we hold the Legislature intended it to be mandatory that an *exact copy* of the title and text of the measure was to be inserted in the petition and that substantial compliance with this portion of § 1 was no longer legally sufficient.

In that cause, the Court of Civil Appeals determined the petitions at issue to be legally insufficient because they failed to include substantive portions of the relevant ordinances. *In re: Referendum Petitions No. 0405-1, 0405-2 and 0405-3*, 2007 OK CIV APP 19at ¶18.

¶52 The copy of HB 1010xx is obviously not an exact copy of the signed bill filed with the secretary of state.[12] Proponents assert, however, that even if strict compliance is required and an exact copy of the text of the measure is necessary, exclusion of the section numbers is not fatal to the sufficiency of the petition because they are not themselves part of the text of the measure. Proponents would distinguish this cause from *In re: Referendum Petitions No. 0405-1, 0405-2 and 0405-3*, where substantive provisions of the text were excluded from the copy. Perhaps this argument may be true of the bill's page numbers and signature page, but it cannot be said of the section numbers.

¶53 A bill's section numbers are part of the text published in the Oklahoma Session Laws. The section numbers of a bill are also used for navigation of the bill, and more importantly, internal cross referencing and the titling of Acts. For example, Section 9 of HB 1010xx provides:

> SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Stat-

utes as Section 5501 of Title 68, unless there is created a duplication in numbering, reads as follows:

Section 9 through 15 of this act shall be known and may be cited as the "Oklahoma Occupancy Tax Act".

HB 1010xx, Protestant's App., Tab 5.

Proponents have pointed out, of course, that Sections 9 through 15 of HB 1010xx were repealed by HB 1012. In order to accomplish that repeal, the Legislature delineated the parts of HB 1010xx it wished to repeal by their section numbers:

SECTION 1. REPEALER Sections 9, 10, 11, 12, 13, 14 and 15 of Enrolled House Bill No. 1010 of the 2nd Extraordinary Session of the 56th Oklahoma Legislature, are hereby repealed.

HB 1012, Protestants' App., Tab 7.

¶54 Without the section numbers present, potential signatories have no easy method of locating the portion of HB 1010xx that has already been repealed by the Legislature, even if the gist had been correctly drafted to make them aware of the issue in the first place. Without the section numbers present, any internal navigation of the bill at issue becomes excessively cumbersome. For the above reasons, the section numbers are part of the exact copy of the text of the measure that must be attached pursuant to 34 O.S. Supp. 2015 § 1 to achieve the strict compliance mandated by legislative amendment. The absence of the section numbers from the attached copy of HB 1010xx is fatal to the legal sufficiency of the petition.

CONCLUSION

¶55 In reaching today's decision, we are mindful of the sacred right of referendum and the duty to preserve and protect that right vested in this Court. *In re Referendum Petition No. 348, State Question No. 640*, 1991 OK 110, ¶5, 820 P.2d 772; *In re Referendum Petition No. 18, State Question No. 437*, 1966 OK 152, ¶11, 417 P.2d 295. The statutory requirements and limitations placed upon referendums and applied today, are not present to impair the right of the people to govern themselves, but to guard against fraud, corruption or deception in the initiative and referendum process. *See In re Referendum Petition No. 348*, 1991 OK 110 at ¶6; *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶14, 797 P.2d 326. They are there for the protection of Oklahoma voters, to ensure that when they are presented with referendum and initiative petitions they are provided with enough information to make an informed choice.

¶56 The gist of Referendum Petition No. 25 is misleading for multiple reasons, any of which would suffice alone to declare it insufficient. Combined, these flaws leave no doubt that signatories are not being put on notice of the changes being made. *See McDonald v. Thompson*, 2018 OK 25, ¶6, 414 P.3d 367; *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶3, 376 P.3d 250; *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶14, 797 P.2d 326. Further, the failure to include an exact copy of the text of the measure to be referred violates a strict statutory mandate that exists to ensure signatories and voters are put on notice of exactly what law is potentially going to be submitted for their approval.

¶57 The gist of referendum and initiative petitions is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition. *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶7, 376 P.3d 250. *See In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, 164 P.3d 125 (declaring gist insufficient and striking petition from the ballot). Similarly, the Oklahoma Constitution and statutes provide no authority for this Court or Proponents to amend the petition itself. The petition is legally insufficient and must be stricken.

¶58 However, as the Second Extraordinary Session of the Fifty-sixth Legislature concluded on April 19, 2018, the ninety-day window for filing referendum petitions against HB 1010xx and obtaining signatures has not yet expired and will not expire until July 18, 2018. Okla. Const. art. 5, § 3. Nothing prevents Proponents from filing a new referendum petition, without the deficiencies identified today, and restarting the process of referendum. *See In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶18, 142 P.3d 400. As part of this process, Proponents would need to obtain new signatures as any obtained up until this point for the legally insufficient Referendum Petition No. 25 could not be applied to a new referendum petition. Any petition for rehearing in this matter shall be filed no later than 5:00pm on June 26, 2018.

REFERENDUM PETITION NO. 25, STATE QUESTION NO. 799, IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

CONCUR: COMBS, C.J., KAUGER, EDMONDSON, REIF, JJ., and BARNES, S.J.

CONCUR IN PART; DISSENT IN PART: GURICH, V.C.J.

DISSENT: WINCHESTER, J. (by separate writing) and WYRICK, J. (by separate writing to follow)

RECUSED: COLBERT and DARBY, JJ.

Winchester, J., dissenting:

¶1 I dissent. I would allow the people to exercise their constitutional right of referendum. The proponents of this referendum are proposing that the people of the State of Oklahoma be allowed to decide whether to approve or disapprove legislation passed within the last 90 days by the State Legislature. The majority of signatures will likely come from those opposing the legislation. Nevertheless, the signatures may merely say, "Let's vote on it." Tax increases are important to the citizens of this state as evidenced by the vote of the people who enacted Article 5, § 33 of Oklahoma's Constitution,[1] which requires a three-fourths majority vote of both the House and the Senate to enact a revenue bill. The increase in taxes in certain areas is what this referendum addresses. While this Court's duty is to guard against fraud, corruption or deception in the referendum process, our decisions should not serve as a road block for the people to voice their objection to legislation. I agree with the majority opinion that this Court has a duty to preserve and protect "the sacred right of referendum," which is the right of the citizens of this state to challenge legislation.

¶2 The oral argument made clear that both sides to this controversy agree that our teachers need a raise. The challenge goes to whether or not this tax increase is to be used for those raises. There is no question the "exact text" or words from the bill are attached to the gist. However, the Court declares the petition invalid due to technicalities of not including "pagination," which is merely page numbers; paragraph numbers; writing the gist in a manner that may be confusing regarding a yes or no vote; and finally, not clarifying to the Court's satisfaction the small cigar tax and the fact that the hotel tax has subsequently been removed. I am not persuaded that any of these minor blemishes in the petition would deceive voters when the issue comes up for a vote. The gist and bill together more than adequately inform a signer of the petition.

¶3 Collecting signatures for a referendum petition should not be a difficult task. The number of signatures necessary is five percent of those who voted in the last election for this state's governor. The referendum is merely asking for a vote on previously approved legislation.

¶4 If successful in collecting the necessary signatures, then the process of drafting a ballot title occurs. 34 O.S.Supp.2017, § 10.[2] Address concerns at that point and the Court can ultimately approve or disapprove the title that goes to a vote. If the proponents fail to collect the signatures, that ends the issue.

¶5 I would allow them to circulate their petition.

COMBS, C.J.:

1. This original action is the second protest to be filed against the legal sufficiency of the petition. On May 10, 2018, the Association of Professional Oklahoma Educators and its Executive Director filed their own protest: *In re: Referendum Petition No. 25, State Question No. 799*, No. 117,004.

2. The hotel/motel tax provisions of HB 1010xx, found at Sections 9-15, were ostensibly repealed during the session by HB 1012 which was signed into law by the Governor on April 10, 2018.

3. Okla. Const. art. 5, § 33 provides:

> § 33. Revenue bills - Origination - Amendment - Limitations on passage - Effective date - Submission to voters.
>
> A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
>
> B. No revenue bill shall be passed during the five last days of the session.
>
> C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.
>
> D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

4. Okla. Const. art. 5, § 1 provides:

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

Okla. Const. art. 5, § 2 provides:

> The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters

shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the Office of Governor.

5. Title 34 O.S. Supp. 2015 § 8 provides in pertinent part:

B. It shall be the duty of the Secretary of State to cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency of the petition, and shall include notice that any citizen or citizens of the state may file a protest as to the constitutionality of the petition, by a written notice to the Supreme Court and to the proponent or proponents filing the petition. Any such protest must be filed within ten (10) business days after publication. A copy of the protest shall be filed with the Secretary of State.

6. This ninety-day deadline after the adjournment of the legislative session is a firm deadline, and does not wait upon the resolution of any protests to a particular referendum petition. In contrast, circulation of an initiative petition for signatures does not even begin until after any protests have been resolved and the time for them has expired. *See* 34 O.S. Supp. 2015 § 8(E).

7. The majority of this Court's jurisprudence interpreting the gist requirement of 34 O.S. 2011 § 3 concerns initiative petitions. Proponents argue there are differences between referendum petitions and initiative petitions that require this court view the gist requirements for each through different lenses. They assert that a referendum is limited in scope to the approval or rejection of a single piece of legislation, whereas an initiative petition is capable of making many changes to existing law, where there is greater potential to hide or obscure important details. This Court finds that argument unpersuasive. The statutory requirement for the gist makes no distinction between initiative petitions and referendum petitions. Proponents point to no cases where this Court has applied a different standard when determining the sufficiency of the gist of a referendum petition as opposed to an initiative petition, and we decline to do so now.

8. The legal arguments surrounding this issue were briefed and argued in some detail before this Court, which is illustrative of the complicated nature of the question. However, we need not decide at this time what effect a yes vote on a referendum against an entire bill would have against a previously-repealed set of provisions in that bill. We are concerned at this juncture with the effect the confusion has upon voters, and whether after reading the statement on the petition they are able to cast an informed vote, and are not misled. *See McDonald*, 2018 OK 25 at ¶6; *In re Initiative Petition No. 344*, 1990 OK 75 at ¶14.

9. This remains true even if, as is the case with the hotel/motel tax, Proponents believe the practical effect is that there will no effect at all.

10. In *Community Gas & Service Co. v. Walbaum*, 1965 OK 118, ¶8, 404 P.2d 1014, the Court elaborated further:

While clerical and technical defects in an initiative petition may and should be disregarded, 34 O.S. 1961 § 24, a material departure from the statutory form renders an initiative petition ineffective and void. *In re Initiative Petition No. 9 of Oklahoma City,* 185 Okl. 165, 90 P.2d 665, 668. If a statutory provision is essential to guard against fraud, corruption or deception in the initiative and referendum process, such provision must be viewed as an indispensable requirement and failure to substantially comply therewith is fatal.

11. The "title" portion of "exact copy of the title and text of the measure" was removed by the Legislature in 2015. *See* Laws 2015, HB 1484, c. 193, § 1, emerg. eff. April 28, 2015.

Also of note, the 1961 amendments to 34 O.S. § 1 changed the question to be submitted to voters from "shall the following ... be vetoed:" to "shall the following ... be approved?" *See* Laws 1961, SB 64, p. 263, § 1, emerg. eff. May 17, 1961. Potentially, this was done to bring the requirements of 34 O.S. § 1 in line with Okla. Const. art. 5, § 3, as interpreted and applied by this Court in *In re State Question No. 216, Referendum Petition No. 71,* 1937 OK 309, 68 P.2d 424.

12. Protestants' App., Tab 5. *Also available at https://www.sos.ok.gov/documents/legislation/56th/2018/2S/HB/1010.pdf*

The best practice for drafting referendum petitions would be to attach, with no deviation whatsoever, a copy of the signed bill in question that is on file with the Secretary of State of the State of Oklahoma. This will alleviate any potential confusion about what voters are being asked to approve. As the Court of Civil Appeals noted:

Strict compliance with the clear mandate in §1 that an *exact copy* of the measure be inserted will obviate the need for a case by case determination as to how much of a measure must be included to satisfy a subjective substantial compliance rule. All parties, including the voters, will benefit because there will be nothing left to conjecture or speculation as to the content of the measure which is the subject of the petition. Additionally, strict compliance with this requirement will remove one portion of the petition process from the need for judicial review.

In re: Referendum Petitions No. 0405-1, 0405-2 and 0405-3, 2007 OK CIV APP 19at ¶19.

Winchester, J., dissenting:

1. § 33. Revenue bills - Origination - Amendment - Limitations on passage - Effective date - Submission to voters.

A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.

B. No revenue bill shall be passed during the five last days of the session.

C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

Amended by State Question No. 640, Initiative Petition No. 348, adopted at election held March 10, 1992.

2. A. Any person who is dissatisfied with the wording of a ballot title may, within ten (10) business days after the same is published by the Secretary of State as provided for in subsection I of Section 8 of this title, appeal to the Supreme Court by petition in which shall be offered a substitute ballot title for the one from which the appeal is taken. Upon the hearing of such appeal, the court may correct or amend the ballot title before the court, or accept the substitute suggested, or may draft a new one which will conform to the provisions of Section 9 of this title.

B. No such appeal shall be allowed as to the ballot title of constitutional and legislative enactments proposed by the Legislature.

Amended by Laws 2015, HB 1484, c. 193, § 6, emerg. eff. April 28, 2015.

2018 OK 56

APRIL MARTIN, as custodial parent of S.M. and A.M., minor children, Plaintiff/Respondent, v. DANIEL PAUL PHILLIPS, Defendant/Petitioner.

No. 116,672. June 26, 2018

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

HONORABLE PATRICIA G. PARRISH, DISTRICT JUDGE

¶0 After Petitioner was convicted for sexually molesting Respondent's minor children, Respondent filed a civil action against Petitioner based on the same conduct. Respondent then argued that, as a result of Petitioner's plea and conviction in the criminal case, the law requires that Petitioner be found liable for the same acts in

the civil case. The trial court agreed and, based upon the ordinary rules of preclusion and the nature of Petitioner's plea in his criminal case, so do we.

WRIT OF CERTIORARI TO REVIEW CERTIFIED INTERLOCUTORY ORDER PREVIOUSLY GRANTED; AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS

R. Ryan Deligans and Lane R. Neal, DURBIN, LARIMORE & BIALICK, Oklahoma City, Oklahoma, for Petitioner.

P. Scott Spratt, THE SPRATT LAW FIRM, Oklahoma City, Oklahoma, for Respondent.

Wyrick, J.:

¶1 Daniel Phillips was convicted of multiple counts of indecent or lewd acts with children under the age of sixteen. The mother of the children has now sued Phillips, alleging various torts arising out of his crimes. The mother moved for partial summary adjudication in the case, arguing that Phillips's conviction for the crimes establishes his liability for the torts. In response, Phillips argued that because his conviction was the product of an *Alford* plea – where a defendant admits there is sufficient evidence to support a conviction, but nonetheless insists that he did not commit the crimes[1] – his conviction cannot preclude him from disputing liability in the civil case.

¶2 The district court agreed with the mother, granting partial summary adjudication in her favor on the issue of liability. Phillips asked the district court to certify that decision for immediate review pursuant to 12 O.S.2011 § 952(b)(3). The district court did so, and Phillips timely petitioned this Court for certiorari. We granted the petition and now affirm.

I.

¶3 As a general rule, when a case is litigated to judgment, the parties are precluded from later seeking to relitigate "the adjudicated claim, [and] also any theories or issues that were actually decided, or could have been decided, in that action."[2] Parties are also precluded in subsequent actions from relitigating any distinct issues of fact or law necessary to the judgment in the prior case.[3] This "issue preclusion" or "collateral estoppel," as we call it, "prevents relitigation of facts and issues *actually litigated* and *necessarily determined* in an earlier proceeding between the same parties or their privies" where the parties had a "full and fair opportunity" to litigate the issue.[4] An issue is "actually litigated" if "it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined," and the issue is "necessarily determined" if "the judgment would not have been rendered but for the determination of that issue."[5]

¶4 This Court has already held that these preclusionary rules apply to criminal convictions resulting from a jury verdict, barring criminal defendants from relitigating their guilt in subsequent civil actions.[6] The threshold question presented by this case is thus whether criminal convictions resulting from pleas, rather than jury verdicts, are generally subject to the same rules. We conclude that they are.

¶5 First, a criminal sentence cannot be imposed on a defendant unless there is a factual basis for the defendant's plea.[7] Accordingly, any judgment of conviction following a plea is necessarily predicated on the presiding judge's determination that the evidence supports the conviction.[8] Thus, the issue of factual guilt is one that is actually litigated (in that it is raised in the indictment or information and submitted to the judge for determination) and necessarily determined (in that a judgment of guilt cannot be entered unless the court finds that sufficient evidence of guilt exists).[9]

¶6 Second, section 513 of Oklahoma's Code of Criminal Procedure describes the types of pleas available under Oklahoma law, and in so doing specifically mandates that *nolo contendere* ("no-contest") pleas "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."[10] The Legislature's creation of this exception would be a solution in search of a problem if pleas weren't generally subject to normal rules of preclusion. Because we presume that the Legislature means to accomplish *something* when it writes a law,[11] section 513 represents the understanding that pleas other than no-contest pleas *can* "be used against the defendant as an admission in any civil suit" arising out of the same facts.

¶7 Third, extra-jurisdictional authorities agree that a guilty plea precludes subsequent relitigation of the issue of guilt.[12] "A counseled plea of guilty" is, after all, "an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue

of factual guilt from the case."[13] Accordingly, "for purposes of applying the doctrine of collateral estoppel, there is no difference between a judgment of conviction based upon a guilty plea and a judgment rendered after a trial on the merits."[14]

II.

¶8 Because we hold the normal rules of preclusion apply to convictions resulting from pleas, the question that remains is whether an *Alford* plea like the one entered in this case falls within section 513's statutory exception to those rules. We hold that it does not.

¶9 First, the text of section 513 does not specifically address *Alford* pleas, at least not by that name. Section 513 only recognizes four pleas in response to a criminal charge: (1) not guilty, (2) guilty, (3) no contest, and (4) a plea of "former jeopardy."[15] Moreover, as explained above, section 513's exception from the ordinary preclusive effect only applies to no-contest pleas.[16] If the Legislature intended *Alford* pleas to be treated similarly, it could have said so; but it hasn't, despite *Alford* pleas having been recognized for nearly half a century.[17] Thus, because the Legislature has declined to specifically account for *Alford* pleas, we will not do so for them. "Exceptions," after all, "should not be read into a statute which are not made by the legislative body."[18]

¶10 Second, an *Alford* plea cannot be characterized as a no-contest plea in order to fall within section 513's exception by its own terms. As the parties here recognize, because section 513 does not mention *Alford* pleas at all, an *Alford* plea must be either a no-contest plea or a guilty plea – otherwise Oklahoma courts wouldn't be statutorily authorized to accept them. We conclude, as have numerous courts before us, that an *Alford* plea is a guilty plea – just one "entered while maintaining innocence."[19]

¶11 In the *Alford* case itself, *Alford* pleaded guilty to second-degree murder on the understanding that, because of the State's strong case against him, his failure to do so could result in a first-degree murder conviction accompanied by the death penalty.[20] But when entering that guilty plea, Alford consistently maintained that he was factually innocent.[21] The trial court nevertheless accepted the guilty plea and entered judgment against Alford. Alford then sought post-conviction relief, claiming his plea was the result of fear and coercion.[22] In reaching that claim, however, the U.S. Supreme Court first examined whether Alford's guilty plea was rooted in fact.[23]

¶12 While a guilty plea is ordinarily justified by (1) an admission that the defendant committed the crime and (2) consent to a waiver of trial,[24] the Court reasoned that an admission of factual guilt is not constitutionally required for a court to impose criminal liability because "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[25] As long as the plea is rooted in fact – and Alford's was, in light of the State's evidence against him – and entered into voluntarily and with knowledge of the alternatives, the Court reasoned, a guilty plea is proper and need not be accompanied by an admission of factual guilt.[26]

¶13 The Court thus concluded that Alford's plea was a constitutionally valid plea of guilty.[27] This is so because an *Alford* plea involves an admission of the government's ability to secure a conviction – *i.e.,* an admission of legal guilt – even though the defendant professes his factual innocence. In the end, however, the effect is the same: the defendant has pleaded guilty. Thus, even though an *Alford* plea and a *nolo contendere* plea might appear similar in certain respects, courts nonetheless recognize that an *Alford* plea is a guilty plea accompanied by protestations of innocence.[28]

¶14 Finally, there's the plea form Phillips entered in this case that confirms he was pleading guilty. Phillips insists in briefing that he entered into an *Alford* plea, and "in so pleading [he] never admitted to committing the crimes charged," and that his "plea was not based upon an admission of guilt, nor was the resulting judgment based upon a factual finding of such guilt."[29] The record, however, does not support this assertion. The plea is certainly delineated as an *Alford* plea in two places on the plea form, first on the first page where someone wrote in "(Alford)" above where the form says "Plea of Guilty and Summary of Facts,"[30] and then later in response to question 24 – which asks, "What is/are your plea(s) to the charge(s) (and to each one of them)?" – where someone wrote "pleads guilty by *Alford*."[31] But when asked whether he committed the acts charged in the information, Phillips answered "yes," and did so under penalty of perjury.[32] Phillips also

repeatedly agreed that he was pleading "guilty" to the crimes charged.[33] The trial judge, meanwhile, plainly found that there was a factual basis for the plea and that Phillips was guilty as charged.[34] Indeed, apart from merely referencing "*Alford*" and relying upon any connotation that might come with it, Phillips never declared he was factually innocent. He instead did the opposite; he admitted that he committed the crimes. In other words, in all substantive respects, Phillips entered a guilty plea.

¶15 Because we conclude that an *Alford* plea is a form of guilty plea, we have no difficulty concluding that Phillips's plea carries with it a guilty plea's preclusive effect. So long as Phillips's plea was both voluntary and reflected an intelligent choice among alternative options open to a defendant, it must be treated as any other guilty plea. Phillips does not assert that his plea was coerced or forced upon him in any way, and he admitted there was a factual basis for his conviction. Phillips's plea was therefore proper and could serve as an evidentiary basis for the district court presiding over the civil case against him to grant partial summary adjudication in favor of Martin.

* * *

¶16 For these reasons, we affirm the district court's grant of partial summary adjudication, and remand the case for further proceedings.

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

Darby, J. (by separate writing), concurs in part and dissents in part.

Darby, J., concurring in part and dissenting in part:

¶1 The issue is whether the trial court in a subsequent civil case may preclude or estop a convicted criminal from denying that he committed the acts which formed the basis for his criminal conviction.

¶2 Mr. Phillips reached a plea-bargain agreement with the State and entered what the trial court considered to be an "*Alford* plea." The record, however, does not support a finding that Mr. Phillips entered an "*Alford* plea." As the majority notes, the plea form contains a question which reads, "Did you commit the acts charged in the information?" The form provides that Mr. Phillips answered, "Yes," thereby admitting the facts. A defendant who pleads *Alford* does not admit to committing the acts charged, he or she denies it.

¶3 To fully understand what the term "*Alford* plea" in fact describes, we must consider its source. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970). In 1963, North Carolina indicted Mr. Alford for first-degree murder, a capital offense, and sought the death penalty. Pursuant to a plea-bargain agreement, in which the state conceded to reduce the charge to second-degree murder, Mr. Alford entered a guilty plea and avoided the possibility of receiving a sentence of death. The primary issue before the United States Supreme Court was whether or not the State coerced Mr. Alford to plead guilty by seeking a death sentence. Ultimately, the court found Mr. Alford voluntarily entered his plea. "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly ex-pressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." *Alford*, 400 U.S. at 38, 91 S. Ct. at 168.

¶4 The *factual basis*, however, came from the State, not Mr. Alford. Consider portions of Mr. Alford's statement when he pleaded guilty:

> "'I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.' . . . . 'I'm not guilty but I plead guilty.'"

Alford, 400 U.S. at 29 n.2, 91 S. Ct. at 163 n. 2.

¶5 An *Alford* plea is a legal fiction authorized by some courts to provide a vehicle to resolve criminal cases in a manner all necessary parties accept. Unlike Mr. Alford, Mr. Phillips admitted to committing the acts that were the basis for his conviction making his plea a straight plea of guilty. I would decide the effect of an *Alford* plea on a subsequent related civil case another day and limit today's ruling to conventional pleas of guilty. Three times, though, someone wrote "*Alford*" onto the plea form to describe the nature of Mr. Phillips' plea, and the majority of this court apparently accepts the label over the substance. Therefore, I will address the issue accordingly.

¶6 A true "*Alford* plea" should not form the basis for collateral estoppel and issue preclu-

sion as described by the majority. *Clark v. Baines*, 84 P.3d 245, 251 (Wash. 2004); *Doe 136 v. Liebsch*, 872 N.W. 2d 875 (Minn. 2015). An *Alford* plea is not a simple plea of guilty or a *nolo contendere* plea. An *Alford* plea is a category of plea all its own. If the court must qualify an *Alford* plea as one or the other, as the majority suggests, I would find that an *Alford* plea more closely resembles a plea of *nolo contendere*. In *Alford*, the United States Supreme Court stated:

> The fact that his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law. . . .
>
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal acts and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

Alford, 400 U.S. at 37, 91 S. Ct. at 167 (internal citations omitted).

¶7 Regarding *Alford*, the Tenth Circuit said in *U.S. v Buonocore*,

> [t]he Supreme Court equated the plea offered by the defendant to a plea of *nolo contendere*, *see id*. at 37, 91 S.Ct. 160, and held that when there is a strong factual basis for the plea, it is not unconstitutional for a court to accept a guilty plea despite the defendant's professed belief in his innocence, *see id.* at 38, 91 S.Ct. 160.
>
> . . . .
>
> When a defendant offers an *Alford* plea (i.e., a guilty plea accompanied by protestations of innocence), the proper procedure is to treat the plea as a plea of *nolo contendere*. *See* Fed.R.Crim.P. 11 advisory committee's note (1974).

United States v. Buonocore, 416 F.3d 1124, 1129-30 (10th Cir. 2005)

¶8 In Oklahoma, the trial court determines the factual basis for a guilty plea from the defendant. *King v. State*, 1976 OK CR 103, ¶ 11 (III)(B), 553 P.2d 529, 535. A criminal defendant who enters a guilty plea must admit that he or she committed the acts charged in the information; that specific question appears on the standard plea of guilty summary of facts form which the Oklahoma Court Criminal Appeals has ordered must be used in every felony guilty plea. Rules of the Court of Criminal Appeals, 22 O.S.2011, ch. 18, app., r. 13.0; 22 O.S.Supp. 2016, ch. 18, app., Form 13.10, Part A (28). A straight plea of guilty is without condition.

¶9 When a defendant enters a plea of *nolo contendere* (no contest), the defendant admits nothing. The defendant denies nothing. The court determines the factual basis from a source apart from the defendant. The same is true with an *Alford* plea.

¶10 The Oklahoma Legislature has recognized that a defendant who pleads *nolo contendere* does not admit to the act, mandating that a *nolo contendere* plea "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." 22 O.S.2011, § 513. The defendant pleading "*Alford*" also does not admit to committing the acts charged against him or her. But unlike a no contest plea, the defendant pleading "*Alford*" goes one further and actually *denies* committing the acts.

¶11 I recognize that in *Lee*, this Court decided that if a criminal conviction is the result of **jury** verdict, collateral estoppel applies and the criminal defendant will not be allowed to relitigate the issues of fact determined by the **jury**. *Lee v. Knight,* 1989 OK 50, ¶¶ 2, 10, 771 P.2d 1003, 1004, 1006. But a *jury* does not determine the fact issues to which the trial court, and now this court, have irrefutably bound defendants who enter an *Alford* plea. *Lee* and its reasoning do not apply.

¶12 A convicted criminal whose conviction is based on an *Alford* plea should be allowed to *deny* he or she committed the acts of which they were convicted to a finder of fact in a pending civil case. At most, I would admit a prior *Alford* plea, along with the resulting conviction "for what it's worth," in a civil trial and allow the convicted criminal to advance a defense.

Wyrick, J.:

1. *See generally North Carolina v. Alford*, 400 U.S. 25 (1970).

2. *Miller v. Miller*, 1998 OK 24, ¶ 23, 956 P.2d 887, 896 (citing *Nat'l Diversified Bus. Servs., Inc. v. Corp. Fin. Opportunities, Inc.*, 1997 OK 36, ¶ 12, 946 P.2d 662, 667). This general rule applies even in cases where a defendant never appears in a case and default judgment is entered

– so long as the defendant had fair *opportunity* to litigate the case. *Swift & Co. v. Walden*, 1935 OK 1173, ¶ 31, 55 P.2d 71, 79 ("The principle of res adjudicata is as applicable to default judgments after proper notice or summons as to any other judgment." (citing *Rhodabarger v. Childs*, 1926 OK 333, 250 P. 489; 2 A.C. Freeman, *A Treatise on the Law of Judgments* § 662, at 1395 (5th ed. 1925))).

3. *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438, 458.

4. *Id*. (citing *Carris v. John R. Thomas & Assocs., P.C.*, 1995 OK 33, ¶ 11, 896 P.2d 522, 528; *Underside v. Lathrop*, 1982 OK 57, ¶ 6 n.6, 645 P.2d 514, 516 n.6).

5. *Id*. (citing *Restatement (Second) of Judgments* § 27 cmt. d (1982); Fleming James, Jr. & Geoffrey Hazard, Jr., *Civil Procedure* §§ 11.16, 11.19 (3d ed. 1985)).

6. In *Lee v. Knight,* this Court adopted the Restatement (Second) of Judgments' view that judgment of a prior criminal proceeding carries a "fully conclusive, or collateral estoppel, effect." *Lee v. Knight*, 1989 OK 50, ¶¶ 8-9, 771 P.2d 1003, 1005 (citing Restatement (Second) of Judgments § 85 (1982)). Accordingly, this same evidence can also serve as the foundation for a grant of partial summary adjudication as it did in *Lee v. Knight*, *id*. ¶ 10, 771 P.2d at 1006, due to the preclusive effect of the jury's determination of guilt. For example, a criminal defendant found guilty of murder by jury cannot argue that he is actually innocent in a subsequent civil action for wrongful death because the issue of whether he wrongfully caused the death of the victim has already been decided against him. The fact he may adamantly maintain his innocence from his prison cell is of no consequence to the inquiry. He was found guilty as a matter of law, and that conviction precludes him from seeking to relitigate his innocence in any case where the burden of proof is "beyond a reasonable doubt" or lower.

7. *See* Okla. Ct. Crim. App. R. 4.1, 22 O.S.2011 ch. 18, app. (prescribing the mandatory form for guilty pleas, Okla. Ct. Crim. App. Form 13.10, 22 O.S.2011 ch. 18, app., which requires both that the defendant state the factual basis for his plea, *id*. at Part A(28), and that the court find that such a factual basis exists for the plea, *id*. at Part A(36)(E)).

8. *See Alford*, 400 U.S. at 38 (finding the requisite factual basis where "the [State's] evidence against [Alford] . . . substantially negated his claim of innocence"); *see also* ROA, p.14, Plea of Guilty & Summ. of Facts at Part A(32)(E) (where the trial court found that "a factual basis exists for the plea(s)" and "the defendant is guilty as charged").

9. In *Alford*, the Supreme Court described the trial court's function in this regard as follows: "Although denying the charge against him, [Alford] nevertheless preferred the dispute between him and the State to *be settled by the judge* in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it, the trial court proceeded to convict and sentence *Alford* for second-degree murder." *Alford*, 400 U.S. at 32-33 (emphasis added).

10. 22 O.S.2011 § 513.

11. *Curtis v. Bd. of Educ. of Sayre Pub. Schs*., 1995 OK 119, ¶ 9, 914 P.2d 656, 659 ("[T]he Legislature will never be presumed to have done a vain and useless act in promulgating a statute." (citing *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 5, 829 P.2d 15, 20; *Farris v. Cannon,* 1982 OK 88, ¶ 8 n.4, 649 P.2d 529, 531 n.4)).

12. *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1554 (11th Cir. 1993); *Manzoli v. Comm'r of Internal Revenue*, 904 F.2d 101, 105 (1st Cir. 1990); *Gray v. Comm'r of Internal Revenue*, 708 F.2d 243, 246 (6th Cir. 1983) ("A guilty plea is as much a conviction as a conviction following jury trial."); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978); *Nathan v. Tenna Corp.,* 560 F.2d 761, 763-64 (7th Cir. 1977); *Brazzell v. Adams*, 493 F.2d 489, 490 (5th Cir. 1974); *Metros v. U.S. Dist. Court*, 441 F.2d 313, 317, 319 (10th Cir. 1970); *Zinger v. Terrell,* 985 S.W.2d 737, 741 (Ark. 1999); *Paterno v. Fernandez*, 569 So. 2d 1349, 1350 (Fla. Dist. Ct. App. 1990); *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 244 (Iowa 2000); *In re Bowman*, 111 So. 3d 317, 322-23 (La. 2013); *J.R. ex. rel. R.R. v. Malley*, 62 So. 3d 902, 905-06 (Miss. 2011); *Commonwealth, Dep't of Transp. v. Mitchell,* 535 A.2d 581, 585 (Pa. 1987); *Zurcher v. Bilton*, 666 S.E.2d 224, 226 (S.C. 2008); *R.F. v. Tex. Dep't of Family & Prot. Servs*., 390 S.W.3d 63, 71-72 (Tex. App. 2012); *State ex rel. Leach v. Schlaegel*, 447 S.E.2d 1, 4 (W. Va. 1994). *Cf. McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[A] guilty plea is an admission of all the elements of a formal criminal charge . . . ."); *Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive.").

13. *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)); *accord* 22 C.J.S. *Criminal Procedure and Rights of Accused* § 230 (2016) ("A guilty plea and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, it leaves no issue for the jury . . . ." (footnotes omitted)).

14. *Blohm*, 994 F.2d at 1554 (citing *United States v. Killough*, 848 F.2d 1523, 1528 (11th Cir. 1988); *Mazzocchi Bus. Co. v. Comm'r,* 65 T.C.M. (CCH) 1858, 1865 (1993)); *cf.* 22 C.J.S. *Criminal Procedure and Rights of Accused* § 230 (2016) (stating that a guilty plea "is equivalent to, and as binding as, a conviction after a trial on the merits" and that "[i]t has the same effect in law as a verdict of guilty").

15. 22 O.S.2011 § 513; *see also Fines v. State*, 1925 OK CR 557, 204 P. 1079, 1080 (describing the fourth plea listed in section 513 – formerly O.S.1921 § 2617 – as a "plea of former jeopardy").

16. 22 O.S.2011 § 513 ("Third, Nolo contendere, subject to the approval of the court. The legal effect of such plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.").

17. In fact, Oklahoma's Code of Criminal Procedure did not specifically authorize a no-contest plea until 1976, which was six years *after* the Supreme Court of the United States handed down its opinion in the *Alford* case. *See* 22 O.S.1971 § 513 (listing only three pleas: "First, Guilty. Second, Not guilty. Third, A former judgment of conviction or acquittal of the offense charged, which must be specially pleaded, with or without the plea of not guilty"); Act of Mar. 3, 1976, ch. 20, § 1, 1976 O.S.L. 22, 22 (adding the *nolo contendere* plea, as well as the distinction of such pleas from guilty pleas); *Phillips v. Altman*, 1966 OK 46, ¶ 12, 412 P.2d 199, 202 ("In passing, we note that the Criminal Code of this state does not specifically authorize a plea of *nolo contendere*; 22 O.S. 1961, Sec. 513."). Had the Legislature so desired, it could have listed *Alford* pleas alongside no-contest pleas in the 1976 amendment to section 513 and specified that *Alford* pleas "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Yet the Legislature did not do so.

18. *Udall v. Udall,* 1980 OK 99, ¶ 11, 613 P.2d 742, 745 (citing *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 1966 OK 155, 422 P.2d 840).

19. *E.g., Ocampo v. State*, 1989 OK CR 38, ¶ 8, 778 P.2d 920, 923 (describing the *Alford* case as involving a "guilty plea entered while maintaining innocence"); *Alford*, 400 U.S. 25 passim (repeatedly describing the plea as a "guilty plea"); *United States v. Mancinas-Flores,* 588 F.3d 677, 681 (9th Cir. 2009) ("An *Alford* plea is simply shorthand for a guilty plea accompanied by a protestation of innocence. Thus, when a defendant offers what courts and lawyers describe as an *Alford* plea, the defendant is actually offering, in [Fed. R. Crim. P.] 11 terms, a guilty plea."); *United States v. Tunning*, 69 F.3d 107, 110-11 (6th Cir. 1995) ("The so-called '*Alford* plea' is nothing more than a guilty plea entered by a defendant who either: 1) maintains that he is innocent; or 2) without maintaining his innocence, is unwilling or unable to admit that he committed acts constituting the crime. Because we believe it is important to bear in mind that in either situation the defendant's plea is guilty, we will use the term '*Alford*-type guilty plea,' rather than merely '*Alford* plea.' We also note that there should be no confusion regarding the difference between an *Alford*-type guilty plea and a plea of *nolo contendere*. . . . An *Alford*-type guilty plea is a guilty plea in all material respects." (internal marks and citations omitted)); *Blohm*, 994 F.2d at 1554-55 ("Assertions of innocence . . . do not transform ordinary guilty pleas into pleas of *nolo contendere*. Each remains distinct, and the collateral effects of a guilty plea are undiminished by a simultaneous protestation of innocence."); *Cortese v. Black*, 838 F. Supp. 485, 494 (D. Colo. 1993) ("When a criminal defendant pleads guilty he admits all of the elements of the crime with which he is charged. . . . The fact that Cortese's plea was an *Alford* plea does not change this result."); *Emp'rs Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 20 (Iowa 2012); *Zurcher,* 666 S.E.2d at 227.

20. 400 U.S. at 26-27.

21. *Id*. at 28.

22. *Id*. at 29.

23. *See id*. at 37-38.

24. *See id*. at 32, 37.

25. *Id*. at 37.

26. *Id*. at 32-33, 37-38.

27. *See id*. at 37-39.

28. *See supra* note 19 and accompanying text.

29. Pet'r's Br. at 2.

30. ROA, p.9, Plea of Guilty & Summ. of Facts at 1.

31. *Id*. p.12, Plea of Guilty & Summ. of Facts at Part A(24).

32. *Id*. pp.12-13, Plea of Guilty & Summ. of Facts at Part A(25), (30)(3).

33. *Id*. pp.11-12, Plea of Guilty & Summ. of Facts at Part A(15)-(16), (19), (21), (23)-(24), (27).

34. *Id*. p.14, Plea of Guilty & Summ. of Facts at Part A(32)(E)-(F).

2018 OK 57

ROBERT HILL, Petitioner, v. AMERICAN MEDICAL RESPONSE, INDEMNITY INS. CO. OF NORTH AMERICA, and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 115,558. June 26, 2018

ON APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

¶0 The petitioner filed a workers' compensation claim after suffering an injury to his shoulder while working as a paramedic. In a hearing to determine permanent partial disability, the petitioner challenged the admissibility of a report by his employer's evaluating physician concerning the extent of his impairment. The petitioner also challenged the constitutionality of several provisions of the workers' compensation statutes requiring use of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition. The administrative law judge rejected the petitioner's claims concerning admissibility and constitutionality, and determined the petitioner sustained 7% whole person impairment and was entitled to an award of $7,913.50. The petitioner appealed and the Workers' Compensation Commission affirmed. The petitioner appealed to this Court and we retained the matter.

ORDER OF THE WORKERS' COMPENSATION COMMISSION AFFIRMED

Richard Bell, Norman, Oklahoma, Michael R. Green, Tulsa, Oklahoma, and Bob Burke, Oklahoma City, Oklahoma, for Petitioner.

Donald A. Bullard and H. Lee Endicott, Bullard & Associates, P.C., for Respondents.

Mithun Mansinghani, Solicitor General, Office of the Attorney General, Oklahoma City, Oklahoma, for the State of Oklahoma.

John N. Hermes and Andrew J. Morris, McAfee & Taft, P.C., for Amicus Curiae the State Chamber of Oklahoma.

COMBS, C.J.:

¶1 The question before this Court concerns whether evidence in the underlying workers compensation proceeding should have been excluded by the administrative law judge, as well as the constitutionality of several provisions of the Administrative Workers Compensation Act (AWCA), 85A O.S. §§ 1-125, that require mandatory use of the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides, Sixth Edition) to evaluate permanent partial disability (PPD). This Court determines the administrative law judge did not err by admitting the challenged evidence. This Court also determines the mandatory use of the AMA Guides, Sixth Edition, for assessing impairment for non-scheduled members does not violate the Constitution.

I.
FACTS AND PROCEDURAL HISTORY

¶2 Petitioner Robert Hill (Hill) was a paramedic in the employ of Respondent American Medical Response (Employer), when he injured his right shoulder on September 22, 2014, while lifting a person of large body habitus. On November 7, 2014, Hill underwent surgery to repair a torn rotator cuff. After post-operative physical therapy, Hill was released on February 5, 2015, at maximum medical improvement and given permanent restrictions.

¶3 Hill timely filed a CC-Form-3 on February 11, 2015. Employer admitted the injury and benefits were provided pursuant to the provisions of the AWCA. Employer was apparently unable to accommodate Hill's permanent restrictions, and so Hill is no longer employed with American Medical Response. Per Hill's testimony, he found work with a new employer and is making approximately 25% less per annum.

¶4 On June 30, 2016, a hearing was held before Administrative Law Judge (ALJ) Tara A. Inhofe. The issue that concerns this appeal was Hill's request for an award of PPD benefits. Hill submitted a report by Dr. Stephen Wilson, who opined that Hill sustained 8% whole person impairment pursuant to the AMA Guides, Sixth Edition, and 31.8% impairment pursuant to the AMA Guides, Fifth Edition. Dr. Wilson did not express an opinion as to which rating more accurately described Hill's PPD. Employer's evaluating physician, Dr. William Gillock, asserted in his own report that Hill sustained 4.2% whole person impairment pursuant to the AMA guides, Sixth Edition.

¶5 At the hearing, Hill attempted to exclude Dr. Gillock's report. Hill asserted: 1) that the report violated the requirements of *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 113, S.Ct. 2786, 125 L.Ed.2d 469 (1993); and 2) the manda-

tory use of the AMA Guides, Sixth Edition, for assessing impairment for non-scheduled members violates the Oklahoma Constitution. The ALJ rejected Hill's arguments and determined that Hill sustained 7% whole person impairment, equal to an award of $7,913.50.

¶6 Hill appealed to the Workers' Compensation Commission (Commission), which affirmed the ALJ's decision on November 18, 2016. Hill filed a Petition for Review in this Court on November 28, 2016. Hill's appeal was retained by this Court on November 29, 2016. The Court held oral argument in this matter on March 19, 2018, and the cause was assigned to this office on March 28, 2018.

II.
STANDARD OF REVIEW

¶7 The law in effect at the time of the injury controls both the award of benefits and the appellate standard of review where workers' compensation is concerned. *Corbeil v. Emricks Van & Storage,* 2017 OK 71, ¶9, 404 P.3d 856; *Brown v. Claims Mgmt. Res., Inc.*, 2017 OK 13, ¶9, 391 P.3d 111; *Williams Co., Inc. v. Dunkelgod,* 2012 OK 96, ¶14, 295 P.3d 1107. Hill's injury occurred on September 22, 2014. As Hills's injury occurred after the effective date of the AWCA, appellate review is governed by 85A O.S. Supp. 2013 § 78, which provides in pertinent part:

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

¶8 When considering the constitutionality of a statute, courts are guided by well-established principles and a heavy burden is placed upon those challenging the constitutionality of a legislative enactment. *Lee v. Bueno*, 2016 OK 97, ¶7, 381 P.3d 736; *Douglas v. Cox Ret. Properties, Inc.*, 2013 OK 37, ¶3, 302 P.3d 789; *Thomas v. Henry,* 2011 OK 53, ¶8, 260 P.3d 1251. All presumptions are to be indulged in favor of a statute's constitutionality. *Lee*, 2016 OK 97 at ¶7; *Douglas,* 2013 OK 37 at ¶3; *Thomas*, 2011 OK 53 at ¶8. A legislative act is presumed to be constitutional and will be upheld by this Court unless it is clearly, palpably and plainly inconsistent with the Constitution. *Lee*, 2016 OK 97 at ¶7; *Rural Water Sewer and Solid Waste Mgmt. v. City of Guthrie*, 2010 OK 51, ¶15, 253 P.3d 38; *Kimery v. Public Serv. Co. of Okla.,* 1980 OK 187, ¶6, 622 P.2d 1066.

¶9 We have previously explained that this Court's examination of a statute's constitutional validity does not extend to policy:

> The nature of this Court's inquiry is limited to constitutional validity, not policy. It is not the place of this Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition. *Douglas,* 2013 OK 37, ¶3; *In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, L.L.C.*, 2007 OK 25, ¶12, 161 P.3d 303; *Fent,* 1999 OK 64, ¶4. A court's function, when the constitutionality of a statute is put at issue, is limited to a determination of the validity or invalidity of the legislative provision and a court's function extends no farther in our system of government. *Douglas,* 2013 OK 37, ¶3; *Edmondson v. Pearce,* 2004 OK 23, ¶17, 91 P.3d 605; *Fent,* 1999 OK 64, ¶4.

Lee, 2016 OK 97 at ¶8.

III.
ANALYSIS

A. The ALJ did not err by admitting the report of Employer's treating physician.

¶10 Hill first asserts that the report of Employer's expert, Dr. William Gillock, relying on

the AMA Guides, Sixth Edition, is not relevant to establishing the nature and extent of Hill's permanent partial disability, and thus violates the standards of *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 113, S.Ct. 2786, 125 L.Ed.2d 469 (1993). As this Court noted in *Christian v. Gray*, 2003 OK 10, ¶¶7-9, 65 P.3d 591, the *Daubert* decision sets forth several criteria a trial judge must consider when determining the admissibility of expert testimony under Federal Rule of Evidence 702, 28 U.S.C.A. We explained:

> *Daubert* provided a list of factors for the trial judge to consider when determining the admissibility of evidence. They include: 1. Can the theory or technique be, or has it been, tested; 2. Has the theory or technique been subjected to peer review and publication; 3. Is there a "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation;" and 4. Is there widespread acceptance of the theory or technique within the relevant scientific community. *Daubert,* 509 U.S. at 593-594. The inquiry is a flexible one, and focuses on the evidentiary relevance and reliability underlying the proposed submission, and not on the conclusions they generate. *Id*. 509 U.S. at 595.
>
> The evidence must also "assist the trier of fact to understand the evidence or to determine a fact in issue." This requirement "goes primarily to relevance." *Daubert*, 509 U.S. at 591. Rule 702 thus "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 U.S. at 592.

Christian, 2003 OK 10, ¶¶8-9.

¶11 Federal Rule of Evidence 702 was amended in direct response to *Daubert* and its progeny, and currently provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 702, 28 U.S.C.A. The requirements of Rule 702, and hence the *Daubert* standard, have been incorporated directly into the AWCA by the Legislature through 85A O.S. Supp. 2013 § 72(D), which provides:

> Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments.

¶12 Hill's *Daubert* argument is a definitional one based on relevance. Essentially, Hill argues that the opinion of Employer's expert Dr. William Gillock, relying on the AMA Guides, Sixth Edition, is not relevant to establishing the nature and extent of Hill's permanent partial disability because the AMA Guides, Sixth Edition, address impairment whereas the Commission, through its ALJs, is charged with determining disability. Hill asserts that no-where in the AWCA is there any mention of awarding impairment. Hill also notes that the AMA Guides, Sixth Edition, define "impairment" and "disability" as distinct terms.[1] Be-cause the AWCA provides for awards of disability and not impairment, Hill argues, the AMA Guides, Sixth Edition, are wholly insufficient to provide a reasonable basis for evaluation of disability and are irrelevant to the Legislature's mandate to consider an injured worker's disability.

¶13 Hill's argument, however, is foreclosed by the language of the AWCA itself. The AWCA provides its own definitions that are controlling in this instance. Title 85A O.S. Supp. 2013 § 2(33) defines "permanent disability" and provides:

> "Permanent disability" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the current edition of the American Medical Association guides to the evaluation of impairment, if the impairment is contained therein;

The language of this provision unambiguously defines "permanent disability" in a manner that aligns with the AMA Guides, Sixth Edition, definition of "impairment." Indeed, the Legislature's definition of permanent disability and the AMA Guides, Sixth Edition, definition of impairment both center on loss of bodily

function as a result of an injury, not on activity limitations or loss of employment capacity. The AMA Guides themselves are incorporated directly into the definition of "permanent disability." The AWCA's definition of "permanent disability" is then incorporated into the definition of "permanent partial disability" in 85A O.S. Supp. 2013 § 2(34), which provides:

> "Permanent partial disability" means a **per-manent disability** or loss of use after maximum medical improvement has been reached which prevents the injured employee, who has been released to return to work by the treating physician, from returning to his or her pre-injury or equivalent job. All evaluations of permanent partial disability must be supported by objective findings; (emphasis added).

¶14 The idea that the Legislature has chosen to base permanent partial disability primarily on the AMA Guides, Sixth Edition, impairment ratings is further supported by the language of 85A O.S. Supp. 2013 § 45(C), which provides in pertinent part:

> 1. A permanent partial disability award or combination of awards granted an injured worker may not exceed a permanent partial disability rating of one hundred percent (100%) to any body part or to the body as a whole. The determination of permanent partial disability shall be the responsibility of the Commission through its administrative law judges. Any claim by an employee for compensation for permanent partial disability must be supported by competent medical testimony of a medical doctor, osteopathic physician, or chiropractor, and shall be supported by objective medical findings, as defined in this act. The opinion of the physician shall include employee's percentage of permanent partial disability and whether or not the disability is job-related and caused by the accidental injury or occupational disease. **A physician's opinion of the nature and extent of permanent partial disability to parts of the body other than scheduled members must be based solely on criteria established by the current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment"**. A copy of any written evaluation shall be sent to both parties within seven (7) days of issuance. Medical opinions addressing compensability and permanent disability must be stated within a reasonable degree of medical certainty. Any party may submit the report of an evaluating physician. (Emphasis added).

This equation of permanent partial disability with impairment is not a new concept in Workers' Compensation Law, including in Oklahoma. For example, *Modern Workers Compensation* explains:

> When permanent partial disability is defined in terms of loss of a body member, the definition approaches that of physical or mental impairment. A permanent impairment is any permanent anatomic or functional abnormality or loss. **Indeed, in some states, permanent partial disability is equal to or the same as physical impairment**. Or, a showing of physical impairment is prerequisite to an award for permanent partial disability. But in other states permanent impairment, while a basic consideration in the evaluation of permanent disability, and a contributing factor to the extent of permanent disability, is not necessarily an indication of the entire extent of permanent disability.

2 Modern Workers Compensation § 200:9, Permanent Partial Disability, Generally (emphasis added).

¶15 The interlocking nature of impairment and permanent partial disability was apparent even under the old Oklahoma Workers' Compensation Act. It defined permanent partial disability in the following manner: "'Permanent partial disability' means permanent disability which is less than total and shall be equal to or the same as permanent impairment." Title 85 O.S. Supp. 2010 § 3(21), *repealed by* Laws 2011, SB 878, c. 318, § 87.

¶16 Hill, by asserting expert opinions concerning "permanent partial disability" must contain data in regard to educational background, vocational training, loss of wage-earning capacity, etc., is conflating the definition of "permanent partial disability" with that of "permanent total disability," which under both the AWCA and the now-repealed Oklahoma Workers' Compensation Act factored in employment capability.[2]

¶17 Hill relies on this Court's decision in *Maxwell v. Sprint PCS,* 2016 OK 41, 369 P.3d 1079, for the proposition that data on educational background, vocational training, work

history, transferable skills, or loss of wage-earning capacity are necessary elements for any opinion on the nature and extent of permanent partial disability. However, *Maxwell* does not support this argument. This Court noted in *Maxwell* that:

> Since 1941, permanent partial disability compensation has been awarded **solely on the basis of loss of function as established by medical evidence,** and an injured employee's loss of earning capacity has been arbitrarily fixed by statute and a claimant has *not* been required to present evidence of loss of wage-earning capacity.

2016 OK 41 at ¶12.

The *Maxwell* opinion implies that this situation could have changed due to new language in 85A O.S. Supp. 2013 §2(34) because it incorporates an employee's inability to return to his or her pre injury or equivalent job into the definition of permanent partial disability. *Maxwell*, 2016 OK 41 at ¶13. The Court's observations, however, were made in the context of 85A O.S. Supp 2013 § 45(C)(5), a deferral provision which unquestionably required an evaluation of whether an injured employee returned to his or her pre-injury or equivalent job. This Court struck that provision as unconstitutional in part because:

> In actuality, despite the fact the Commission continues to presume that an employee's loss of earning capacity is measured by the degree of physical disability sustained and is arbitrarily fixed by statute, the monetary award based on the physical disability rating to the employee's body becomes meaningless once the employee returns to work. An injured employee who returns to work receives no compensation for the physical injury sustained and no compensation for a reduction in future earning capacity.

Maxwell, 2016 OK 41 at ¶27.

Not only did this Court strike the deferral provisions of 85A O.S. Supp. 2013 § 45(C)(5), including the language "returns to his pre-injury or equivalent job," this Court also determined "[a]ny definitional provisions found in 85A O.S. Supp. 2013 § 2, as discussed herein, are invalid to the extent they are inconsistent with the views expressed today." *Maxwell*, 2016 OK 41 at ¶31.

¶18 This Court determined in *Maxwell* that it was unacceptable for an employee to lose permanent partial disability benefits merely because they returned to their pre-injury or equivalent job. *See* 2016 OK 41 at ¶¶23-25. Therefore, any requirement in 85A O.S. Supp. 2013 § 2(34) that "permanent partial disability" be contingent on whether an employee returns to their pre-injury or equivalent job is also invalid. Accordingly, "permanent partial disability" as defined by 85A O.S. Supp. 2013 § 2(34) essentially means "permanent disability," which as discussed above is functionally equivalent to impairment as defined by the AMA Guides, Sixth Edition.[3]

¶19 Dr. Gillock's report was not irrelevant and inadmissible because it contained no data in regard to Hill's education background, vocational training, work history, transferrable skills, or loss of wage-earning capacity. Such information is not necessary for a determination of "permanent partial disability" pursuant to the provisions of the AWCA. The ALJ did not err by admitting the report into evidence.

B. Mandatory use of the AMA Guides, Sixth Edition, is not an unconstitutional restraint upon the trier of fact nor an impermissible legislative predetermination of an adjudicatory scientific fact.

¶20 Hill also challenges the constitutionality of several provisions of the AWCA that mandate use of the AMA Guides. Hill first asserts that the mandatory use of the current edition of the AMA Guides under the AWCA is an unconstitutional restraint upon the administrative law judge who acts as the trier of fact in workers' compensation proceedings under the AWCA and further that such mandatory use constitutes a legislative predetermination of an adjudicatory scientific fact.

¶21 The separation-of-powers doctrine serves to halt any legislative intrusion upon the role of the judiciary as set out by the constitution. Okla. Const. art. 4, § 1; *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶13, 130 P.3d 213; *Earl v. Tulsa County Dist. Ct.*, 1979 OK 157, ¶6, 606 P.2d 545. While the Legislature's responsibility is to make law, the judiciary is invested with an adjudicative function that requires it to hear and determine forensic disputes. *Lee v. Bueno,* 2016 OK 97, ¶40, 381 P.3d 736; *Yocum*, 2005 OK 27 at ¶13. The power to adjudicate is the power to determine questions of fact or law framed by a controversy and this power is exclusively a judicial power. *Lee*, 2016 OK 97 at

¶40; *Conaghan v. Riverfield Country Day School*, 2007 OK 60, ¶20, 163 P.3d 557; Yocum, 2005 OK 27 at ¶13. Any legislative removal of the discretionary component of the adjudicative process is a usurpation of the courts' freedom; a freedom that is essential to the judiciary's independence from the other branches of government. *Lee*, 2016 OK 97 at ¶40 (citing *Yocum*, 2005 OK 27 at ¶13).

¶22 Pursuant to the AWCA, ALJs undoubtedly act in an adjudicative capacity and therefore must be given the same freedom to determine questions of fact free from legislative interference. In *Maxwell*, we explained:

> [T]he AWCA orders the Commission, through its ALJs, "to hear and determine claims for compensation and to conduct hearings and investigations and to make such judgments, decisions, and determinations as may be required by any rule or judgment of the Commission." 85A O.S. Supp. 2013 § 22(D). By statutory directive, the ALJs undoubtedly act in an adjudicative capacity in the administrative workers' compensation system because adjudication includes "the authority to hear and determine forensic disputes." *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 13, 130 P.3d 213, 220. "When an administrative board acts in an adjudicative capacity, it functions much like a court" and such proceedings are quasi-judicial in nature.

2016 OK 41 at ¶16 (footnotes omitted).

¶23 Hill asserts that by prohibiting admission of any medical evidence that does not conform to the current edition of the AMA Guides, the Legislature has violated the above-stated principles and is encroaching into the domain of the trier of fact. In support of this assertion, Hill cites *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, 130 P.3d 213 and *Conaghan v. Riverfield Country Day School*, 2007 OK 60, 163 P.3d 557.

¶24 In *Yocum*, this court considered the independent medical examiner provisions of the old workers' compensation regime, found at 85 O.S. 2001 § 17(D) (*repealed by* Laws 2011, SB 878, c. 318, § 87). This Court concluded that the provisions in question **did not** assign a higher probative value to reports from independent medical examiners, and to have done so would have been constitutionally impermissible. *Yocum*, 2005 OK 27 at ¶¶11-12. The Court went on to explain:

> A legislative command to adjudicate a fact by a predetermined statutory direction would constitute an impermissible invasion into the realm of judicial independence. It encroaches upon the free exercise of decisionmaking powers reserved to the judiciary. Were the Legislature to require that the Workers' Compensation Court accord an elevated degree of probative value to an IME report its enactment would impermissibly r**ob that tribunal of its independent power to establish impairment or disability within the range of received competent evidence**. The Legislature is confined to mandating what facts must be adjudged. It may neither predetermine adjudicative facts nor direct that their presence or absence be found from any proof before a tribunal.

Yocum, 2005 OK 27 at ¶14 (footnotes omitted).

¶25 In *Conaghan*, this Court considered a different incarnation of the independent medical examiner provisions of the old workers' compensation regime, found at 85 O.S. Supp. 2005 § 17(A)(2). That provision provided in pertinent part:

> a. There shall be a rebuttable presumption in favor of the treating physician's opinions on the issue of temporary disability, permanent disability, causation, apportionment, rehabilitation or necessity of medical treatment. Any determination of the existence or extent of physical impairment shall be supported by objective medical evidence, as defined in Section 3 of this title.
>
> b. The Independent Medical Examiner shall be allowed to examine the claimant, receive any medical reports submitted by the parties and review all medical records of the claimant. If the Independent Medical Examiner determines that the opinion of the treating physician is supported by the objective medical evidence, the Independent Medical Examiner shall advise the Court of the same. If the Independent Medical Examiner determines that the opinion of the treating physician is not supported by objective medical evidence, the Independent Medical Examiner shall advise the Court of the same and shall provide the Court with his or her own opinion. In cases in which an independent medical examiner is appointed, the Court shall not consider the opinion of the Independent

> Medical Examiner unless the Independent Medical Examiner determines that the opinion of the treating physician is not supported by objective medical evidence, in which case the Court shall follow the opinion of the Independent Medical Examiner, the opinion of the treating physician or establish its own opinion within the range of opinions of the treating physician and the Independent Medical Examiner.

This Court upheld the rebuttable presumption in favor of the opinion of the treating physician as a valid procedural device under our settled law. *Conaghan*, 2007 OK 60 at ¶21.

¶26 However, the Court determined that part of 85 O.S. Supp. 2005 § 17(A)(2)(b) restricted both the evidence to be considered by the workers' compensation court and the fact-finding prerogative of that court. The final sentence of 85 O.S. Supp. 2005 § 17(A)(2)(b) required the Workers' Compensation Court to give determinative effect to opinion of the independent medical examiner and the treating physician, **even when the treating physician's opinion was not supported by objective medical evidence.** The Court determined that restriction impermissibly invaded the judiciary's exclusive constitutional prerogative of fact-finding. *See Conaghan*, 2007 OK 60 at ¶22.

¶27 A recent but important decision of this Court not discussed by Hill, however, is *Lee v. Bueno*, 2016 OK 97, 381 P.3d 736. In that case, this Court considered the constitutionality of 12 O.S. 2011 § 3009.1, a statute that serves to limit what types of evidence are admissible in certain civil cases involving personal injury. Specifically, 12 O.S. 2011 § 3009.1 limits admissibility of evidence of medical costs in personal injury cases to what has actually been paid or is owed for a party's medical treatment, rather than the amount billed for that treatment. *Lee*, 2016 OK 97 at ¶9. The petitioner in *Lee* asserted Section 3009.1 was unconstitutional as a violation of Okla. Const. art. 4, § 1, because it invaded the fact-finding function of the judiciary. *Lee*, 2016 OK 97 at ¶39.

¶28 This Court disagreed, and in doing so we stressed that rules of evidence are firmly the province of the Legislature:

> This Court has invalidated legislation for encroaching upon the adjudicative authority of the judiciary when it predetermines an adjudicative fact. *See Conaghan*, 2007 OK 60, ¶22. **However, the judiciary's constitutional prerogatives concerning fact-finding and adjudication should not be confused with the legislative prerogative to determine the rules of evidence**, which this Court has directly recognized: "[a]s to legislative authority to declare rules of evidence, and that same are subject to modification or change is unquestioned, no person having a vested right in a rule of evidence." *Polk v. Oklahoma Alcoholic Beverage Control Bd.*, 1966 OK 224, ¶18, 420 P.2d 520.

Lee, 2016 OK 97 at ¶41 (emphasis added).

¶29 When considered together, this Court's prior decisions support the following proposition: the Legislature is free to determine what evidence is and is not admissible in specific types of adjudicatory proceedings, but it may not afford elevated probative value to particular evidence nor give determinative effect to specific evidence or compel the conclusions to be drawn from it. *See Lee*, 2016 OK 97 at ¶41; *Conaghan*, 2007 OK 60 at ¶22; *Yocum*, 2005 OK 27 at ¶14. The provisions of the AWCA that require use of the current edition of the AMA Guides serve to define both what constitutes admissible evidence on the issue of PPD: expert evidence that conforms to the AMA Guides, as well as to define what constitutes PPD. *See* 85A O.S. Supp. 2013 § 2(31)(2)(b); 85A O.S. Supp. 2013 § 2(33); 85A O.S. Supp. 2013 § 45(C)(1).

¶30 Hill also asserts that mandatory use of the current edition of the AMA Guides is an impermissible legislative predetermination of an adjudicatory scientific fact. Hill cites this Court's decision in *Sterling Refining Co. et al. v. Walker et al.*, 1933 OK 446, 25 P.2d 312. Hill's reliance on that case is misplaced. The Court in *Sterling* did not, as Hill suggests, consider "the legislature's granting to the Supreme Court itself the right to fix or determine 'profitable' prices of oil that a second entity, the Oklahoma Corporation Commission, would use to limit production in Oklahoma's oil and gas fields." Petitioner's Brief in Chief, p.18. Rather, the *Sterling* Court determined: 1) the Legislature could not vest administrative or legislative powers in the Court; and 2) the Corporation Commission could not, itself, fix the price of oil. *Sterling*, 1933 OK 446 at ¶¶ 31-33, 39. That rationale for the inability of the Corporation Commission to determine the price of oil rested not on it being an adjudicatory fact for the Court to determine, but rather on anti-monopolistic principles:

> Petitioners further contend that the act in question is also unconstitutional because it confers upon the Corporation Commission the authority to fix the price of oil, and they further assert that the orders promulgated by the Corporation Commission under the authority of this Conservation Act were for the purpose of establishing or regulating the price. It has been universally held that unless a business is so affected with a public interest in the sense that the regulation of the price thereof is essential to the protection of the public, it is beyond the authority of the state or of the nation to regulate the price of the commodity. Businesses warranting regulation by price-fixing are usually monopolistic in character.

Sterling, 1933 OK 446 at ¶31.

¶31 Adjudicative facts are facts to which the law is applied in the process of adjudication. *Kentucky Fried Chicken of McAlester v. Snell*, 2014 OK 35, n.4, 345 P.3d 351; *Yocum,* 2005 OK 27 at n.32; *State ex rel. Blankenship v. Freeman*, 1968 OK 54, ¶65, 440 P.2d 744. Adjudicative facts are facts about the parties and must be ascertained from formal proof. *Snell*, 2014 OK 35 at n.4; *Yocum*, 2005 OK 27 at n.32; *Freeman*, 1968 OK 54 at ¶65.

¶32 The provisions requiring use of the AMA Guides in the AWCA are not a legislative predetermination of the degree of any claimant's impairment or award of PPD. As the ALJ correctly noted, the trier of fact is free to adjudicate the degree of impairment within the range of competent medical reports submitted at trial. Though those reports must be in accordance with the AMA Guides, the AWCA does not predetermine the weight to be given to any particular medical report, and any party is able to submit a report of an evaluating physician for the trier of fact to consider. As discussed previously, the AMA Guide provisions in the AWCA concern what type of evidence the trier of fact may consider and define PPD. In this cause, the ALJ examined the competent evidence and determined Hill's impairment to be 7% of the whole person, which was on the higher end of the range supported by the evidence.

C. Mandatory use of the current edition of the AMA Guides does not constitute an unlawful delegation of the state's legislative power.

¶33 Hill also asserts the provisions of the AWCA requiring the use of the current edition of the AMA Guides are unconstitutional because they constitute an unlawful delegation of legislative authority. The Oklahoma Constitution vests legislative authority in the Legislature alone. Okla. Const. art. 5 § 1 provides:

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

This legislative authority to determine law and policy is distinct from the power to make rules of a subordinate character to carry them out, and it cannot be delegated. *Associated Indus. of Okla. v. Indus. Welfare Com'n*, 1939 OK 155, ¶16, 90 P.2d 899. *See Tulsa County Deputy Sheriff's Fraternal Order of Police, Lodge Num. 188 v. Bd. of County Com'rs of Tulsa County,* 2000 OK 2, ¶9, 995 P.2d 1124; *Isaacs v. Okla. City*, 1966 OK 267, ¶¶10-11, 437 P.2d 229. However, where a law does not actually delegate authority, there is no violation of the above-noted non-delegation doctrine. *See Thomas v. Henry*, 2011 OK 53, ¶¶12-20, 260 P.3d 1251 (holding a challenged statute did not delegate authority to the federal government merely by acknowledging federal power and the cooperation between the state and federal government).

¶34 First, none of the provisions requiring use of the current edition of the AMA Guides give the AMA the power to make law in Oklahoma. Nothing in Oklahoma law prevents the Oklahoma Legislature from adopting as its own a set of particular standards **already in existence**. In *Oklahoma Coalition for Reproductive Justice v. Cline*, 2016 OK 17, ¶¶12-21, 368 P.3d 1278, this Court discussed the non-delegation doctrine and applied it to a statute that required certain abortion-inducing drugs be used only in accordance with a final printed label set by the Food and Drug Administration (FDA). This Court determined it was bound to, if possible, adopt an interpretation of the challenged statute that did not give the FDA authority to alter the law in Oklahoma by making future changes to the final printed label in question. *Cline,* 2016 OK 17 at ¶16. This Court concluded that the challenged statute required only that usage of the drugs conform to the final printed label in existence at the time, and therefore did not

delegate to the FDA any authority to determine the law in Oklahoma on an ongoing basis. *Cline*, 2016 OK 17 at ¶21.

¶35 The *Cline* case illustrates the important distinction between the Legislature adopting a set of fixed standards as law vs. delegating legislative authority to another entity that might promulgate and change those standards on an ongoing basis. Cases where this Court has found violations of the non-delegation doctrine concern the latter category. For example, in *City of Okla. City v. State ex rel. Okla. Dept. of Labor*, 1995 OK 107, 918 P.2d 26, this Court determined that Oklahoma's Minimum Wages on Public Works Act, 40 O.S.1991, §§ 196.1 to 196.14, violated Article 4, Section 1 and Article 5, Section 1 of the Oklahoma Constitution by delegating "the power to determine prevailing wages to [the United States Department of Labor] without setting standards for the exercise of that determination." *City of Okla. City*, 1995 OK 107 at ¶1. The provisions required the Oklahoma Labor Commissioner to adopt the United States Department of Labor's prevailing wage on an on-going basis. *City of Okla. City*, 1995 OK 107 at ¶9. The act allowed the United States Department of Labor to change Oklahoma's prevailing wage law without legislative action. *City of Okla. City*, 1995 OK 107 at ¶8.

¶36 This Court also discussed two other prior cases in *Cline* supporting the above-noted principles. We explained:

> In *In re Initiative Petition No. 366, State Question No. 689*, 2002 OK 21, 46 P.3d 123, this Court ruled an initiative petition unconstitutional before it was submitted to a vote of the people. The petition called for the State Board of Education and the State Board of Regents for Higher Education to promote principles, but failed to state any principles. *Id.* ¶ 16, 46 P.3d at 128. Because the legislation failed to provide guidelines for implementing rules, the legislation was deemed to have improperly delegated the Legislature's authority by allowing agencies unfettered discretion to make law. *Id*. ¶ 18, 46 P.3d at 129.
>
> Similarly to *In re Initiative Petition No. 366*, in *Estep*, this Court ruled that the Oklahoma Campaign Finance Act, in effect at the time, violated the non-delegation doctrine. 1982 OK 106, ¶ 1, 652 P.2d 271, 272. The act allowed the Campaign Commission unfettered discretion to promulgate rules without legislative standards for guidance. *Id.* ¶ 16, 652 P.2d at 277.

Cline, 2016 OK 17 at ¶¶14-15.

¶37 The question thus becomes what do certain provisions of the AWCA mean when they reference the "current edition of the American Medical Association guides to the evaluation of impairment?"[4] We must determine whether these provisions mean the edition of the AMA Guides in effect at the time of passage (in this case the Sixth Edition) or the Sixth Edition now, followed by whatever future editions of the AMA Guides may be adopted at a later date. If the latter is the case, then the provisions would be an unconstitutional delegation of legislative authority for the reasons discussed in *Cline*.

¶38 The Supreme Court of Pennsylvania recently considered this issue in *Protz v. Workers' Comp. Appeal Bd.* (Derry Area School Dist.), 161 A.3d 827 (Penn. 2017). The court explained:

> At the outset, it is important to clarify that the non-delegation doctrine does not prevent the General Assembly from adopting as its own a particular set of standards which already are in existence at the time of adoption. However, for the reasons we have explained, the non-delegation doctrine prohibits the General Assembly from incorporating, sight unseen, subsequent modifications to such standards without also providing adequate criteria to guide and restrain the exercise of the delegated authority.

Protz, 161 A.3d at 838-39.

The logic expressed above is the same as that supporting this Court's decision in *Cline*. However, the Supreme Court of Pennsylvania went on to determine that references to the "most recent edition" of the AMA Guides could be given no reasonable construction where the language could be understood to mean only the most recent edition when the General Assembly enacted the statute. *Protz*, 161 A.3d at 839. Rather, the court determined "most recent edition" could only mean the most recent edition at the time of examination, and therefore constituted an unconstitutional delegation of legislative authority. *Protz*, 161 A.3d at 839.

¶39 In contrast, the Supreme Court of North Dakota reached the opposite conclusion, holding that language requiring use of the "most current edition" of the AMA Guides referred to

the most current edition of the guides in existence at the time of the statutes enactment, in order to avoid constitutional conflicts implicated by the non-delegation doctrine. *McCabe v. North Dakota Workers Comp. Bureau*, 1997 ND 145, ¶16, 567 N.W.2d 201.

¶40 We are persuaded by the logic of *McCabe* and that of our own prior decisions such as *Cline*. In *Cline* this Court stressed that well-established principles illustrate the heavy burden on those challenging the constitutionality of a legislative enactment:

> We are guided by well-established principles in assessing the conformity of a challenged state statute to our fundamental law. *Liddell v. Heavner*, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199-1200. Our state constitution is a bulwark to which all statutes must yield. In reviewing a statute for conformity to Oklahoma's constitution, we begin with a presumption of constitutionality. *Id*. A statute will be upheld unless it is clearly, palpably, and plainly inconsistent with the Constitution. *Id.* The party challenging a statute's constitutionality has a heavy burden to establish that it is in excess of legislative power. *Id*. Bound by these rules, we must, if possible, construe H.B. 2684 as not allowing the FDA's decisions to change Oklahoma law; the means of doing so is to apply H.B. 2684's restrictions only to Mifeprex, misoprostol, and methotrexate use in abortions, excluding ectopic pregnancies, according to the current Mifeprex FPL.

Cline, 2016 OK 17 at ¶16.

In *Calvey v. Daxon*, we specifically noted:

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

2000 OK 17 at ¶24 (quoting *App. of Okla. Capitol Imp. Auth.*, 1998 OK 25, ¶8, 958 P.2d 759).

¶41 The Legislature chose not to specify in the AWCA whether "most current edition" and "current edition" refer to the edition of the AMA Guides that is most current or current at the time of enactment, or at the time of a claimant's injury or examination. Both interpretations are reasonable given the language of the AWCA. Because the second interpretation would render the provisions requiring use of the AMA Guides an unconstitutional delegation of legislative authority, we are compelled to adopt the interpretation that "most current edition" and "current edition" refer to the current edition of the AMA Guides when the relevant provisions were enacted: the AMA Guides, Sixth Edition.

¶42 The Legislature has not delegated its own authority to the AMA, and further, it has not somehow re-delegated the adjudicatory authority it granted to the Workers' Compensation Commission. Title 85A O.S. Supp. 2013 § 45(C)(1) provides in pertinent part: "The determination of permanent partial disability shall be the responsibility of the Commission through its administrative law judges." The AMA has no role in the adjudicatory process to determine any individual claimant's PPD. Rather, as explained above, the Legislature has adopted a set of existing standards promulgated by the AMA with which evidentiary materials in workers' compensation proceedings must comply, which is well within its province to determine the rules of evidence. *See Lee v. Bueno*, 2016 OK 97 at ¶41; *Polk*, 1966 OK 224 at ¶18.

D. The provisions of the AWCA requiring use of the AMA Guides do not constitute a denial of due process.

¶43 Hill also asserts mandatory use of the AMA Guides in the determination of PPD constitutes a denial of due process in violation of Okla Const. art. 2, § 7[5] and U.S. Const. amend. XIV, § 1.[6] Hill's first argument is that he was denied procedural due process because the AMA guides completely control his PPD award and he should therefore have been entitled to cross-examine the authors of the AMA Guides, Sixth Edition. In determining whether an individual has been denied procedural due process we engage in a two step-inquiry: 1) whether the individual possessed a protected interest to which due process protection applies; and 2) whether the individual was afforded an appropriate level of process. *In re Adoption of K.P.M.A.*, 2014 OK 85, ¶17, 341 P.3d 38; *Thompson v. State ex rel. Bd. of Trustees of Okla. Pub. Employees Ret. Sys.*, 2011 OK 89, ¶16, 264 P.3d 1251; *In re A.M.*, 2000 OK 82, ¶7, 13 P.3d 484.

¶44 Hill correctly cites *Maxwell v. Sprint PCS*, 2016 OK 41, ¶18, 369 P.3d 1079, for the proposi-

tion his award of PPD vested in him a property interest worthy of the protections of due process. The first prong of the test is satisfied, and due process protections apply. *See Maxwell,* 2016 OK 41 at ¶18; *In re Adoption of K.P.M.A.,* 2014 OK 85 at ¶17.

¶45 This Court must next determine whether Hill was afforded the appropriate level of process. The core elements of procedural due process are notice and an opportunity to be heard. *Baby F. v. Okla. County Dist. Court*, 2015 OK 24, ¶15, 348 P.3d 1080; *In re Adoption of K.P.M.A.*, 2014 OK 85 at ¶33 ("Notice and opportunity lie at the heart of due process."); *Booth v. McKnight,* 2003 OK 49, ¶18, 70 P.3d 855. At a general level, Hill does not assert he was denied either of these things. A hearing on the issue of PPD was held in this matter, and Hill was represented at the hearing. He received a PPD award of $7,913.50. However, Hill appears to argue he was denied a meaningful opportunity to be heard because he was unable to cross examine the authors of the AMA Guides, Sixth Edition.

¶46 A trial or hearing held where one is not given a reasonable opportunity to cross examine adverse witnesses is a denial of adequate due process. *In re A.M.*, 2000 OK 82, ¶9, 12 P.3d 484; *Towne v. Hubbard,* 2000 OK 30, ¶19, 3 P.3d 154. However, the authors of the AMA Guides, Sixth Edition, were not witnesses at Hill's PPD hearing, adverse or otherwise. The authors of the AMA Guides, Sixth Editions, did not testify against Hill and there is no indication that Respondents sought to have them do so.

¶47 As required by 85A O.S. Supp. 2013 § 45, both parties presented competent medical testimony concerning the extent of Hill's PPD, and the ALJ made a decision based on the range of evidence presented. Hill was not denied an opportunity to challenge or rebut Dr. Gillock's report, and in fact made a *Daubert* challenge to it at trial. As discussed above, the Legislature has chosen to adopt the AMA Guides as the standard for any physician's opinion on the nature and extent of PPD, and incorporated the AMA Guides into the definition of "permanent disability" itself. Doubtless, the AMA Guides, Sixth Edition, have an effect on PPD awards, because expert witness testimony must conform to them. The Legislature has incorporated them into workers' compensation law. This does not, however, make the authors of the AMA Guides adverse witnesses. Hill's inability to cross examine the authors of the AMA Guides, Sixth Edition, did not amount to a denial of procedural due process.

¶48 Hill also argues that he was denied substantive due process. He asserts that mandatory use of the AMA Guides, Sixth Edition, is an arbitrarily-designed employer immunity that shifts the economic loss to an innocent injured employee. Beyond this assertion, Hill's argument is supported only by citation to this Court's opinion in *Torres v. Seaboard Foods, LLC,* 2016 OK 20, 373 P.3d 1057.

¶49 Substantive due process prohibits arbitrary government action and encompasses a general requirement that all government actions have a fair and reasonable impact on the life, liberty, or property of the person affected. *Baby F.*, 2015 OK 24 at ¶16; *City of Edmond v. Wakefield,* 1975 OK 96, ¶5, 537 P.2d 1211. This Court has previously explained:

> The substantive component of the due process clause bars certain governmental action despite the adequacy of procedural protections provided. *Nelson v. Nelson*, 1998 OK 10, n. 26, 954 P.2d 1219; *Daniels v. Williams,* 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In determining whether an action violates substantive rights, a balance must be struck between the right protected and the demands of society. *Matter of Adoption of J.R.M.*, 1995 OK 79, 899 P.2d 1155; *Youngberg v. Romeo*, 457 U.S. 307, 320, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982).

Baby F., 2015 OK 24 at ¶16.

¶50 In *Torres*, this Court reiterated and ap-plied the test used to determine whether economic legislation such as workers' compensation statutes offend the requirements of substantive due process. *See* 2016 OK 20 at ¶¶27-29. The Court noted that the analysis requires an adjudication of whether the legislation is rationally related to a legitimate government interest and if the challenged legislation reasonably advances that interest. *Torres*, 2016 OK 20 at ¶27. *See Edmondson v. Pearce*, 2004 OK 23, ¶35, 91 P.3d 605.[7]

¶51 Concerning the first part of the test, we explained:

> There is little doubt that a state legislature may alter private contractual rights of employers and employees when it properly exercises its police power in creating a particular workers' compensation law, or that workers' compensation laws, by them-

selves, have been considered by courts as a legitimate State interest since the compensation laws were first created. In our case today, we do not repeat *Lochner's* error of *improperly rejecting* an articulated economic interest of the State. We accept for the purpose of the arguments made herein, respondent's articulated State interest as legitimate in this case, *i.e.*, the prevention of workers' compensation fraud and the decrease in an employer's costs as a result of legislative effort to prevent fraud.

Torres, 2016 OK 20 at ¶30 (footnotes omitted).

Similarly, we accept the state interest articulated in this matter as legitimate: a desire to establish uniform standards for workers' compensation law that allows for less disparity in outcomes.

¶52 Hill makes no argument as to how this stated interested is illegitimate or as to how mandatory use of the AMA guides is arbitrary or fails to advance that interest, beyond citing a portion of *Torres*. In *Torres*, this Court declared unconstitutional a provision that prohibited employees from filing workers' compensation claims unless they had been continuously employed with that employer for at least 180 days. *See* 2016 OK 20 at ¶16; 85A O.S. Supp. 2013 § 2(14). This Court determined the provision in question was both overinclusive and underinclusive as it related to the legitimate state interest of prohibiting fraud in workers' compensation claims. We explained:

> *When considering the articulated purpose of preventing workers' compensation fraud*, a statute creating a class of employees who are injured, in fact, with a cumulative trauma injury during the first 180 days of employment with their then current employer, and then they are conclusively placed within a class of employees who file fraudulent claims, that statutory placement is overinclusive by lumping together the innocent with the guilty. On the other hand, if one of the purposes of workers' compensation is to provide statutory compensation for employees actually suffering an injury arising out of the course and scope of employment; then the statute is underinclusive because it fails to include employees actually injured during the first 180 days of employment.

Torres, 2016 OK 20 at ¶42 (footnotes omitted).

¶53 The provisions of the OWCA requiring use of the AMA guides do not suffer from the same flaw. They ensure that all claimants seeking PPD are subject to the same standards when it comes to evaluation of their impairment. The provisions require every person claiming the same type of injury, specifically to non-scheduled body parts, to ensure their medical opinion testimony conforms to the AMA Guides, and requires the same of any medical testimony submitted by their employers. The AMA Guides directly serve the State's articulated interest in ensuring uniformity between injured employees with similar injuries. The provisions are not arbitrary and do not offend the substantive due process safeguards inherent in Okla Const. art. 2, § 7 and U.S. Const. amend. XIV, § 1.

E. Mandatory use of the AMA Guides as part of the process for determining PPD does not violate Okla. Const. art. 2, § 6.

¶54 Hill also asserts that he has been denied access to justice within the meaning of Okla. Const. art. 2, § 6. He argues because the ALJs are bound by law to use the AMA Guides, Sixth Edition, to determine an injured workers' disability, such disability has been prejudged by the Legislature and the AMA and such prejudgment is a denial of access to justice.

¶55 Hill cites no law in support of his assertion beyond *Marbury v. Madison*, 5 U.S. 137, 2. L.Ed. 60 (1803) and the text of Okla. Const. art. 2, § 6 itself. Generally, assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal, unless it is apparent, without further research that they are well taken. *James v. State Farm Mut. Auto Ins. Co.,* 1991 OK 37, ¶23, 810 P.2d 365; *Paris Bank of Texas v. Custer*, 1984 OK 5, ¶31, 681 P.2d 71. Effectively, Hill's argument is a restatement of his claims that mandatory use of the AMA Guides constitutes an impermissible predetermination of adjudicative facts. As explained above, that is not the case.

¶56 If this Court interprets Hill's assertion to be that he was denied meaningful access to courts to seek a remedy, then he has still failed to meet the burden required to show the AMA Guides requirements violate Okla. Const. art. 2, § 6. Hill received a hearing before the ALJ, presented evidence of his PPD, and received an award. He was not treated differently from any other claimant in the same position with re-

gards to his ability to seek redress for his injury. In *Lee* this Court explained the purposes and boundaries of Okla. Const. art. 2, § 6, and that explanation is worth repeating here:

> [T]his Court has consistently ruled that Okla. Const. art. 2 § 6 operates as a mandate to the judiciary rather than a limitation on the Legislature. *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust,* 2010 OK 48, ¶18, 237 P.3d 181; *Rivas v. Parkland Manor,* 2000 OK 68, ¶18, 12 P.3d 452; *Rollings v. Thermodyne Industries, Inc*., 1996 OK 6, ¶9, 910 P.2d 1030. "In other words, Section 6 was intended to guarantee that the judiciary would be open and available for the resolution of disputes, but not to guarantee that any particular set of events would result in court-awarded relief." *Rollings*, 1996 OK 6, ¶9.

2016 OK 97 at ¶29.

¶57 In *Lee* we concluded that the petitioner failed to meet the burden of showing the evidentiary provision in question violated Okla. Const. art. 2, § 6, because it did not deny any subclass of litigants the ability to seek redress for their claims. Much like the evidentiary provision discussed in *Lee*, the AMA Guides requirements do not arbitrarily prevent the filing of workers' compensation claims and they subject all similarly-situated claimants to the same evidentiary requirements to demonstrate PPD. Hill has failed to meet the burden required to demonstrate that the AMA Guides requirements violate Okla. Const. art. 2, § 6 and deny him an adequate remedy at law.

F. The Grand Bargain

¶58 Lastly, Hill asserts that mandatory use of the AMA Guides, when combined with numerous other provisions of the AWCA, constitutes a violation of the grand bargain that forms the basis for workers' compensation law.[8] Hill notes this Court has already determined several provisions of the AWCA to be constitutionally repugnant. Hill also discusses several provisions of the AWCA that he argues re-introduce fault as a limit to compensability into what is supposed to be a no fault system, and therefore support his assertions that the grand bargain is dead.[9]

¶59 The Court considered similar arguments about the AWCA in Torres, supra. We explained:

> Public policies adopted by our Legislature one hundred years ago that were foundational for establishing workers' compensation laws, such as the historic Legislature's views on the grand bargain and economic-welfare shifting, *do not control or limit the current Legislature's determination of public policy*. It is a well-known principle of statutory *and constitutional construction* that one Legislature cannot bind another, and this Court has followed this principle for several decades. Courts recognize that a legislature has the power to change the common law "to reflect a change of time and circumstances." While the English common law may be a starting point for a legal analysis, statutory law may modify the common law. The old hand that was at the legislative helm a hundred years ago does not control the present Legislature's view of good public policy.

Torres, 2016 OK 20 at ¶51 (footnotes omitted).

The Court reached the conclusion that discussion of the grand bargain was important in the sense it formed the beginning of an analysis of what was or was not a current and legitimate state interest in the context of addressing **specific constitutional claims**. *Torres*, 2016 OK 20 at ¶52.

¶60 Hill makes no argument, beyond a single assertion, concerning how the grand bargain is affected by the provisions of the AWCA requiring use of the AMA Guides. The numerous provisions cited by Hill in his discussion of the grand bargain are not implicated in this cause.[10] Hill has raised, and this Court has addressed, specific legal arguments concerning the constitutionality of the provisions of the AWCA requiring mandatory use of the AMA Guides. "[I]nvocation of a constitutionally deficient grand bargain in the current Oklahoma statutes is a hypothetical question" that in this cause, as in *Torres*, is not linked to any legal argument raised by Hill that affects his rights. 2016 OK 20 at ¶51.

¶61 What Hill's arguments, including those concerning the grand bargain, amount to is a claim that his award of PPD is insufficient. Hill, like others before him, argues that the workers of Oklahoma have been betrayed by a Legislature that has gradually eroded the deal that convinced Oklahoma's early industrial workforce to give up their right to seek redress in the courts via tort law. There is a ring of truth to this. From the evidence in the record before us, there is no doubt that use of the AMA

Guides, Sixth Edition, resulted in a lower impairment rating for Hill's injury than what he would have received under the previously-used Fifth Edition of the AMA Guides. The ALJ awarded Hill PPD for 7% of the whole person totaling $7,913.50. Had the ALJ not been compelled to consider only evidence based upon the AMA Guides, Sixth Edition, she could have awarded PPD up to 31.8% of the whole person, for a total of $35,949. That is a $28,035.50 discrepancy. *See* Order Awarding Permanent Partial Disability Benefits, r. 60; Comparison of Benefits, r. 204; Petitioner's Brief in Chief, p. 5.

¶62 This Court is not indifferent to the frustration and hardship brought about by the gradual erosion of the grand bargain as the Legislature has exercised its power to determine the policy of Oklahoma. Writing separately in *Torres,* Justice Colbert noted:

> [T]he [grand bargain] strikes a balance between the rights and duties of Oklahoma employers and employees. But with the enactment of the Administrative Workers' Compensation Act (AWCA), the balance is now off kilter and has become one-sided to the benefit of the employer.

2016 OK 20 at ¶4 (concurring specially).

Also writing separately, I noted:

> The grand bargain is not merely the starting point for an analysis to inform the court of what may or may not be legitimate state interests, but the cornerstone of the entire workers' compensation system's legitimacy.

Torres, 2016 OK 20 at ¶7 (concurring specially).

¶63 However, this Court's extant caselaw is clear: the proper forum for challenging the sufficiency of workers' compensation awards and the policy choices underlying the grand bargain is before the Legislature, not this Court. *See Torres*, 2016 OK 20 at ¶51; *Rivas v. Parkland Manor,* 2000 OK 68, ¶15, 12 P.3d 452 (holding that while an award may seem inadequate, this Court cannot interfere with the wisdom or policy of legislation); *Hughes Drilling Co. v. Crawford*, 1985 OK 16, ¶21, 697 P.2d 525 (Holding the amount of recovery for wrongful death under the workers' compensation statutes was the province of the Legislature, and if it is too small the people have the power, either through elected officials or by right of initiative petition, to increase it).

IV. CONCLUSION

¶64 The ALJ did not err by allowing the report of Employer's physician, Dr. Gillock, into evidence. The mandatory use of the AMA Guides, Sixth Edition, for assessing impairment for non-scheduled members does not violate the Constitution. The significant discrepancy of $28,035.50 in the dollar award for the disability resulting from Mr. Hill's job-related injury using the AMA Guides, Fifth Edition and the dollar award for the same disability under the AMA Guides, Sixth Edition is a direct consequence of the Legislature's adoption of the AMA Guides, Sixth Edition. Hill's claims concerning the ongoing destruction of the grand bargain and the increasing insufficiency of workers' compensation awards are arguments about policy best brought before the Oklahoma Legislature. The order of the Workers' Compensation Commission is affirmed.

ORDER OF THE WORKERS' COMPENSATION COMMISSION AFFIRMED

CONCUR: COMBS, C.J., WINCHESTER, DARBY, JJ., GOREE, S.J., and MITCHELL, S.J.

CONCUR IN PART; DISSENT IN PART: KAUGER, J. (by separate writing).

DISSENT: GURICH, V.C.J. (by separate writing), EDMONDSON, and REIF, JJ.

RECUSED: COLBERT and WYRICK, JJ.

KAUGER, J., concurring in part/dissenting in part:

While I do not disagree with much of the majority's analysis of the issues, it appears to me that a decision on the merits is premature. Even if the Legislature intended for the Sixth Edition of the American Medical Association (AMA) Guides to be used when it used the term "current edition," the Legislature also carefully, and meticulously, set forth a procedure for the Workers' Compensation Physician Advisory Committee (PAC) to hold a public hearing to review the AMA Guides, and determine methods of deviations from them, if any.

In 2011, the Oklahoma Legislature substantially revised the statutes relating to Workers' Compensation. The Legislature subsequently replaced the Workers' Compensation Act (the Act) with the new Workers' Compensation Code (the Code), both by adding new provisions and by repealing and renumbering statutory provisions found in the previous Act. Title

85A O.S. Supp. 2014 §17 continues the existence of the nine member Physicians Advisory Council to the Workers' Compensation Commission. It provides that the PAC **shall**:

> . . .3. **After public hearing,** review and make recommendations for acceptable deviations from the American Medical Association's "Guides to the Evaluation of Permanent Impairment";
>
> 4. **After public hearing**, adopt Physician Advisory Committee Guidelines (PACG) and protocols for only medical treatment not addressed by the latest edition of the Official Disability Guidelines;
>
> 5. **After public hearing,** adopt Physician Advisory Committee Guidelines for the prescription and dispensing of any controlled substance included in Schedule II of the Uniform Controlled Dangerous Substances Act if not addressed by the current edition of the Official Disability Guidelines; . . . [Emphasis supplied]

Section 17 also requires:

> "E. Meetings of the Physician Advisory Committee shall be called by the Commission but held at least quarterly. The presence of a majority of the members shall constitute a quorum. No action shall be taken by the Physician Advisory Committee without the affirmative vote of at least a majority of the members.[1]

At oral argument, the Workers' Compensation Commission conceded that the Physician Advisory Committee (PAC) has not held a public hearing on this issue since the adoption of 85A in 2013. Although the mandatory "shall" is utilized to require a public hearing, after the adoption of the Workers' Compensation Code, there is nothing in the record to show any such hearing has been held regarding the 6th Edition since 2009. It does show that a public hearing was held on January 9, 2009,[2] wherein the PAC unanimously rejected the 6th Edition and voted to continue to use the 5th Edition.

Without the condition precedent of calling and having public hearings and approval of the PAC, the "current edition" of the AMA Guidelines remains the Fifth Edition which was the last edition approved by the PAC as of 2009. The 6th Edition may certainly be effective, but only after compliance with the legislative enactment requiring a public hearing pursuant to 85A O.S. Supp. 2014 §17. The Court's decision on the use of the Sixth Edition is premature. The Court should issue a show cause order for the Workers' Compensation Commission to show that the 6th Edition has properly been authorized for use pursuant to the mandatory legislation.

Gurich, V.C.J., with whom Edmondson and Reif, JJ., join dissenting:

¶1 I respectfully dissent. Although it is true that the use of the AMA Guides in evaluating permanent partial disability has been part of the statutory law of workers' compensation since 1977, there is a **paradigm shift** in the approach taken by the Sixth Edition.[1] The new model focuses on enablement rather than disablement. In other words, the Sixth Edition measures what an injured person can still do, not what the injured person has lost. In contrast, the AWCA is based purely on disability, specifically focusing on what has been lost due to injury or disease. For example, § 2(34) states: "Permanent partial disability means a permanent disability or *loss of use* after maximum medical improvement has been reached which prevents the injured employee, who has been released to return to work by the treating physician, from returning to his or her pre-injury or equivalent job. All evaluations of permanent partial disability must be supported by objective findings." 85A O.S. Supp. 2013 § 2(34) (emphasis added). Section 30 defines a physically impaired person as one who has suffered the *loss of* the sight of one eye, *loss by* amputation or *loss of use* or partial loss of use. 85A O.S. Supp. 2013 § 30 (emphasis added). Section 46, which awards permanent partial disability to scheduled members, states that "[a]n injured employee who is entitled to receive permanent partial disability compensation under Section 45 of this act shall receive compensation for each part of the body in accordance with the number of weeks for the scheduled *loss* set forth below. 85A O.S. Supp. 2013 § 46(A) (emphasis added); see also 85A O.S. Supp. 2013 § 46(C) ("The permanent partial disability rate of compensation for amputation or permanent total *loss of use* of a scheduled member specified in this section shall be seventy percent (70%) of the employee's average weekly wage . . . .") (emphasis added).

¶2 In both the AWCA and the Sixth Edition, impairment and disability are distinct terms. The AWCA defines permanent disability as the extent, expressed as a percentage of the loss of a portion of the total physiological capabilities

of the human body as established by competent medical evidence.[2] The AWCA does not even include a definition of impairment. In the Sixth Edition, disability is defined as activity limitations and/or participation restrictions in an individual with a health condition, disorder or disease. The Sixth Edition provides that "in disability evaluations, the impairment rating is one of several determinants of disablement. Impairment rating is the determinant most amenable to physician assessment; it must be further integrated with contextual information typically provided by non-physician sources regarding psychological, social, vocation and avocational issues."[3] The Sixth Edition defines impairment as a significant deviation, loss or loss of use of any body structure or body function in an individual with a health condition, disorder or disease. The Sixth Edition bases an impairment rating on a measurement of activities of daily living. The Sixth Edition does not allow a physician to rate disability and specifically provides that "[t]he Guides are not intended to be used for direct estimates of work participation restrictions. Impairment percentages derived according to the Guides criteria do not directly measure work participation restrictions."[4] Finally, the Sixth Edition states: "the relationship between impairment and disability remains both complex and difficult, if not impossible to predict."

¶3 The Sixth Edition is diagnosis and classification based. There is no consideration given to whether or not someone has surgery as a result of the injury or whether the surgery was successful.[5] Yet in 85A O.S. Supp. 2013 § 54 an injured person is penalized for not having surgery.[6] The Sixth Edition also purports to limit an impairment evaluation to licensed physicians, and chiropractic doctors are limited to rating the spine only. Ratings by treating physicians are discouraged as they are not independent and subject to greater scrutiny.[7] The Sixth Edition also prejudges the record by making prejudicial statements that patients reporting pain and limitations may contribute to an inconsistent examination and are prone to symptom magnification.[8] On the other hand, the AWCA is an administrative system which assigns decision making authority to ALJ's based upon the evidence submitted, and does not limit expert medical testimony.[9] Another example of vastly different meanings between the Sixth Edition and the AWCA concerns permanent total disability. An injured worker in Oklahoma may seek an award for permanent total disability based upon evidence of functional loss combined with age and other factors resulting in the inability to work. While the claim is pending, the injured worker can engage in vocational rehabilitation.[10] Contrast that with the rating system used in the Sixth Edition which is based on a maximum impairment rating of 100% and is described as "approaching death."[11]

¶4 Additionally, in my view, it is questionable as to whether the Sixth Edition has even been adopted by the Commission for use by physicians rating permanent partial disability. The Physician Advisory Committee, comprised of experts in the field, refused to adopt the Sixth Edition in 2009.[12] The only indication of the "adoption" of the Sixth Edition comes from a Notice Regarding Evaluation of Permanent Impairment issued on April 16, 2014, by the Executive Director of the Workers' Compensation Commission. This Notice stated that for all compensable claims occurring after February 1, 2014, physicians evaluating permanent impairment shall use the Sixth Edition of the AMA Guides, citing 85A O.S. Supp. 2013 § 45(C)(3). We have previously commented that "[n]either the Commission rules nor title 85A give the Executive Director the authority to issue such notices, and only the appellate courts of this State have the authority to render a binding interpretation of a state statute. The issuance of this Notice lacked any semblance of the procedural due process protections required by Art. 2 § 7 of the Oklahoma Constitution and such action was clearly in excess of the Commission's jurisdiction." Maxwell, 2016 OK 41, n.46, 369 P.3d at n.46. Since February 1, 2014, the Physicians Advisory Committee has not scheduled a public hearing on the AMA Guides and there is no recorded change in the position taken by the Physician Advisory Committee in 2009. But that is not surprising since Section 17, enacted in 2013, specifically "grandfathers in" any member serving on the effective date of this section and allows that member to serve the remainder of their term.[13]

¶5 There is also another major issue created by the use of the Sixth Edition for compensable claims after February 1, 2014. Since at least 1990, the applicable edition of the AMA Guides was based on the date of injury.[14] In fact, this Court has consistently applied the date of injury to arrive at all applicable workers' compensation benefits.[15] Even the AWCA 85A O.S. Supp. 2013 § 3 follows the long standing prec-

edent that the date of injury controls the applicability of benefits:

A. Every employer and every employee, unless otherwise specifically provided in this act, shall be subject and bound to the provisions of the Administrative Workers' Compensation Act. However, nothing in this act shall be construed to conflict with any valid Act of Congress governing the liability of employers for injuries received by their employees.

B. This act shall apply only to claims for injuries and death based on accidents which occur on or after the effective date of this act.

C. The Workers' Compensation Code in effect before the effective date of this act shall govern all rights in respect to claims for injuries and death based on accidents occurring before the effective date of this act.

¶6 If a compensable injury or illness occurred prior to February 1, 2014, the Fifth Edition of the AMA Guides is applicable to rate permanent partial disability even though the AMA Sixth Edition was published in 2008. This is true because the AMA Sixth Edition was never adopted by the Workers' Compensation Court after recommendation by the Physician Advisory Committee and a public hearing. The Court of Existing Claims continues to follow 85 O.S. 2011 § 333, which requires ratings be based on the Fifth Edition of the AMA Guides. The monetary award in the case under review would be vastly different if the Fifth Edition was applicable.[16] Any edition of the AMA Guides must be subject to public hearing and review by a group of medical experts before it becomes effective. To do otherwise, may result in an arbitrary outcome.[17]

¶7 Further, although I agree with the majority that the Legislature has the authority to limit certain types of evidence admissible by the parties in civil proceedings,[18] § 2(41) of Title 85A also emphasizes that evidence admissible under the AWCA must be scientifically based. The Sixth Edition readily admits it is based on "consensus" not on science. In fact, there have never been any scientific studies to validate the use of the AMA Guides.[19] In addition, since 2005, the workers' compensation statutes have referenced Rule 702 of the Federal Rules of Evidence.[20] This Court has never addressed whether a conflict exists between the use of the AMA Guides and FRE 702 because there was never a direct challenge to the use of Editions 1 through 5 of the AMA Guides.[21] But in my view, by the terms of FRE 702 it is impossible for any physician to rely on the Sixth Edition of the AMA Guides. Admissible evidence must meet the test of reliability set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

¶8 I do not advocate abandoning all guidelines. I just ask that we not put our heads in the sand and disregard the clear evidence developed in this case. This Court has struggled for years with challenge after challenge to make sense of the AWCA. I have been reluctant to engage in a discussion of the Grand Bargain in previous decisions. However, the limitations in the AWCA placed on injured workers have been numerous, and at times, onerous.[22] The strength of the system is based on the adjudicators and the physicians who are experts, and well versed in the field of disability medicine and law. The system is out of balance, and makes robots out of the very highly qualified individuals who have been charged with the responsibility of administering the system.

¶9 The AMA Guides should be relegated to a "guide" and nothing more. The Physician Advisory Committee is in the best position to reconsider whether the Sixth Edition should be adopted.[23] To the extent the Sixth Edition is inconsistent with the AWCA, it should be disregarded. And even if the Sixth Edition is presumptively reliable under the majority's theory, then any other evidence which meets the FRE 702 standard should also be admissible, including other editions of the AMA Guides. For the reasons set forth above, I would reverse the award in this case and remand it to the Commission for reconsideration based on all of the competent evidence.

COMBS, C.J.:

1. Hill cites the following definitions:
"Impairment" is a significant deviation, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease.
"Disability" has been defined as activity limitations and/or participation restrictions in an individual with a health condition, disorder, or disease.
AMA Guides, Sixth Edition, Second Printing (2011), 1.3d Operational Definitions: Impairment, Disability, Handicap. Exhibit 21, p. 23.

2. Title 85A O.S. Supp. 2013 § 2(35) provides:
"Permanent total disability" means, based on objective findings, incapacity, based upon accidental injury or occupational disease, to earn wages in any employment for which the employee may become physically suited and reasonably fitted by education, training, experience or vocational rehabilitation provided under this act. Loss of both hands, both feet, both legs, or both eyes, or any two thereof, shall constitute permanent total disability;

Title 85 O.S. Supp. 2010 § 3(20), *repealed by* Laws 2011, SB 878, c. 318, § 87, provided:

> "Permanent total disability" means incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may become physically suited and reasonably fitted by education, training or experience, including vocational rehabilitation; loss of both hands, or both feet, or both legs, or both eyes, or any two thereof, shall constitute permanent total disability

3. Hill also cites *Brown v. W.T. Martin Plumbin & Heating, Inc.*, 2013 VT 38, 72 A.3d 346. However, that cause concerned the propriety of using the AMA Guides as the only method for diagnosis and determination of a compensable injury. The *Brown* court saw no issue with the mandatory use of the AMA Guides for determining the existence of impairment, but determined nowhere did the relevant statutes state that the AMA Guides were to provide the exclusive mechanism for determining the existence of, or diagnosis associated with, a compensable injury. *Brown*, 2013 VT 38 at ¶21-22. The diagnosis and existence of a compensable injury is not at issue in this cause.

4. The challenged provisions of the AWCA all require use of the "current" or "most current" edition of the AMA Guides. Title 85A O.S. Supp. 2014 § 2(31)(a)(2)(b) provides:

> For the purpose of making permanent disability ratings to the spine, physicians shall use criteria established by the **most current edition** of the American Medical Association "Guides to the Evaluation of Permanent Impairment". (Emphasis added).

Title 85A O.S. Supp. 2014 § 2(33) defines "permanent disability" as:

> [T]he extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the **current edition** of the American Medical Association guides to the evaluation of impairment, if the impairment is contained therein; (emphasis added).

Title 85A O.S. Supp. 2013 § 45(C) provides in pertinent part:

> A physician's opinion of the nature and extent of permanent partial disability to parts of the body other than scheduled members must be based solely on criteria established by the **current edition** of the American Medical Association's "Guides to the Evaluation of Permanent Impairment". (Emphasis added).

5. Okla Const. art. 2, § 7 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

6. U.S. Const. amend. XIV, § 1 provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. The Court has long held to this doctrine, and in *Edmondson* we noted:

> "The Legislature is primarily the judge of whether facts and conditions exist that make it advisable that any certain business be regulated for the public good, under the police power, and as to what means are best adapted to regulate it, and every possible presumption is to be indulged in favor of the correctness of such finding, and though the courts may hold views inconsistent with the wisdom of such legislation, they may not annul it as being in violation of substantive due process unless it is clearly irrelevant to the policy the Legislature may adopt or is arbitrary, unreasonable or discriminatory."

2004 OK 23 at ¶35 (quoting *Jack Lincoln Shops, Inc. v. State Dry Cleaners' Board*, 1943 OK 28, ¶0, 135 P.2d 332 (syllabus)).

8. This Court has previously explained that the grand bargain:

> [C]onsisted of an injured worker relinquishing a common-law right to bring an action in a District Court against the worker's employer and the worker gained statutory compensation in a lessor amount. On the other hand, the employer relinquished certain common-law defenses in a District Court action and gained an economic liability that was both less in individual cases and fixed by statute.

Torres, 2016 OK 20 at ¶49.

9. Hill cites the following provisions in support of his argument concerning fault: 85A O.S. § 2(9)(b)4) (creating a rebuttable presumption injury is not compensable if an employee tests positive for certain substances after injury); 85A O.S. § 2(30) (defining misconduct); 85A O.S. § 57 (terminating benefits for missing scheduled appointments (held unconstitutional in *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, 404 P.3d 44); 85A O.S. § 48 (doubling benefits to injured minors but not if they misrepresent their age); and 85A O.S. § 50(H)(12) (shifting cost of missed appointments to employees without a good-faith reason for absence).

10. A party who challenges the constitutionality of a statue must have a legally cognizable interest which is threatened by the application of that statute. *Torres*, 2016 OK 20 at n.18; *Herring v. State ex rel. Oklahoma Tax Commission*, 1995 OK 28, ¶8, 894 P.2d 1074. Hill has demonstrated no such interest with regard to the provisions of the AWCA he cites as violations of the grand bargain.

KAUGER, J., concurring in part/dissenting in part:

1. We take judicial notice of statutory enactments. Huber v. Culp, 1915 OK 366, 149 P. 216. Title 12 O.S.1991 § 2201 provides in pertinent part:

> "A. Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States...."

2. Page 163 of the record includes an affidavit from William R. Gillock, the Independent Medical Examiner under the Administratice Workers' Compensation Commission. It includes the minutes from the Physician Advisory Committee held on Friday, January 9, 2009.

Gurich, V.C.J., with whom Edmondson and Reif, JJ., join dissenting:

1. The Sixth Edition adopts the terminology and conceptual framework of disablement as put forward by the International Classification of Functioning, Disability and Health by the World Health Organization. Record at 21.

2. Maxwell v. Sprint PCS, 2016 OK 41, ¶¶ 12-14, 369 P.3d 1079, 1088-89. Disability is defined as the incapacity because of compensable injury to earn, in the same or any other employment, substantially the same amount of wages the employee was receiving at the time of the compensable injury. 85A O.S.Supp. 2013 § 2(16), (34).

3. Record at 24.

4. Id.

5. Record at 41-42; 168.

6. Except in cases of hernia, which are specifically covered by Section 61 of this act, where an injured employee unreasonably refuses to submit to a surgical operation which has been advised by at least two qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Commission shall take the refusal into consideration when determining compensation for permanent partial or permanent total disability.

7. Record at 26; 29.

8. Record at 30; 167.

9. 85A O.S. Supp. 2013 § 45(C)(1). "Any claim by an employee for compensation for permanent partial disability must be supported by competent medical testimony of a medical doctor, osteopathic physician, or chiropractor..."

10. 85A O.S. Supp. 2013 § 2(35); §45(E)(8).

11. Record at 25.

12. Record at 162-166. The Physicians Advisory Committee was statutorily created in 1993, 85 O.S. Supp. 1993 § 201.1. There are apparently two versions of the Physician Advisory Committee currently in effect as 85 O.S. Supp. 2005 § 373 was first repealed on May 6, 2013, and then later amended on May 13, 2013. There is no subsequent legislation repealing this section. The other version is found at 85A O.S. Supp. 2013 § 17.

13. 85A O.S. § 17(A)(3).

14. Rules of the Workers' Compensation Court, Rule 21(D), 85 O.S. Supp. 1990, Ch.4,App.; see also In Re: The Court Rules of the Workers' Compensation Court, 2006 OK 6, 133 P.2d 886, Rule 21 (B)-(F), (I).

15. Williams Cos. Inc., v. Dunklegod, 2012 OK 96, 295 P.3d 1107.

16. The 7% permanent partial disability rating awarded by the ALJ for the Petitioner under the Sixth Edition is equal to an award of $7,913.50; the Petitioner's medical expert opined that his permanent partial disability was rated at 31.8% using the Fifth Edition, which, is valued at $35,949.00.

17. In Rivas v. Parkland Manor, 2000 OK 68, 12 P.3d 452, while this Court found no equal protection violation, the AMA Guides were not at issue. The majority in Rivas interpreted a 1995 statute which limited recovery so that the sum of all PPD awards for each individual claimant could not exceed 100%. There was a rational basis for setting a life time limit on PPD benefits and it applied equally to all claimants. This statute did not arbitrarily fix a date when disability benefits were drastically reduced.

18. Lee v. Bueno, 2016 OK 97, 381 P.3d 736.

19. Record at 158.

20. 85 O.S. Supp. 2005 § 3; 85 O.S. Supp. 2010 § 3; 85 O.S. § 2011 § 308.

21. Branstetter v. TRW/Reda Pump, 1991 OK 38, 809 P.2d 1305 (Opala, J. concurring in result ¶ 2).

22. See Maxwell, 2016 OK 41, 369 P.3d 1079; Torres v. Seaboard Foods, LLC, 2016 OK 20, 373 P.3d 1057; Vasquez v. Dillards, 2016 OK 89, 381 P.3d 768; Strickland v. Stephens Production Company, 2018 OK 6, 411 P.3d 369; Gibby v. Hobby Lobby, 2017 OK 78, 404 P.3d 44.

23. The Physician Advisory Committee has specific authority to develop an alternative method of evaluation as set forth in 85A O.S. Supp. 2013 § 60, which is similar to prior statutory versions, including 85 O.S. §3(11); 85 O.S. 2001 § 3(14); 85 O.S. Supp. 2003 § 3(16).

2018 OK 58

THE STATE OF OKLAHOMA, Plaintiff/Appellee, v. BILL W. DURFEY, Defendant, and JOHN BURKS, Bondsman/Appellant.

No. 114,809. June 26, 2018

APPEAL FROM THE COURT OF CIVIL APPEALS DIVISION 1

Honorable Trisha Misak, Trial Judge

¶0 The appellant, John Burks, a bondsman, after posting a one hundred thousand dollar bond, requested in writing that Billy Durfey be placed on the National Crime Information Center (NCIC) database without any restrictions or limitations. The Garvin County Sheriff entered Durfey on the NCIC, but limited an extradition directive geographically to Oklahoma and the surrounding states. After the bondsman tracked Durfey down in Montana, local authorities would not assist in his apprehension because he did not appear in the NCIC database because Montana was not a surrounding state to Oklahoma. Consequently, the bondsman paid the bond forfeiture, and subsequently sought exoneration pursuant to 59 O.S. Supp. 2014 §1332(c). The trial court denied exoneration and the Court of Civil Appeals affirmed. We hold that the bondsman is entitled to remittance pursuant to 59 O.S. Supp. 2014 §1332.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Jeff Eulberg, Oklahoma City, Oklahoma, for Appellant.

KAUGER, J.,

¶1 The only question presented is whether, under the facts of this cause, the bondsman is entitled to remittance of the posted bond pursuant to 59 O.S. Supp. 2014 §1332.[1] We hold that he is.

FACTS

¶2 The appellant, John Burks, (Burks/bondsman) is a bondsman who posted one hundred thousand dollar ($100,000) bail for the defendant, Billy Durfey, in a criminal case in Garvin County District Court.[2] Durfey did not appear in court and the court forfeited the bond. On December 15, 2014, the same day that Durfey failed to appear, the bondsman made a written request to the Garvin County Sheriff's office that Durfey be entered into the National Crime Information Center (NCIC) database. The bondsman did not place any restrictions or limitations on his request and he signed a letter agreeing to pay for all extradition expenses incurred in returning Durfey to Garvin County.[3]

¶3 Days later, Burks learned that the Sheriff's office had entered Durfey into the database, but that the extradition directive had been geographically limited to Oklahoma and its surrounding states. At his own expense, Burks conducted an investigation for Durfey which led him to Montana. Local law enforcement, however, was unable to assist Burks because Durfey was not listed in the NCIC database due to the restrictions placed by the Garvin County Sherriff.

¶4 Burks again contacted the Sheriff's office and asked that any territorial restrictions be removed. It was not until the Bondsman obtained information that Durfey may have traveled to Mexico that an Oklahoma Highway Patrol Trooper assigned to the U.S. Marshal's office got involved. The Oklahoma Highway Patrol Trooper contacted the Sheriff's office in late January 2015[4] and the Sheriff lifted the geographical restrictions pursuant to the Highway Patrol's request. On July 7, 2015, the bondsman paid the bond forfeiture after he was unable to apprehend Durfey and return him to Garvin County.

¶5 On January 22, 2016, the bondsman filed a motion for remittur, asking that the bond payment be returned because the Garvin County Sherriff's Office failed to enter Durfey into the NCIC system without restrictions as the bondsman has twice requested.

¶6 On February 18, 2016, the trial court, pursuant to 59 O.S. Supp. 2014 §1332(C), found that the bond could not be exonerated because the forfeiture had already been paid and the defendant has not been returned to custody within one year of the payment due. The bondsman appealed. The Court of Civil Appeals acknowl-

edged that the Sheriff's failure to honor Burks' requests hindered his ability to apprehend Durfey. Nevertheless, it held that the ninety-day statutory period had expired and Burks had to pay the forfeiture of $100,000 on July 7, 2015. We granted certiorari on June 4, 2018.

UNDER THE FACTS OF THIS CAUSE, THE BONDSMAN IS ENTITLED TO REMITTANCE OF THE POSTED BOND PURSUANT TO 59 O.S. 2014 Supp. §1332.

¶7 This cause is submitted on the bondsman's brief only because the appellee did not file a response to the petition in error or an answer brief. Burks argues that the bond was exonerated by operation of law. We agree. At the time, title 59 O.S. Supp. 2014 §1332(C)(5)(a)[5] provided:

> [T]he bond shall be exonerated by operation of law in any case in which … the bondsman has requested in writing of the sheriff's department in the county where the forfeiture occurred that the defendant be entered into the computerized records of the National Crime Information Center, and the request has not been honored within fourteen (14) business days of the receipt of the written request by the department.

Burks requested, in writing, that Durfey be entered into the NCIC database. He did not request any territorial limitation and even affirmatively asked that the territorial limitation be removed. Burks fully complied with the statute, yet the Sheriff did not honor this request within the statutory period. Consequently, the bond was exonerated by operation of law.

¶8 In State v. Torres, 2004 OK 12, ¶ 20, 87 P.3d 572, we concluded:

> When a defendant fails to appear as ordered, the Oklahoma statutes authorize the court to declare a forfeiture of the appearance bond. The bondsman is then given a ninety-day grace period in which he or she can return the defendant to custody and obtain vacation of the forfeiture as a matter of course. After the ninety-day grace period has expired, the trial court retains discretion to vacate the bond forfeiture under the provisions of § 1332(C)(5). (Emphasis supplied).

Torres, supra, clarifies that even after the ninety-day period has expired and the bondsman is required to pay the forfeiture, the provisions of §1332(C) remain operative. Thus, although ninety days passed and Burks paid the forfeiture, §1332(C) was in still in force.

¶9 Additionally, the trial court had discretion under 59 O.S. Supp. 2014, §1332(C)(6)(a) to vacate the order of forfeiture:

> The court may, in its discretion, vacate the order of forfeiture and exonerate the bond where good cause has been shown for . . . the defendant's failure to appear.

Burks has presented convincing evidence of good cause why Durfey did not appear. Despite Burks' repeated requests, it was not until the Oklahoma Highway Patrol intervened that the Sheriff's office removed the territorial limitations from the NCIC database. Even though the Sheriff's office was well aware that Durfey had cut off his ankle tracking monitor in Montana, the Sheriff entered him in the database only for Oklahoma and the surrounding states. Because of this, Burks' agents in Montana could not coordinate with local law enforcement to have Durfey arrested.

¶10 In State v. Vaughn, 2000 OK 63, ¶22, 11 P.3d 211, we set forth the factors to be considered in exercising discretion. We said:

> Subsection 1332(C)(5)(b) allows the trial court to determine whether a bondsman has shown good cause for his or her failure to return the defendant to custody within ninety days and, if good cause is shown, gives the trial court discretion to vacate the forfeiture order. In exercising its discretion, the trial court must not act arbitrarily or unreasonably. Patel, supra. The trial court is to consider all pertinent factors, some of which include:
>
> (a) whether the defendant has been returned to custody and, if so, whether the bondsman's efforts assisted in the defendant's return;
>
> (b) the nature and extent of the bondsman's efforts to locate and return the defendant to custody;
>
> (c) the length of the delay caused by the defendant's non-appearance;
>
> (d) the cost and inconvenience to the government in regaining custody of the defendant;
>
> (e) the stage of the proceedings at the time of defendant's non-appearance; and

(f) the public interest and necessity of effectuating defendant's appearance.

This list of factors is illustrative, not exhaustive. No one factor in and of itself is determinative and we do not prescribe the weight to be given any factor.

¶11 Here, the bondsman tracked Durfey to Montana. The Sheriff's failure to make the registration nationwide prohibited the bondsman from returning Durfey to custody in Oklahoma. The Sheriff's failure caused the length of delay in apprehending Durfey. The Sheriff's actions increased the cost and inconvenience in regaining custody. Certainly, there is public interest and necessity in effectuating a defendant's appearance. Pursuant to Vaughn, supra, the bondsman showed good cause.

CONCLUSION

¶12 Burks fully complied with 59 O.S. Supp. 2014 §1332, yet the Sheriff did not honor his request within the statutory period. Consequently, the bond was exonerated by operation of law. Burks presented convincing evidence of good cause why Durfey did not appear. The bondsman is entitled to remittance of the posted bond pursuant to 59 O.S. Supp. 2014 §1332.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GURICH, V.C.J, KAUGER, EDMONDSON, COLBERT, REIF, WYRICK, DARBY, JJ., concur.

COMBS, C.J., WINCHESTER, J., dissent.

KAUGER, J.,

1. Title 59 O.S. Supp. 2014 §1332(c) provides in pertinent part:
C. 1. The bail bondsman shall have ninety (90) days from receipt of the order and judgment of forfeiture from the court clerk or mailing of the notice if no receipt is made, to return the defendant to custody.
2. The bondsman may contract with a licensed bail enforcer pursuant to the Bail Enforcement and Licensing Act to recover and return the defendant to custody within the ninety-day period, or as agreed, or notwithstanding the Bail Enforcement and Licensing Act if the bondsman is duly appointed in this state by an insurer operating in this state, the bondsman may seek the assistance of another licensed bondsman in this state who is appointed by the same insurer.
3. When the court record indicates that the defendant is returned to custody in the jurisdiction where forfeiture occurred, within the ninety-day period, the court clerk shall enter minutes vacating the forfeiture and exonerating the bond. If the defendant has been timely returned to custody, but this fact is not reflected by the court record, the court shall vacate the forfeiture and exonerate the bond.

2. The criminal case, CF-2012-319, concerned multiple alleged rapes, lewd molestations, and forcible sodomy. One victim was under fourteen years old, and one was under sixteen.

3. The request, dated December 15, 2014, provides:

I, John R. Burks, request the following person Billy W. Durfey be entered NCIC by the Garvin County Sheriff's Office on case # CF-2012-319.
I would like extradition state/nationwide. I will be responsible for all costs related to the above person's extradition. It will also be my responsibility to notify, in writing, the Garvin County Sheriff's Office if I am no longer in need of the NCIC entry.

4. No specific date appears in the petition for certiorari or Court of Civil Appeals opinion.

5. The statute has since been superseded (Nov. 1, 2015). However, the relevant provision, 59 O.S. Supp. 2015 §1332(c)(5)(a) currently remains substantially the same and it provides:
5. In addition to the provisions set forth in paragraphs 3 and 4 of this subsection, the bond shall be exonerated by operation of law in any case in which:
a. the bondsman has requested in writing of the sheriff's department in the county where the forfeiture occurred that the defendant be entered into the computerized records of the National Crime Information Center, and the request has not been honored within fourteen (14) business days of the receipt of the written request by the department,

2018 OK 59

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

No. 115,078. June 26, 2018

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

HONORABLE FLOYD DOUGLAS HAUGHT, DISTRICT JUDGE

¶0 This appeal concerns the trial court's judgment after a bench trial that denied the Appellant's petition to cancel Appellee's oil and gas leases, to quiet title in favor of the Appellant's "top leases," and to hold Appellee liable for slander of title. This Court retained the appeal to address several issues of first impression. We decline to adopt the definition of "capability" propounded by the Appellant and affirm the district court's finding that Appellee's wells were capable of production in paying quantities. We affirm the district court's judgment insofar as it quieted title in Appellee's favor as to leasehold interests located inside those wells' spacing units. We reverse the district court's judgment, however, insofar as it quieted title in Appellee's favor as to leasehold interests in lands falling outside those wells' spacing units, because the statutory Pugh clause found in 52 O.S. § 87.1(b) so requires. We further find that the title of the bill enacting the statutory Pugh clause did not violate Article V, Section 57 of the Oklahoma Constitution and that the effect of the statutory Pugh clause upon Appellee's leasehold interests does not result in an unconstitutional taking in viola-

tion of Article II, Section 23 of the Oklahoma Constitution. Lastly, we reverse the district court's judgment insofar as it quieted title in Appellee's favor as to leases upon which no well has ever been drilled.

JUDGMENT OF THE DISTRICT COURT AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS

Keith A. Needham and Amy N. Wilson, NEEDHAM & ASSOCIATES, PLLC, Oklahoma City, Oklahoma, for Appellant.

Charles P. Horton, HORTON & ASSOCIATES ATTORNEYS AT LAW, P.C., Altus, Oklahoma, and G. Dale Elsener, Edmond, Oklahoma, for Appellee Michael Stephen Galmor.

Randy Mecklenberg, Andrew E. Karim, and Michelle L. Nabors, HARRISON & MECKLENBERG, INC., Kingfisher, Oklahoma, for Amicus Curiae, Oklahoma Mineral Owners Association.

Wyrick, J.:

I. FACTUAL AND PROCEDURAL BACKGROUND

¶1 Between 1954 and 2008, the predecessors-in-interest for Appellee Michael Stephen Galmor d/b/a MSG Oil and Gas ("Galmor") entered into thirty oil and gas leases covering mineral interests in lands located in Beckham County, Oklahoma.[1] All thirty leases contained habendum clauses that made the leases valid for primary terms lasting between 90 days and 10 years and then for secondary terms thereafter lasting as long as oil or gas is "produced" from the leased premises. In the event production ceased during the secondary term, twenty-nine of the leases also contained "cessation of production" clauses that gave the lessee a grace period ranging between 60 days and 6 months during which to re-establish production either by reworking the existing well or by drilling a new well.[2]

¶2 During the primary terms of those leases, Galmor's predecessors-in-interest drilled seven wells into the Granite Wash formation and the Permian Dolomite (a/k/a Brown Dolomite) formation.[3] These seven wells were located on lands covered by fourteen of the thirty leases at issue.[4] The lands covered by two of those fourteen leases were also subject to voluntary pooling agreements with lands covered by six more leases on which no wells had been drilled.[5] The lands covered by the remaining ten leases did not have completed wells and were not otherwise held under a voluntary pooling agreement or a statutory spacing unit.[6]

¶3 During the secondary terms of the fourteen leases on which wells had been drilled, six of the seven wells actually produced oil and gas.[7] Some of the wells drilled prior to the 1990's ceased production for "a number of years" during that decade, but afterwards attained their previous production levels.[8]

¶4 Galmor's immediate predecessor-in-interest, a Texas corporation named Marion Energy Inc. ("Marion Energy"), stopped pumping gas out of the Denby 2, Speed B-4, G.S. Spencer 1, R.B. Jordan 1, and R.B. Jordan 2 wells in August 2011 and on the Speed 6-B well in January 2012.[9] The trial court found that "no one really knows why production ceased [because] . . . . [a]ll [of Marion Energy's] principals are gone and are probably bankrupt."[10] But one witness who formerly worked for Marion Energy postulated that the wells were not very productive after Marion Energy replaced jack pumps with plunger lifts and that this poor production technique ultimately resulted in the repossession of Marion Energy's rented compressors that had allowed it to market to a buyer who owned a high-pressure line to north of the field.[11]

¶5 The seventh well, the Dalton Counts 1-16 well, produced and marketed 1,675 Mcf of natural gas during its six months of operation. Marion Energy stopped pumping gas out of the Dalton Counts 1-16 well in May 2008.[12] This shut-down occurred during the primary term of seven of the eight relevant leases; the eighth lease had just passed into its secondary term after a short six-month primary term.[13] Again, the particular reason for the shut-down was unclear.[14]

¶6 Within a few months of all wells being shut down, Marion Energy was looking to offload all of its assets in Beckham and Greer Counties. In the spring of 2012, Marion Energy contacted Galmor about its desire to sell the seven wells at issue, approximately fifty other wells, and a gas-gathering system for $2,000,000. Galmor declined the offer because of the price.[15] By December 2013, Marion Energy had also approached Appellant E.L. "Bo" Hall d/b/a Hall Family Production ("Hall").[16] Although Hall was interested in purchasing the seven wells at issue in this lawsuit, he did not wish to buy any of the other assets. Marion Energy, however, was not interested in selling its assets in piecemeal fashion. Instead, Hall suggested

that Marion Energy approach one of his investors, James Steedly of Triple "S" Gas, Inc.[17] In early 2014, Marion Energy apparently lowered its asking price to $200,000 for all potential buyers.[18] Galmor inspected all the wells being sold in January 2014, but put everything on hold once it appeared someone else might buy the wells.[19] During February and March 2014, Triple "S" Gas directed Hall to exercise due diligence by inspecting the public record on Marion Energy's leases and production records.[20] Hall notified Marion Energy on April 22, 2014, that Triple "S" Gas was not interested in pursuing acquisition of Marion Energy's assets "due to issues surrounding the marketability of title to the underlying leases and Marion Energy's failure to market the product and/or pay shut-in royalties for the last three years."[21] Five months later, on October 4, 2014, Galmor and Marion Energy signed an agreement for the purchase of all assets at the reduced price, and the Corporation Commission transferred operations to Galmor on October 30, 2014.[22]

¶7 Despite his refusal of Marion Energy's proposed deal, Hall's quest for Marion Energy's property did not end in April 2014. Between April and June, Hall secured and recorded "top leases" from fifteen mineral owners that covered many of the same lands covered by Marion Energy's fourteen "bottom leases" on which the seven wells are located.[23] The trial court found that "it is more probably true than not that plaintiff Hall was purchasing new leases from the royalty owners at the same time he was negotiating with Marion Energy for a purchase of Marion's interest."[24] Hall pursued these leases because he apparently thought the seven wells at issue were capable of producing in paying quantities.[25] In July 2014, Hall contacted Marion Energy to advise that he intended to take over operations of the seven wells and to ask Marion Energy about releasing its fourteen bottom leases.[26] Marion Energy responded by letter dated July 23, 2014, asserting that it remained "the operator of record of the [seven] wells" and that it continued to "own[] valid and existing oil and gas leases covering" them; Marion Energy also threatened legal action if Hall "attempt[ed] to access the well or exercise any purported lease rights."[27] On October 23, 2014, Hall's attorney sent a letter further outlining Hall's position that Marion Energy's leases were invalid but offering $20,000 in lieu of litigation.[28] Twenty-one days later, Marion Energy's attorney advised Hall's attorney that Marion Energy had completed a sales transaction with a buyer who had taken over operations of the leases and wells at issue and suggested that future correspondence be directed to that new operator, Galmor.[29] Hall subsequently made the same overture to Galmor by letter dated November 21, 2014, offering $20,000 in lieu of litigation, but Hall's overtures went unanswered.[30] Hall then sent Galmor two demand letters pursuant to the Oklahoma Nonjudicial Marketable Title Procedures Act, 12 O.S. §§ 1141.1 *et seq.*, both of which went unanswered.[31]

¶8 On February 26, 2015, Hall filed this suit against Galmor, seeking to invalidate Galmor's leases, to quiet title in favor of his fifteen top leases, and to recover compensatory and punitive damages for an alleged slander of title.[32] During the discovery phase of litigation, the trial court allowed Galmor to conduct 12-hour tests on the seven wells to ascertain their pressures, insofar as such information might be relevant in determining capability to produce.[33] Before the tests could be performed, six of the wells required repair work, including the removal of obstructions in the production tubing, the removal of a plunger lift, and the installation of pump assemblies.[34]

¶9 During a two-day bench trial on May 4 and 5, 2016, the parties presented seven witnesses and 205 exhibits. Dueling experts in the field of petroleum engineering offered opposing opinions concerning the ability of these wells to produce gas in paying quantities. Hall's title lawyer conceded that he could not say whether the wells were capable of producing and that he therefore could not determine whether the wells were still active or whether the leases were still valid.[35] Galmor's employee, Mike Case, described the tests performed on the wells during litigation and, at the invitation of Hall's attorney, stated his belief that the wells were capable of producing in paying quantities.[36] Galmor also testified that he believed the wells were capable of producing in paying quantities both at the time he inspected the leaseholds in January 2014 and at the time testing was conducted during litigation in October 2015.[37] But perhaps the most convincing testimony was the following exchange between Hall and his attorney:

> Q. . . . Now, in your opinion, do you believe that you could produce seven wells in question here today in – in paying quantities?
>
> A. It would pay to me.[38]

Defense counsel reminded the trial court of Hall's testimony during closing argument, and the judge seemingly relied upon this admission in reaching his judgment.[39]

¶10 On May 25, 2016, the trial court issued judgment against Hall on both claims.[40] The trial court relied upon *Pack v. Santa Fe Minerals*, 1994 OK 23, 869 P.2d 323, providing that a "lease will continue as long as the well is capable of production in paying quantities subject, of course, to any violation of any other express provisions such as the shut-in royalty clause or implied covenants such as the covenant to market."[41] The trial court also relied upon *James Energy Co. v. HCG Energy Corp.*, 1992 OK 117, 847 P.2d 333, providing that "the lessor must demand that an implied covenant be complied with before a court of equity will grant a forfeiture" and that "the lessor, not a stranger to the lease . . . , must make demand on the lessee to comply with the implied covenants."[42] The trial court specifically found that all seven of the wells at issue "were capable of producing in paying quantities during the period they were shut in" and that "no demand to comply with implied covenants was made by the royalty owners to Marion [Energy] or to Galmor."[43] Hall now appeals the judgment, and this Court has retained the appeal.

II. STANDARD OF REVIEW

¶11 Because this is a suit by Hall to cancel certain oil and gas leases belonging to Galmor, it is a matter of equitable cognizance,[44] requiring the application of two standards of review.

¶12 We will not reverse the trial court's factual findings or ultimate decision unless they are clearly against the weight of the evidence.[45] "[I]n an equitable proceeding, where the evidence is in conflict, the findings of the trial court will not be set aside unless, after a consideration of the entire record, it appears that such findings are clearly against the weight of the evidence."[46] It is for the trial court in a case of equitable cognizance to determine the credibility of the witnesses and the weight and value to be given to the testimony.[47]

¶13 Issues of law, however, are reviewable by a *de novo* standard, whereby we possess "plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings." [48]

III. ANALYSIS AND REVIEW

¶14 In his primary attack upon the trial court's judgment, Hall alleges numerous errors of law and fact related to the trial court's conclusion that Galmor's leases have not expired. Hall also alleges that the trial court erred in failing to quiet title in his favor (1) on the ten leases that did not have completed wells and were not subject to any pooling agreements – leases which Hall calls "Non-Unit Leases" – and (2) on lands outside the 160-acre plots where the seven wells are located – lands which Hall calls "Pugh Clause Lands." We address each of Hall's propositions of error below.

A. Hall's Standing

¶15 As a preliminary matter, we must ascertain whether Hall has standing to challenge the validity of all thirty of the bottom leases that Galmor acquired from Marion Energy.[49]

¶16 The seven gas wells are located on lands covered by fourteen of the thirty bottom leases,[50] which we will refer to as the "Well Leases." Hall obtained fifteen top leases covering all of the same lands except the E/2 of the NW/4 of 16-08N-22W.[51] Consequently, Hall would have standing to challenge the validity of Galmor's fourteen Well Leases and to seek an order quieting title in his favor, although any judgment he obtains could not quiet title to the E/2 of the NW/4 of 16-08N-22W in his favor.

¶17 With respect to the Dalton Counts 1-16 well, the Speed B-4 well, and the Speed 6-B well, the Oklahoma Corporation Commission has issued orders establishing 160-acre drilling and spacing units pursuant to 57 O.S. § 87.1.[52] The lands on which these wells are located are set forth in eleven of the fourteen Well Leases. Ten of those leases cover lands both within and without the 160-acre units;[53] the eleventh lease only covers lands contained within the 160-acre unit.[54] The parties refer to the lands outside the units as "Pugh Clause Lands." Hall obtained eleven top leases covering those same lands.[55] Consequently, Hall has standing to seek an order quieting title to the Pugh Clause Lands in his favor.

¶18 Those same eleven top leases obtained by Hall also overlap with ten bottom leases on which wells were never drilled.[56] Hall refers to these ten bottom leases as "Non-Unit Leases," and we will stick with that convention. Insofar as Hall obtained leases covering the same lands, he has standing to challenge the validity of Galmor's ten Non-Unit Leases.

¶19 Lastly, of the fourteen Well Leases, two were subject to voluntary pooling agreements with six additional bottom leases on which no wells were drilled. We will call these six leases

the "Pooled Leases." Hall, however, did not obtain top leases that overlapped the Pooled Leases. The existence of the Pooled Leases thus does not cloud title to, or otherwise injure the enforceability of, Hall's fifteen top leases to other lands.[57] Hall therefore lacks standing to challenge the validity of the Pooled Leases or to obtain a judgment quieting title in his favor to the lands covered thereby.

¶20 The trial court thus did not err in refusing to quiet title to the following lands in favor of Hall: (1) the only tract of land covered by Galmor's Well Leases but not by one of Hall's top leases (i.e., the E/2 of the NW/4 of 16-08N-22W); and (2) any tract of land covered by Galmor's six Pooled Leases (i.e., any portion of 31-08N-22W; any portion of 24-08N-23W; the SW/4 of 25-08N-23W; and any portion of 36-08N-23W). Hall only has standing to allege error in the trial court's refusal to quiet title in his favor as to the remaining lands (i.e., the lands covered by the Well Leases, including the Pugh Clause Lands, and the lands covered by the Non-Unit Leases).

B. Capability

¶21 Concerning the Well Leases, Hall contends that the trial court erred in finding that the wells located thereon were capable of production in paying quantities. The viability of a mineral-interest lease depends largely upon whether a well is capable of production in paying quantities, i.e., the characteristic that distinguishes a "shut-in" well from a well experiencing a "cessation of production."[58] The shut-in well is capable of production in paying quantities such that the lease remains viable under the habendum clause, which defines the duration of the lease in relation to the production life of the well.[59] On the other hand, a well that is not capable of production in paying quantities has ceased "production," as we define that term, and the lease is in danger of forfeiture because its habendum clause is not satisfied. Thus, the status of Galmor's wells and the viability of his leases on the underlying land depends upon whether these wells are "capable."

1. *The Trial Court Did Not Err in Rejecting Hall's Definition of the Term "Capability"*

¶22 All of Galmor's bottom leases contain habendum clauses providing that the leases will remain in force for a fixed period of time – i.e., the "primary term" of the lease – and then for so long thereafter as oil or gas continues to be *produced* – i.e., the "secondary term." Although the word "produced" is typically understood to mean "produced *in any quantity*," this Court has consistently defined the term to mean "produced *in paying quantities*,"[60] and has further specified that "paying quantities" means an amount of production "sufficient to yield a profit to the lessee over operating expenses."[61] In the context of cases where the well was not actually producing, we further refined our definition of the term "produced" to mean "*capable* of producing in paying quantities,"[62] because "[i]t is the ability of the lease to produce that is the important factor rather than actual production applied."[63] Lastly, this Court has repeatedly refused to inject any requirement of marketing into the definition of "produced."[64]

¶23 Hall argues that the trial court erred as a matter of law when it failed to define the legal term "capable" as meaning the well must be maintained in turn-key condition such that it will produce in paying quantities immediately upon being turned "on."

¶24 The definition touted by Hall – and by the amicus curiae who represents mineral owners – was first announced by the Texas Court of Appeals in the case of *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427 (Tex. App. 1993). The Texas court defined "capable of production in paying quantities" as meaning "a well that will produce in paying quantities if the well is turned 'on,' and it begins flowing, without additional equipment or repair" and as excluding a "well [that] did not flow [when turned 'on'], because of mechanical problems or because the well needs rods, tubing or pumping equipment."[65] This definition of "capability" was later approved by the Texas Supreme Court in the case of *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 558 (Tex. 2002). Division I of the Oklahoma Court of Civil Appeals has endorsed Texas's definition of "capability" in an unpublished opinion in the case of *Chesapeake Exploration v. Concorde Resources Corp.*, No. 106,005, slip op. at 4 (Okla. Civ. App. Feb. 27, 2009), cert. denied (Okla. Apr. 27, 2009). Hall's briefing also points out that Texas's definition of "capability" has been adopted by the U.S. Court of Appeals for the Third Circuit and by courts in New Mexico and Ohio.[66]

¶25 On the other hand, Galmor argues we should adopt a more holistic approach to defining "capability," as the Kansas Supreme Court did in the case of *Levin v. Maw Oil & Gas, LLC*, 234 P.3d 805 (Kan. 2010). The Kansas court "decline[d] . . . to adopt a rigid legal definition of shut-in entirely dependent upon whether

dewatering has begun or upon whether equipment or repairs are still needed" and instead stated that "the factors to be considered by the factfinder in determining whether a well is physically complete and capable of producing in paying quantities, i.e., shut-in, are those that affect the properties and potential of the well itself."[67] Division IV of the Oklahoma Court of Civil Appeals adopted Kansas's approach in *Concorde Resources Corp. v. Williams Production Mid-Continent Co.*, 2016 OK CIV APP 37, 379 P.3d 1157, *cert. denied* (Okla. May 2, 2016), noting that "*Hydrocarbon Management, Inc*. is contrary to Oklahoma jurisprudence as well as that of other jurisdictions" and holding that "a determination of whether a well is 'capable of producing in paying quantities' involves equitable considerations conducted on a case-by-case basis" that is similar to the method for "examin[ing] the facts and circumstances of [a] cessation on a case-by-case basis."[68]

¶26 Bearing in mind this Court's definition of a "shut-in" well, we decline any rigid definition of the term "capable" that would extend the relevant time period past the moment when the well was shut in. The relevant time period for our consideration is the moment prior to the shutting-in of the well.[69] So long as the well was complete and was producing in paying quantities when it was shut in, the well remains "capable" and the habendum clause in the lease remains satisfied throughout the shut-in period.[70] Thus, we reject Hall's proposed definition that would require operators to *continually* maintain their shut-in wells in turn-key condition, and hereby affirm the trial court's rejection of the same definition.

2. *The Trial Court Did Not Err in Determining That the Subject Wells Were "Capable"*

¶27 Our inquiry as to capability does not end here, however, because Hall contends that the trial court erred as a matter of fact in finding the subject wells were capable of producing in paying quantities when they were shut in. As stated above, we will only reverse the trial court's factual findings if they are clearly against the weight of the evidence.

¶28 At trial, the parties presented the following evidence of capability: (1) the historical data demonstrating proven recoverable reserves, (2) the testimony of Galmor's employee, Mike Case, that he believed the wells were all capable of producing in paying quantities; (3) the testimony of Galmor that he believed the wells were capable of producing in paying quantities; (4) the research and opinions of Galmor's petroleum engineering expert, Steve Ramsey, that the wells were capable of producing in paying quantities; (5) the results from the 2015 pressure tests of the wells that showed the wells had enough gas to produce in paying quantities, (6) Galmor's contentions that Hall's petroleum engineering expert, Raymond Roush, used inflated post-production costs and expenses in his calculation of whether the wells were capable of producing in paying quantities; (7) Moseley's testimony that other wells purchased by Galmor from Marion Energy, which are not the subject of this litigation, have performed better since Galmor brought them back into production; (8) the inference to be drawn from Hall's purchase of top leases on these wells that these wells were perfectly good wells that were capable of producing in paying quantities; and, last but not least, (9) Hall's testimony that he could make the wells produce in paying quantities for him. In light of all this evidence, we hold the trial court's finding that the wells were capable of paying production was not against the clear weight of evidence.

¶29 Hall mainly contests the trial court's factual finding of capability on the basis that the wells were in disrepair after being shut-in for over four years.[71] Our rejection of Hall's definition of capability, however, disposes of this argument. Evidence of the wells' current or post-shut-in condition is not relevant to whether the wells were capable of paying production on the date of shut-in.[72]

¶30 Hall further argues that it was impossible to determine whether the wells were capable of producing in paying quantities because there were no expense documents produced for any period after 2008.[73] Even so, the trial court was able to rely upon extrapolations from Galmor's expert about the expected expenses and to give such evidence the weight it deserved. Yet Hall also complains about those very extrapolations because Galmor's expert allegedly used inflated production rates, omitted production data for the months of June and July 2011, and used unreliable pressure data.[74] These perceived problems with the expert's accounting and opinions were addressed during Hall's direct and cross-examination of the expert, and the trial court was entitled to weigh the credibility and reliability of the expert's testimony.

¶31 Lastly, Hall argues for the first time in his appellate reply brief that Marion Energy essen-

tially admitted the leases were invalid when it drastically reduced the sales price for the leases and wells from $2,000,000 to $200,000. In light of Marion Energy's continued insistence as late as July of 2014 that its leases were valid,[75] it is just as likely that the price reduction was made due to Marion Energy's impending bankruptcy,[76] rather than some realization that the leases were invalid. Regardless, this is a new argument not advanced at trial and, consequently, not preserved for appeal.[77]

¶32 Having considered all the evidence, the trial court found that the wells were capable of producing in paying quantities, and we cannot say that finding is against the clear weight of evidence.

3. *Capability Satisfies the Habendum Clauses and Cessation-of-Production Clauses*

¶33 Seeking to avoid the trial court's determination that the wells were capable of producing in paying quantities, Hall attempts to recharacterize the shutting-in as a "cessation of production" that triggered the expiration of the leases' various habendum clauses. But our affirmation of the trial court's finding of capability prevents Hall from saying "production" ceased because, as previously noted, we define the term "production" as meaning "capable of producing in paying quantities."[78] If the wells are capable of paying production, then they must be considered producing wells, and the habendum clauses permitting the leases to continue "for so long . . . as oil or gas continues to be produced" have not been breached. Thus, the trial court did not err in finding that the Well Leases were still viable.

¶34 By extension, Hall's argument that it was error for the trial court not to invalidate the subject leases under their respective cessation-of-production clauses is not well taken. In essence, Hall argues that there was no production from the subject wells between August 2011 and May 2014, which far exceeded the 60-day to 6-month grace periods set forth in the cessation-of-production clauses of the various leases. This argument has at least two problems.

¶35 First, cessation-of-production clauses only serve to "modify the habendum clause[s] and to extend or preserve the lease[s] while the lessee resumes operations designed to restore production."[79] Where the law (by operation of the temporary cessation doctrine) would ordinarily give a lessee a "reasonable" amount of time in which to restore production,[80] the cessation-of-production clause substitutes a bargained-for period of time that cannot be altered by any court's notion of reasonableness.[81] Thus, the main function of a cessation-of-production clause is to serve as a savings clause of sorts that prevents automatic termination of the lease under its habendum clause; if a lease terminates, it terminates by operation of its habendum clause after expiration of the grace-period contained in its cessation-of-production clause.[82] Consequently, the cessation-of-production clauses in the Well Leases cannot serve as the basis for terminating any of those leases.

¶36 Second, Hall cannot establish "production" has ceased such that the cessation-of-production clauses would be implicated here. "[O]ur understanding of the term in the cessation of production clause is influenced by how we have interpreted it in other provisions of oil and gas leases such as the habendum clause…. The term 'production' as used in the cessation of production clause must mean the same as that term means in the habendum clause."[83] Consequently, in the context of a cessation-of-production clause, the term "production" means "production in paying quantities" for an active well and "capable of production in paying quantities" for a shut-in well.[84] Using this definition of the term "production," capability of production in paying quantities satisfies not only the habendum clause but also the cessation-of-production clause.[85] "[T]he express provisions of the cessation of production clause . . . are [only] intended to come into play in the event that *production* from the well shall cease, i.e., the well becomes incapable of producing in paying quantities."[86] Our affirmation of the trial court's finding that the subject wells were capable of paying production leads us to conclude that "production" never ceased, that the cessation-of-production clauses were therefore never implicated, and that the trial court's failure to terminate the Well Leases under the terms of their respective cessation-of-production clauses was not error.

¶37 Our rejection of Hall's argument that the Well Leases terminated under their express terms should come as no surprise. Since this Court's decision in *Pack v. Santa Fe Minerals,* 1994 OK 23, 869 P.2d 323, it has been clear that a well's capability to produce in paying quantities would satisfy both the habendum clause and the cessation-of-production clause and that the cessation-of-production clause is only triggered where a well has become incapable of paying production.[87]

¶38 Nevertheless, Hall argues for the opposite result, relying heavily upon the Oklahoma Court of Civil Appeals' opinion in *Fisher v. Grace Petroleum Corp.*, 1991 OK CIV APP 112, 830 P.2d 1380.[88] Citing *Fisher*, Hall voices concern that an affirmance of the trial court's judgment would signal to "Oklahoma lessees that a well capable of producing in paying quantities can sit without any actual production for an indefinite period of time, thus rendering the bargained-for cessation of production time restraints null."[89]

¶39 Hall's reliance upon *Fisher* is misplaced for two reasons. First, this Court's ruling in the *Pack* case came three years after *Fisher* and signaled a departure from the *Fisher* court's approach.[90] Whereas the *Fisher* court held that "physical capability alone" would not maintain a lease and opined that a contrary holding would "render temporary cessation clauses superfluous,"[91] this Court held that capability would maintain a lease for purposes of both the habendum clause and the cessation-of-production clause and opined that "[a]ny other conclusion would render the habendum clause useless" and "the shut-in royalty clause … meaningless."[92] Second, and more to the point of Hall's arguments, a lessor could always avoid an "indefinite" shut-in by seeking to enforce payments under the shut-in royalty clause (although it is worth noting that "failure to pay shut-in royalties in and of itself [will] not operate to cause a termination of the lease"),[93] or by making a written demand for compliance with the implied covenant to market (which would force the lessee to pump gas out of the ground and market it or else face the possibility of lease cancellation).[94] Either way, the lessor can force the lessee to do something that will give the lessor value out of the lease. In the end, Hall's arguments and the *Fisher* court's reasoning do not change our holding that the Well Leases have not terminated under the terms found in their habendum and cessation-of-production clauses.

C. The Trial Court's Review of Whether the Implied Covenant to Market Was Breached Was Not Error

¶40 Next, we address Hall's contention that the trial court recharacterized his claim for breach of the express lease terms (i.e., the habendum and cessation-of-production clauses) as a claim for breach of the implied covenant to market and conflated the jurisprudence related to both types of claims, thereby erring as a matter of law.[95] Hall then points to those portions of the trial court's order discussing *James Energy Co. v. HCG Energy Corp.*, 1992 OK 117, 847 P.2d 333, and its requirement that "the lessor must demand that an implied covenant be complied with before a court of equity will grant a forfeiture" and then finding that no lessors had ever demanded that Marion Energy or Galmor comply with the implied covenant to market.[96] To Hall, all of this demonstrates an apparent inconsistency evidencing the trial court's confusion about the legal issues in the case.

¶41 Hall, however, either misunderstands or has chosen to ignore the remainder of the trial court's ruling. As discussed above,[97] those portions of the trial court's order discussing the *Pack* case and concluding that the wells were capable of paying production disposed of Hall's claims that the habendum and cessation-of-production clauses were breached.[98]

¶42 The trial court understood the issues presented by Hall, addressed his claims for breach of the express lease terms by finding that the wells were capable of paying production, and then logically proceeded to an analysis of whether the leases could be canceled for breach of any other express provisions or implied covenants, as the *Pack* case cued the trial court to do.[99] Hence the trial court looked to case law governing the implied covenant to market, assessed whether the leases could be canceled due to breach of that covenant on either Marion Energy's or Galmor's part, and correctly found the leases could not be canceled because the *James Energy* case's prerequisite for a demand to market made by the lessors had not been met. This doesn't demonstrate legal error on the trial court's part; it demonstrates thoroughness.

D. The Trial Court Erred in Failing to Quiet Title to the Pugh Clause Lands in Hall's Favor

¶43 For his next proposition of error, Hall asserts the trial court erred in failing to quiet title to the Pugh Clause Lands in his favor. He essentially argues that Oklahoma's statutory Pugh clause at 52 O.S. § 87.1(b) required the trial court to invalidate Galmor's interest in the Pugh Clause Lands – i.e., those portions of leased lands falling outside the two 160-acre spacing units that encompass the Dalton Counts 1-16 well and the Speed B-4 and Speed 6-B wells – even if such lands would otherwise be held under the terms of a Well Lease by production from a well located on the portion of the leased premises falling inside the spacing unit. According to Hall, section 87.1(b) would

permit Galmor to retain the Pugh Clause Lands only if a producing well had been drilled on them within a 90-day grace period following expiration of the Well Lease's primary term, which didn't happen. The ten Well Leases at issue were signed between April 27, 1990, and September 20, 2007,[100] and the last primary term to expire did so on September 20, 2010.[101] Hence, Hall argues all of the Pugh Clause Lands should have reverted back to the lessors no later than December 19, 2010 (i.e., ninety days after September 20, 2010), such that Galmor's Well Leases would not create any cloud on the top leases that Hall obtained from the landowners in 2014.

¶44 Galmor counters with several arguments. First, Galmor claims that section 87.1(b) is susceptible to a different interpretation and should be so read because Hall's interpretation defeats that section's purposes of resource conservation, as evidenced by the authorization of spacing units, and of correlative rights, as evidenced by the equitable apportionment of royalties. Second, Galmor argues that, if section 87.1(b) is applied to cancel his leasehold interests in portions of the Well Leases lying outside the spacing units, the cancellation would constitute a taking for private use in violation of Article II, Section 23 of the Oklahoma Constitution. Third, Galmor asserts that the title of the statutory amendment adding section 87.1(b) violated Article V, Section 57 of the Oklahoma Constitution because it did not provide an adequate description of the subject matter contained in subpart (b).

1. *Discerning the Meaning of Oklahoma's Statutory Pugh Clause*

¶45 Before we can address Galmor's constitutional challenges, we must first determine the meaning of section 87.1(b). This inquiry begins with the text of the statute and – absent unresolvable ambiguity – ends with the text. Our task is to determine the ordinary meaning of the words that the Legislature chose in the provisions of law at issue.[102] In ascertaining meaning, we look not just at the text of the provision at issue, but also at the text of related provisions in the same statute or legislative act,[103] in a manner that achieves full force and effect for each provision.[104]

¶46 Since its addition to section 87.1 in 1977, subpart (b) has provided: "In case of a spacing unit of one hundred sixty (160) acres or more, no oil and/or gas leasehold interest outside the spacing unit involved may be held by production from the spacing unit more than ninety (90) days beyond expiration of the primary term of the lease."[105] The plain language of this provision is susceptible to two interpretations. These two interpretations are perhaps best summarized by the late Professor Eugene Kuntz, who wrote a law review article in 1978 about the amendment to section 87.1 that, in part, added subpart (b):

> On the one hand, the language "no oil and/or gas leasehold interest outside the spacing unit involved may be held by production from the spacing unit" is capable of being construed to apply only where the well is not located on the leased premises, on the reasoning that where there is production from the lease, production from the unit is not required to satisfy the habendum clause. However, this language is also capable of being construed to apply regardless of whether the well is located on the leased premises because production from such a well is "production from the spacing unit."

Eugene Kuntz, *Statutory Well Spacing and Drilling Units,* 31 Okla. L. Rev. 344, 352 (1978). Given this alleged ambiguity, we examine contextual indicators of the Legislature's objective in enacting the amendment.

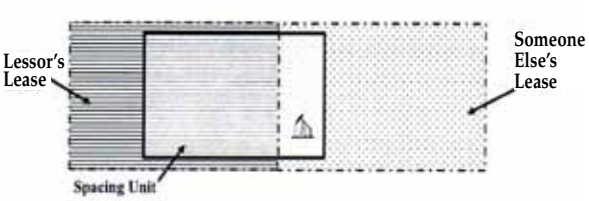
¶47 Prior to the enactment of subpart (b), this Court's case law determined the viability of leasehold interests that fell outside drilling and spacing units created by the Oklahoma Corporation Commission pursuant to section 87.1. This Court had judicially determined that, when a spacing unit included only a portion of a leased premises, production from a well inside the unit would satisfy the habendum clause of the lease as to both the part of the leased premises inside the unit and the part of the leased premises outside the unit.[106] Further, this Court had resolved that production from the unit would satisfy the habendum clause of the lease regardless of whether the unit well was located on that lease or elsewhere in the unit.[107] In other words, the location of the well within the unit was not significant; production from the well could hold all the lands inside and outside the spacing unit for every lease included in the spacing unit.

¶48 This operation of the law had adverse economic consequences that were objectionable to lessors whose land was included in a spacing unit with other land.[108] By statute each lessor received only a pro rata share of the royalties for any production from a unit well,[109] even though the entire lease was extended by

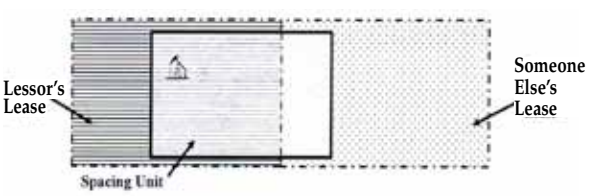
the unit well's production.[110] Moreover, lessors faced this problem regardless of the producing well's location within the unit.[111] Thus, the lessee got the extension of all leasehold rights for which it bargained – sometimes as a result of the drilling efforts of a different lessee upon a different lease in the unit – while the lessor received *only a fraction* of the royalties for which he or she bargained.

¶49 By way of example, assume half of a 240-acre lease (i.e., a 120-acre portion) was included with someone else's land in a 160-acre spacing unit. A producing well located in the unit on the 40 acres belonging to someone else (Scenario A, below) would have entitled the lessor of the 120-acre tract to only 75% of any royalties due, even though the well preserved 100% of the 240-acre lease. If the producing well was instead located on the 120 acres belonging to the lessor (Scenario B, below), the result would have been identical. In both scenarios, the lessor did not get the full benefit of his bargain. The lessor's problem of adverse economic consequences needed a solution that would result in forfeiture of leasehold interests outside the spacing unit *even if* the unit well was located on the lessor's lease. If both a lessor on whose land there was no unit well and a lessor on whose land there was a unit well suffered from adverse economic consequences, then both lessors were in need of relief from the Legislature. Defining the scope of the problem in this way reveals the objective of the Legislature in adding subpart (b).

Scenario A



Scenario B



¶50 Section 87.1(b) was meant to extinguish *all* leasehold interests falling outside the spacing unit, even those that would normally be held by the lease's habendum clause. Subpart (b) was designed to overcome in part the effect of this Court's judicial determinations that negatively affected lessors by changing the applicable legal rule as to the portion of the leased premises falling outside the spacing unit when said unit was comprised of at least 160 acres.[112]

¶51 The meaning of the statute becomes even more manifest when we review the materials cited by Hall. In the case of *Wickham v. Gulf Oil Corp.*, 1981 OK 8, 623 P.2d 613, this Court stated, "As a result of Section 87.1(b), leased lands lying outside of the spacing unit would no longer be held by production over ninety days beyond the expiration of the primary term of the lease – a departure from the previous law that the production of oil and gas in commercial quantities from any part of the leased premises during the primary term extended the lease not only as to the acreage committed to the drilling and spacing unit but also as to the lands lying outside of the unit area."[113] This statement of legislative purpose came a mere four years after the addition of subpart (b) and lacks any equivocation or qualification. Similarly, in the case of *Siniard v. Davis*, 1984 OK CIV APP 13, 678 P.2d 1197, the Court of Civil Appeals stated, "Section 87.1(b) has the purpose of preventing production from a unit from satisfying the habendum clause *of any lease* for more than ninety days beyond the expiration of the primary term as to acreage outside of the unit when a part of the leased premises is included in a unit of 160 acres or more."[114] Lastly, a Report of the Oil and Gas Appellate Referee from an Oklahoma Corporation Commission matter, *In re Application of Sandridge Exploration & Production, L.L.C. for Drilling & Spacing Units,* No. CD-201101938, gives some insight into how the Corporation Commission interprets section 87.1(b): "[T]he Statutory Pugh Clause . . . is a provision dealing with correlative rights. The Statutory Pugh Clause addresses a situation where if a farmer owned an interest in three or four sections and his lease covered all of those sections one well in one of those sections would hold all of that acreage in the other sections. That's what the Statutory Pugh Clause was designed to address; in cases of spacing units of 160 acres or more, you will have 90 days after the expiration of the primary term of the lease to develop these lands outside the spacing unit. If you do not do so, the lease would expire."[115] Although none of these statements has precedential val-

ue, they confirm our understanding of the meaning of section 87.1(b).

2. *Galmor's Policy Arguments Do Not Overcome Our Interpretation of the Statutory Pugh Clause*

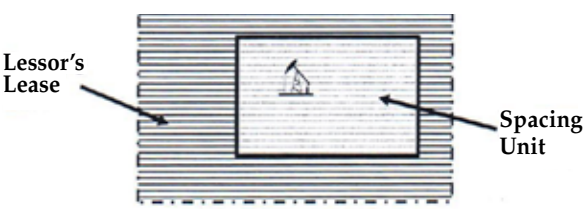
¶52 Galmor attempts to resist our interpretation of section 87.1(b) by pointing out that its application to his leases would actually defeat the purposes of resource conservation and correlative rights that the rest of section 87.1 advances through the authorization of spacing units and through the equitable apportionment of royalties. Galmor acknowledges that, "[w]here separately owned tracts are included in the unit boundary, Section 87.1(b) provides relief to each owner to the extent of any lands outside the unit"; but he argues there is no relief needed "where the unit boundaries embrace only the leased premises."[116] Professor Kuntz made the same observations:

> The objectionable feature with which the amendment deals is the economic consequences to the lessor when a part of the leased premises is included in a unit *with other land*. The lessor receives royalty only on a portion of the production from a unit well, yet the production serves to hold the entire leased premises. This objection is present whether the unit well is located on the leased premises or is located on other land in the unit. However, *where no other land is included in the unit, such objection is not present.* For example, if a lease should be granted on a section of land and drilling units of 160 acres should be established in that area, it would be unreasonable to conclude that production from a unit which included no other land other than a part of the leased premises does not satisfy the habendum clause as to the entire section of land. Such a conclusion would attribute too much to the purpose of an amendment to a conservation statute because conservation and protection of correlative rights are not thereby served.

Kuntz, *supra* note 108, at 352 (emphasis added). Galmor's reason for making this argument centers upon the same analysis of equities we performed above while discussing section 87.1(b)'s objective.[117]

¶53 Where a spacing unit covers a portion of a larger lease (Scenario C, below), there is only one lessor who will receive royalties from any producing well drilled within the unit; thus, that lessor is reaping 100% of the benefit for which he bargained. Prior to 87.1(b), the habendum clause of the lease was satisfied by the producing unit well, and the lessee also reaped the full benefit of his bargain. In this scenario, the equities were in balance. But if we interpret section 87.1(b) as canceling those leasehold interests outside the spacing unit, the lessee is reaping only a fraction of the benefits for which he bargained, and the equities are thrown out of balance. Besides this, whether a lessee complies with the terms of 87.1(b) or fails to do so, the result is more wells, which seemingly goes against the whole notion of conservation. As couched by Galmor, this seems like a dilemma.

Scenario C



¶54 But even if Galmor and Professor Kuntz have a legitimate criticism of the Legislature's policy, we cannot accommodate those policy concerns by reading into the statute an exception that appears nowhere in its text.[118] Section 87.1(b) was meant to prevent a unit well's production from satisfying the habendum clause *of any lease* for more than ninety days beyond the expiration of the primary term as to acreage outside of the unit when the leased premises, or any portion thereof, is included in a unit of 160 acres or more.

¶55 In light of our interpretation of section 87.1(b), production from the Dalton Counts 1-16 well and the Speed B-4 and Speed 6-B wells cannot satisfy the habendum clauses of the ten Well Leases at issue as to the Pugh Clause Lands lying outside the spacing units. Consequently, Galmor's leasehold interests in the Pugh Clause Lands should be forfeited, unless he can demonstrate that section 87.1(b) is somehow unconstitutional.

3. *The Statutory Pugh Clause Does Not Effect a Taking for Private Use*

in Violation of Article II, Section 23 of the Oklahoma Constitution

¶56 Galmor further attempts to resist our interpretation of section 87.1(b) by arguing it results in an unconstitutional taking of his property for private use, in violation of Article

II, Section 23 of the Oklahoma Constitution.[119] Galmor borrows this argument from Professor Kuntz, who believed that "the amendment [i.e., Senate Bill No. 7 that, among other things, added subpart (b)] would be unconstitutional if applied to an *existing* lease, regardless of whether it is held by production from a unit."[120] But Galmor attempts to extend Kuntz's argument to cover any and every lease – even leases granted after the effective date of the amendment (i.e., May 25, 1977).

¶57 Hall tries to short-circuit our analysis of this issue by suggesting that we already decided it in his favor in the *Wickham* case. But in *Wickham*, we merely determined that section 87.1(b) *did not* apply retroactively and *could not* apply retroactively because of the constitutional problems its retroactive application would create.[121] Although the opinion discussed a "presumption of prospective operation" for section 87.1(b),[122] the Court's holding simply stated that such presumption led to "a determination that the section d[id] not apply [retroactively] to the 1967 Wickham lease."[123] The Court did not address the constitutionality of the statute as applied prospectively. Thus, the issue cannot be avoided for this reason.

¶58 In any event, Galmor fails to explain how prospective application of a statute like this would result in a taking. He merely tenders the issue and provides cursory analysis in four sentences, citing only two cases that concern distinguishable takings claims and one case that stands for the general proposition that equity abhors a forfeiture.[124] While retroactive application of section 87.1(b) may well be problematic, when applied prospectively there is no taking.[125]

¶59 Most takings claims involve outright confiscation of property, like that observed in a condemnation action, or some restriction on the use and enjoyment of property, like what happens in a regulatory takings case. Section 87.1(b) does neither. It simply places a time limitation upon the lessee's ability to hold a lease on Pugh Clause Lands without drilling a well thereon.

¶60 As such, section 87.1(b) is a reasonable regulation that addressed the lessors' problem of negative economic consequences resulting from the inclusion of their land in a spacing unit with a solution that permitted any unused leasehold interests belonging to their lessees to revert back to them after the passage of time. "States have the power to permit unused or abandoned interests in property to revert to another after the passage of time."[126] As a reasonable exercise of the Legislature's police power, section 87.1(b) does not violate the takings clause in Article II, Section 23.[127]

4. *The Title of the Bill Enacting the Statutory Pugh Clause Did Not Violate Article V, Section 57 of the Oklahoma Constitution*

¶61 Galmor also claims that the enactment of section 87.1(b) violated Article V, Section 57 of the Oklahoma Constitution due to an alleged defect in the bill title.

¶62 Article V, Section 57 requires "[e]very act of the Legislature . . . , except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes" to "embrace but one subject, which shall be clearly expressed in its title."[128] If a legislative act embraces any subject that is not contained in the title, the act "shall be void only as to so much of the law as may not be expressed in the title thereof."[129]

¶63 Turning to the bill at hand, the issue is whether the portion of the bill's title describing it as "[a]n act . . . imposing certain time limitations" is a constitutionally sufficient description of the statutory Pugh clause contained in subpart (b). [130]

¶64 Our case law interpreting Article V, Section 57 clearly states that it should not be enforced in a technical manner, so as to unreasonably cripple legislation.[131] The title must be given a liberal construction: "If the words used in a title, taken in any sense or meaning they will bear, are sufficient to cover the provisions of the act, the act will be sustained, even though such meaning may not be the most common meaning of such words."[132] Furthermore, a bill's title need not be a summary or abstract of the statute's content; "there is no need of expressing the details or subdivisions in the title."[133]

¶65 In light of these guiding principles, we hold that the portion of Senate Bill No. 7's title referencing the "imposi[tion of] certain time limitations" is an adequate description of the subject matter contained in section 87.1(b). Galmor argues the subject matter of subpart (b) concerns "imposing a restriction on the right of private parties to contract concerning their mineral interests or a cancellation of valuable leasehold rights under any circum-

stance" and that the bill's title fails to reference any such provision.[134] But while the Legislature could have described the contents of subpart (b) in other terms – perhaps even terms that satisfy Galmor's preferences – the Legislature need not craft the "perfect" title. Laying aside alternatives, we think the bill's actual title describing the content of subpart (b) as "imposing certain time limitations" is sufficient, because that is exactly what section 87.1(b) does.[135] Section 87.1(b) was thus not enacted in violation of Article V, Section 57 of the Oklahoma Constitution.

* * *

¶66 In light of our interpretation of section 87.1(b) and our determinations that its enactment did not violate Article V, Section 57 of the Oklahoma Constitution and that its prospective application to leases executed after its effective date did not violate Article II, Section 23 of the Oklahoma Constitution, we conclude the trial court erred in failing to quiet title to the Pugh Clause Lands in favor of Hall.

E. The Trial Court Erred in Failing to Quiet Title in Hall's Favor to Lands Covered by Galmor's Non-Unit Leases

¶67 Having addressed Hall's arguments concerning the lands covered by the Well Leases, including the Pugh Clause Lands, we turn now to his last proposition of error. Hall asserts the trial court erred by quieting title in Galmor to lands covered by the Non-Unit Leases. The Non-Unit Leases were ten bottom leases covering lands in the NE/4 of 16-08N-22W and in the NW/4 and E/2 of 13-08N-23W on which no well has ever been drilled, either by Galmor or by his predecessors.[136]

¶68 Galmor's Non-Unit Leases contain habendum clauses providing that the leases will remain in force for a primary term of either 7 months or 3 years, and then for a secondary term that continues so long as oil or gas continues to be produced.[137] The Non-Unit Leases were signed between March 30, 2007, and January 14, 2008,[138] and the last primary term to expire did so on January 10, 2011.[139] No wells were ever drilled, and there was no evidence presented showing that such lands had been included in a spacing unit or a pooling agreement.

¶69 Under the express and unequivocal terms of the Non-Unit Leases, the habendum clauses for these leases were not satisfied. Galmor's leasehold rights to the lands terminated upon expiration of the Non-Unit Leases' respective primary terms.[140] It was thus error for the trial court to quiet title to such lands in Galmor.

IV. CONCLUSION

¶70 For the reasons set forth above, this Court declines to adopt the rigid definition of "capability" propounded by Hall. We affirm the trial court's determination that the subject wells were capable of producing in paying quantities, and hold that Galmor's bottom Well Leases remain valid, except as affected by the statutory Pugh clause. We find that application of the statutory Pugh clause in this case should result in termination of those portions of Galmor's bottom Well Leases that fall outside a spacing unit, and that title to such "Pugh Clause Lands" should be quieted in favor of Hall due to his top leases covering those lands. We further hold that the enactment of the statutory Pugh clause found in 52 O.S. § 87.1(b) did not violate Article V, Section 57 of the Oklahoma Constitution and that application of the statutory Pugh clause upon Galmor's leasehold interests is not an unconstitutional taking in violation of Article II, Section 23 of the Oklahoma Constitution. We also find that Galmor's Non-Unit Leases terminated as a result of failure to drill any wells, and that title to the lands covered thereby should be quieted in favor of Hall due to his top leases covering those lands. Lastly, we find that Hall lacks standing to challenge the validity of the Galmor's "Pooled Leases" or to obtain a judgment quieting title in his favor to the lands covered thereby. Accordingly, the judgment of the trial court is affirmed in part and reversed in part. Insofar as we reverse judgment on Hall's quiet title claims concerning the Pugh Clause Lands and lands covered by the Non-Unit Leases, we also vacate that portion of the judgment denying his cause of action for slander of title as to those lands. We remand the case with instructions to conduct further proceedings in a manner consistent with this opinion.

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

Combs, C.J., and Kauger, J., concur in the result.

Wyrick, J.:

1. The precise location of the lands at issue in this case are as follows:

a) the 560-acre lot contained in the eastern half of the northwest corner, the northeast corner, and the south half of Section 16, Township 8 North, Range 22 West (i.e., in abbreviated form: E/2 NW/4, NE/4, and S/2 of 16-08N-22W);
b) the 640-acre lot contained in 13-08N-23W;
c) the 560-acre lot contained in S/2 NE/4, NW/4, and S/2 of 24-08N-23W;
d) the 640-acre lot contained in 25-08N-23W;
e) the 320-acre lot contained in E/2 of 36-08N-23W; and
f) the 160-acre lot contained in NW/4 of 31-08N-22W.

2. Sixteen of the leases contained the following language in their cessation-of-production clauses:

> If at, or after, the expiration of the primary term oil or gas is not being produced on the leased premises, but Lessee is then engaged in operations thereon as provided herein, this Lease shall remain in force so long as operations are prosecuted (whether on the same or successive wells) with no cessation of more than ninety (90) days, and, if production results therefrom, then as long as production is maintained pursuant to the terms hereof.

ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 4-8, 10-15, 17, 58-61; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 47-50, 52-61, 63, 65. Ten of the leases contained this cessation-of-production clause:

> Notwithstanding any contrary provision, if lessee commences mining, drilling or reworking operations on said land or on a consolidated gas leasehold estate at any time while this lease is in force, this lease shall remain in force as provided by any provision hereof and for any longer time during which such operations, or any additional operations, are prosecuted with no cessation of more than sixty consecutive days and, if production results therefrom, as long as production continues or this lease is maintained in force under any provision hereof.

ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 38, 40, 55-57, 78-82; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 37-46. Two of the leases had addendums containing the following cessation-of-production clauses, which took precedence over their counterparts contained in the leases:

> **CESSATION, DRILLING AND REWORKING:** In the event production in paying quantities of oil or gas on the leases [sic] premises, after once obtained, shall cease for any cause within sixty (60) days before the expiration of the primary term of this lease or at any time or times thereafter, this lease shall not terminate if the Lessee commences additional drilling or reworking operations within sixty (60) days after such cessation, and this lease shall remain in full force and effect so long as such operations continue in good faith and workmanlike manner without interruptions totaling more than sixty (60) days during any one such operation; and if such drilling or reworking operations result in the production of oil or gas in paying quantities, this lease shall remain in full force and effect so long as oil or gas is produced in paying quantities or payment of shut-in gas well royalties are made as hereinbefore provided in the lease.

ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 9, 16; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 62, 64. Finally, one lease contained the following cessation-of-production clause:

> Should production from the above described land, or from acreage pooled therewith, cease from any cause after the expiration of the primary term this lease shall not terminate provided lessee succeeds in bringing back such production within six (6) months from such cessation, or within such six (6) month period commences drilling another well on the above described land or on land pooled therewith, and prosecutes the drilling thereof with due diligence to completion, and if such production is restored through any such operations this lease shall continue with the like effect as if there had been no cessation thereof.

ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 39; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Ex. 36. The one lease that did not have a cessation-of-production clause was the oldest of the leases, dating back to 1954; it only contained a dry hole clause. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 3; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Ex. 51.

3. The Denby 2 well was completed in May 1960 in the SW/4 of 16-08N-22W. The G.S. Spencer 1 well was completed in June 1967 in the SE/4 of 25-08N-23W, and the R.B. Jordan 1 well was completed in August of the same year in the NE/4 of the same section. The R.B. Jordan 2 well was completed in July 1974 in the NW/4 of 25-08N-23W. The Speed B-4 well was completed in August 1986 in the SW/4 of 13-08N-23W. In December 2007, the Speed 6-B well was completed in the SW/4 of 13-08N-23W, and the Dalton Counts 1-16 well was completed in the SE/4 of 16-08N-22W. ROA, Doc. 1307, Tr.Vol.II at 186:8-195:11; ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 19, 42-44, 63-64.

4. *See generally* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 3-11, 38-39, 55-57 (comprising the leases that cover the lands mentioned in footnote 3, *supra*); ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 36, 43-46, 51-56, 58, 64-65 (same).

5. The lands covered by those six leases were located in the W/2, the S/2 of the NE/4, and the SE/4 of 24-08N-23W; in the SW/4 of 25-08N-23W; in the E/2 of 36-08N-23W; and in the NW/4 of 31-08N-22W. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 83 (pooling the lease found at Plaintiff's Exhibit 38 (a/k/a Defendant's Exhibit 43) with the leases found at Plaintiff's Exhibits 81 and 82 (a/k/a Defendant's Exhibits 41 and 42)); *id*. at Pl.'s Ex. 84 (pooling the lease found at Plaintiff's Exhibit 39 (a/k/a Defendant's Exhibit 36) with the leases found at Plaintiff's Exhibits 78, 79, and 80 (a/k/a Defendant's Exhibits 38, 39, and 40)); *id*. at Pl.'s Ex. 105 (found in the ROA immediately following Plaintiff's Exhibit 83) (pooling the lease found at Plaintiff's Exhibit 39 (a/k/a Defendant's Exhibit 36) with the lease found at Plaintiff's Exhibit 40 (a/k/a Defendant's Exhibit 37)).

6. *See* ROA, Doc. 1306, Tr.Vol.I at 44:17-48:11, 94:5-97:2; ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 12-17, 58-61; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 47-50, 57, 59-63. That's not to say these lands were devoid of any valid leasehold interests. For example, even though six of these ten leases covered lands with no well that were located exclusively in the NE/4 of 16-08N-22W, *see* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 12-17, seven leases with a well located in the SE/4 of 16-08N-22W also covered lands located in the NE/4 of 16-08N-22W, *see id*. at Pl.'s Exs. 4-8, 10-11.

7. The Denby 2 well produced and marketed 1,253,812 Mcf of natural gas between May 1960 and August 2011; the G.S. Spencer 1 well produced and marketed 315,970 Mcf of natural gas between June 1967 and August 2011; the R.B. Jordan 1 well produced and marketed 402,731 Mcf of natural gas between August 1967 and August 2011; the R.B. Jordan 2 well produced and marketed 239,203 Mcf of natural gas between July 1974 and August 2011; the Speed B-4 well produced and marketed 158,388 Mcf of natural gas between August 1986 and August 2011; and the Speed 6-B well produced and marketed 95,142 Mcf of natural gas between December 2007 and January 2012 and 321 barrels of oil between December 2007 and July 2009. ROA, Doc. 1307, Tr.Vol.II at 186:8-196:2; ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 19, 42-44, 63-64.

8. ROA, Doc. 1308, Tr.Vol.III at 431:7-:20; *see also* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 19, 42-44, 63 (revealing that this trial testimony may have only been true as it relates to the Denby 2 well).

9. ROA, Doc. 1307, Tr.Vol.II at 186:8-196:2; ROA, Doc. 1309, Tr.Vol. IV at Pl.'s Exs. 19, 42-44, 63-64.

10. ROA, p.1304, Decision on the Merits at 2.

11. ROA, Doc. 1308, Tr.Vol.III at 432:10-436:21, 460:10-461:14, 727:22-728:6; *accord id*. at 614:24-615:4 (wherein Appellee's expert witness testified that "the wells shut in because they came and got the compressors," which he thought "had to do with – with Marion paying their bills"); Appellant's Br. 18 (characterizing the taking of the compressors as a "repossess[ion]").

12. ROA, Doc. 1307, Tr.Vol.II at 190:22-191:24; ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 20.

13. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 4-11; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 52-56, 58, 64-65.

14. *See* ROA, p.1304, Decision on the Merits at 2.

15. ROA, Doc. 1308, Tr.Vol.III at 672:6-673:2.

16. ROA, Doc. 1307, Tr.Vol.II at 339:19-341:10.

17. *Id*. at 377:8-378:10.

18. *See* ROA, Doc. 1308, Tr.Vol.III at 673:7-:21 (stating that the asking price had been lowered for Galmor in January 2014); ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 77-78 (suggesting that the asking price had been lowered for Triple "S" Gas in February 2014).

19. ROA, Doc. 1308, Tr.Vol.III at 673:22-678:4; *accord id*. at 437:23-438:8, 449:23-452:8.

20. ROA, Doc. 1307, Tr.Vol.II at 345:5-346:16, 378:1-:10.

21. ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 97; ROA, Doc. 1311, Tr.Vol. VI at Def.'s Exs. 80-81; *see also* ROA, Doc. 1307, Tr.Vol.II at 345:5-349:1 (containing Bo Hall's explanation at trial for why he decided not to purchase Marion Energy's assets); ROA, Doc. 1311, Tr.Vol.VI at Def.'s Ex. 80 (an e-mail offering the same basic explanation as the quoted letter).

22. ROA, Doc. 1308, Tr.Vol.III at 677:12-678:9; ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 28; ROA Doc. 1311, TrVol.VI at Def.'s Exs. 1, 66.

23. ROA, Doc. 1307, Tr.Vol.II at 349:3-352:3, 392:4-394:8 (admitting that negotiations for top leases probably began in April 2014); ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 21-27, 45-48, 65-68.

24. ROA, p.1304, Decision on the Merits at 2.

25. *Id*. (wherein the trial court stated as follows: "However, plaintiff did discuss the proximity of the wells to his other producing interests. That suggested to me he thought the wells could be producing in paying quantities for him."); ROA, Doc. 1307, Tr.Vol.II at 373:2-:5 (wherein Hall was asked at trial whether he "believe[d] that [he] could

produce seven wells in question here today in – in paying quantities" and he responded that the wells "would pay to [him]").

26. ROA, Doc. 1307, Tr.Vol.II at 352:5-353:5, 394:10-395:3; *see also* ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 99; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Ex. 83.

27. ROA, Doc. 1307, Tr.Vol.II at 353:6-354:21; ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 99; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Ex. 83.

28. ROA, Doc. 1307, Tr.Vol.II at 354:22-358:17, 396:14-397:18; ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 100; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Exs. 84-85.

29. ROA, Doc. 1307, Tr.Vol.II at 359:4-361:2, 397:24-398:1; ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 101; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Ex. 86.

30. ROA, Doc. 1307, Tr.Vol.II at 361:3-363:20, 402:22-404:1; ROA, Doc. 1310, Tr.Vol.V at Pl.'s Ex. 102; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Exs. 88-89.

31. ROA, Doc. 1307, Tr.Vol.II at 363:21-368:1, 404:5-405:22; ROA, Doc. 1310, Tr.Vol.V at Pl.'s Exs. 103-104; ROA, Doc. 1312, Tr.Vol.VII at Def.'s Exs. 90-91.

32. ROA, pp.7, 19-22, Pl.'s Pet. at 1, 13-16.

33. *See* ROA p.317, Decision on Mot. to Reconsider & Mot. to Clarify Scheduling Order at 1.

34. ROA, Doc. 1307, Tr.Vol.II at 222:23-226:3, 246:3-248:20 (describing the work done on the R.B. Jordan 1 and G.S. Spencer 1 wells); ROA, Doc. 1308, Tr.Vol.III at 468:19-:25, 472:9-474:6, 478:9-:25, 480:1-486:9 (specifying the work done on five of the wells prior to testing); ROA, Doc. 1310, Tr.Vol.V, Pl.'s Exs. 91-94, 96; Def.'s Exs. 68-70, 72-73.

35. ROA, Doc. 1306, Tr.Vol.I at 120:24-122:4.

36. ROA, Doc. 1308, Tr.Vol.III at 487:8-:20.

37. *Id.* at 646:2-:4, 652:21-:22, 655:12-:15, 673:22-677:2.

38. ROA, Doc. 1307, Tr.Vol.II at 373:2-:5.

39. ROA, Doc. 1308, Tr.Vol.III at 722:5-:10 ("Mr. Bo Hall sat in that chair as did Steve Galmor sitting in that chair and both tell you that I can produce these wells profitably. Both sides agree on that. That means those wells are capable of being operated at a profit sufficient to satisfy the habendum clause of all the oil and gas leases."); ROA, p.1304, Decision on the Merits at 2 ("[P]laintiff did discuss the proximity of the wells to his other producing interests. That suggested to me he thought the wells could be producing in paying quantities for him.").

40. ROA, p.1303, Decision on the Merits at 1.

41. *Id.*, p.1304, Decision on the Merits at 2 (quoting *Pack*, 1994 OK 23, ¶ 21, 869 P.2d at 329).

42. *Id.*, p.1303, Decision on the Merits at 1 (quoting *James Energy Co.*, 1992 OK 117, ¶¶ 17-18, 847 P.2d at 338).

43. *Id.*, p.1305, Decision on the Merits at 3.

44. *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 8, 85 P.3d 830, 833; *Hininger v. Kaiser,* 1987 OK 26, ¶ 10, 738 P.2d 137, 141; *Cotner v. Warren,* 1958 OK 208, ¶ 5, 330 P.2d 217, 219; *Henry v. Clay*, 1954 OK 170, ¶ 12, 274 P.2d 545, 548.

45. *Smith*, 2004 OK 10, ¶ 8, 85 P.3d at 833; *Hamilton v. Amwar Petroleum Co.*, 1989 OK 15, ¶ 6, 769 P.2d 146, 147; *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, ¶ 35, 687 P.2d 1049, 1055; *Cotner*, 1958 OK 208, ¶ 5, 330 P.2d at 219.

46. *Briggs v. Sarkeys, Inc.*, 1966 OK 168, ¶ 29, 418 P.2d 620, 624 (citing *Nelson v. Daugherty,* 1960 OK 205, 357 P.2d 425).

47. *Childers v. Childers,* 2016 OK 95, ¶ 18, 382 P.3d 1020, 1024; *White v. Adoption of Baby Boy D.*, 2000 OK 44, ¶ 36, 10 P.3d 212, 220 (quoting *Perry v. Perry,* 1965 OK 160, ¶ 5, 408 P.2d 285, 287; *In re H.M.*, 1998 OK CIV APP 176, ¶ 12, 970 P.2d 1190, 1192-93); *Hitt v. Hitt*, 1953 OK 391, ¶ 0, 258 P.2d 599, 599.

48. *State ex rel. Dep't of Human Servs. v. Baggett,* 1999 OK 68, ¶ 4, 990 P.2d 235, 238; *accord Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084.

49. Standing may be assessed at any point during the judicial process, and may be raised by this Court *sua sponte. J.P. Morgan Chase Bank Nat'l Ass'n v. Eldridge*, 2012 OK 24, ¶ 7, 273 P.3d 62, 65 (quoting *Hendrick v. Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1234; *In re Estate of Doan*, 1986 OK 15, ¶ 7, 727 P.2d 574, 576)

50. *See supra* note 4 and accompanying text.

51. *See supra* note 23 and accompanying text.

52. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 18, 41, 62.

53. *Id.* at Pl.'s Exs. 4-8, 10-11, 55-57; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs.44-46, 52-56, 58, 65.

54. ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 9; ROA Doc. 1311, Tr.Vol. VI at Def.'s Ex. 64.

55. ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 21-27, 65-68.

56. *Compare* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 12-17, 58-61 (exclusively covering lands in the NW/4 and E/2 of 13-08N-23W and in the NE/4 of 16-08N-22W), *and* ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 47-50, 57, 59-63 (same), *with* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 21-27, 65-68 (covering the same lands, and more).

57. *See Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶ 8, 890 P.2d 906, 910-11 (providing that a party must prove standing by demonstrating that, among other things, he has "suffered an 'injury in fact' – an invasion of a legally-protected interest" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

58. *Bixler v. Lamar Exploration Co.*, 1987 OK 15, ¶ 6, 733 P.2d 410, 412; *Hoyt v. Cont'l Oil Co.*, 1980 OK 1, ¶ 11, 606 P.2d 560, 564.

59. *Black's Law Dictionary* 716 (7th ed. 1999) (defining "habendum clause" as "[a]n oil-and-gas lease provision that defines the lease's primary term and that usu. extends the lease for a secondary term of indefinite duration as long as oil, gas, or other minerals are being produced"); *see also Stewart v. Amerada Hess Corp.*, 1979 OK 145, ¶ 11, 604 P.2d 854, 858 ("The 'thereafter' clause . . . is to be regarded as fixing the life of a lease . . . ."); 2 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 26.1, at 318 (1989) ("The purpose of the habendum clause in an oil and gas lease is to describe the duration of the interest granted.").

60. *See*, *e.g.*, *Smith,* 2004 OK 10, ¶ 9, 85 P.3d at 833; *Pack,* 1994 OK 23, ¶ 8, 869 P.2d at 328; *Barby v. Singer,* 1982 OK 49, ¶ 4, 648 P.2d 14, 16; *State ex rel. Comm'rs of the Land Office v. Amoco Prod. Co.*, 1982 OK 14, ¶ 6, 645 P.2d 468, 470; *Mason v. Ladd Petroleum*, 1981 OK 73, ¶ 3, 630 P.2d 1283, 1284; *Stewart*, 1979 OK 145, ¶ 5, 604 P.2d at 857; *State ex rel. Comm'rs of the Land Office v. Carter Oil Co. of W. Va.*, 1958 OK 289, ¶¶ 37-47, 336 P.2d 1086, 1094-96; *McVicker v. Horn, Robinson & Nathan,* 1958 OK 49, ¶¶ 5-6, 322 P.2d 410, 412-14; *Henry,* 1954 OK 170, ¶ 6, 274 P.2d at 546; *Gypsy Oil Co. v. Marsh*, 1926 OK 246, ¶ 18, 248 P. 329, 333. Our reason for defining "produced" in this way was to secure development of the property for the mutual benefit of both lessor and lessee, thereby giving effect to the purpose of a mineral-interest lease and to the mutual intent of its parties. *Gypsy Oil Co.*, 1926 OK 246, ¶ 18, 248 P. at 333; 2 Kuntz, *supra* note 59, § 26.5, at 335.

61. *Smith*, 2004 OK 10, ¶ 9, 85 P.3d at 833 (quoting *Hininger,* 1987 OK 26, ¶ 6, 738 P.2d at 140, and citing *Stewart*, 1979 OK 145, ¶ 6, 604 P.2d at 857); *accord Mason*, 1981 OK 73, ¶ 3, 630 P.2d at 1284; *Henry,* 1954 OK 170, ¶ 6, 274 P.2d at 546; *Gypsy Oil Co.*, 1926 OK 246, ¶ 18, 248 P. at 333.

62. *Pack*, 1994 OK 23, ¶¶ 5 n.1, 8-12, 869 P.2d at 325 n.1, 326-27 ("The term 'produced' as used in the lease clauses means 'capable of producing in paying quantities.'"); *James Energy Co.*, 1992 OK 117, ¶ 19, 847 P.2d at 338-39; *Bixler,* 1987 OK 15, ¶ 6, 733 P.2d at 412 (recognizing that a lease can be held under the habendum clause by virtue of a shut-in gas well that is capable of producing in paying quantities); *Amoco Prod. Co.*, 1982 OK 14, ¶ 6, 645 P.2d at 470 ("[Cap]ability to produce a shut-in gas well will hold a lease as long as the operator seeks a market with due diligence." (citing *McVicker,* 1958 OK 49, 322 P.2d 410)); *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 45, 336 P.2d at 1095 ("In other words in the absence of a specific clause requiring marketing within the primary term fixed in the lease, the completion of a well, as provided therein, *capable of producing oil or gas in paying quantities* will extend such term, provided that within a reasonable time the actual length of which must of necessity depend upon the facts and circumstances of each case, a market is obtained and oil or gas is produced and sold from such well." (emphasis added)); *Henry,* 1954 OK 170, ¶ 11, 274 P.2d at 548 ("*In the case of Okmulgee Supply Corporation v. Anthis,* 189 Okl. 139, 114 P.2d 451, we held . . . . that the standard by which the judgment and good faith of the lessee is measured is whether the lease is producing, or by the exercise of reasonable skill and diligence *could be made to produce*, sufficient oil and gas to justify a reasonable and prudent operator in continuing the operation thereof. It is a poor rule that does not work both ways. Having held that the operator is under a duty to continue production if by the exercise of reasonable skill and diligence the well *could be made to produce* sufficient oil and gas to justify a reasonable and prudent operator in continuing the operation thereof, we believe the operator should have the right to continue production under the same circumstances." (emphasis added)).

63. *Amoco Prod. Co.*, 1982 OK 14, ¶ 6, 645 P.2d at 470, quoted in *Pack,* 1994 OK 23, ¶ 11, 869 P.2d at 327.

64. *Pack*, 1994 OK 23, ¶¶ 8-9, 869 P.2d at 326; *Gard v. Kaiser,* 1978 OK 110, ¶¶ 17-18, 582 P.2d 1311, 1313; *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 42, 336 P.2d at 1094-95; *McVicker,* 1958 OK 49, ¶ 5, 322 P.2d at 412-13.

65. *Hydrocarbon Mgmt.*, 861 S.W.2d at 433-34.

66. *See* Pet'r's Br. 23 (citing *Smith v. Steckman Ridge*, LP, 590 Fed. Appx. 189 (3d Cir. 2014) (applying Pennsylvania law); *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003); *Hupp v. Beck Energy Corp.*, 20 N.E.3d 732 (Ohio Ct. App. 2014)).

67. *Levin*, 234 P.3d at 819.

68. *Concorde Res.*, 2016 OK CIV APP 37, ¶¶ 45, 49, 53, 379 P.3d at 1164-65.

69. Hall reads our case of *Smith v. Marshall Oil Corp.*, 2004 OK 10, 85 P.3d 830, as requiring that capability be established "at all times" during the shut-in period. *See*, *e.g.*, Appellant's Reply Br. 14 ("[F]or a

well to be a valid and subsisting Pack well, the well must be capable of production in paying quantities *at all times* during the shut-in period." (emphasis added) (citing *Smith*, 2004 OK 10, ¶ 13, 85 P.3d at 835)); *id.* at 16 ("A shut-in well must remain capable of producing in paying quantities *at all times*." (citing *Smith*, 2004 OK 10, ¶ 13, 85 P.3d at 835)). The language Hall cites in support of his interpretation merely notes that the parties in the *Pack* case "stipulated that the subject wells were at all times capable of producing in paying quantities." *Smith*, 2004 OK 10, ¶ 13, 85 P.3d at 835. *See generally Pack*, 1994 OK 23, ¶ 12, 869 P.2d at 327. This factual observation from *Pack* and *Smith* should not be construed as creating a rule requiring the lessee to prove its well was and has been capable "at all times," and it consequently should not be construed as an inconsistency with the rule being announced here that only requires the lessee to prove its well was capable of producing in paying quantities when it was shut in.

70. *Smith*, 2004 OK 10, ¶ 9, 85 P.3d at 833; *Pack*, 1994 OK 23, ¶ 8, 869 P.2d at 326. On the other hand, if the well was not in working order and was not producing in paying quantities at the instant it was shut in, the well is not being "shut in" at the time operations cease. Instead, the well is experiencing a "cessation of production." Under these circumstances, the well is not "capable" of production, and its lease will not continue under the habendum clause. Rather, the lease will be subject to forfeiture if production is not reestablished during the grace-period specified in the cessation-of-production clause, *see French v. Tenneco Oil Co.*, 1986 OK 22, ¶ 8, 725 P.2d 275, 277; *Hoyt*, 1980 OK 1, ¶ 10, 606 P.2d at 563, or, where no such clause exists, the reasonable time period allowed by the temporary cessation doctrine, *see Smith*, 2004 OK 10, ¶ 12, 85 P.3d at 834; *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 44, 336 P.2d at 1095; *Townsend v. Creekmore-Rooney Co.*, 1958 OK 265, ¶ 6, 332 P.2d 35, 37; *Cotner*, 1958 OK 208, ¶ 5, 330 P.2d at 220.

71. *E.g.*, Appellant's Br. 24-25; Appellant's Reply Br. 10, 12-13.

72. *See supra* notes 69-70 and accompanying text. Moreover, once Hall challenged the validity of the leases, evidence of any post-litigation deterioration of the wells' condition becomes irrelevant because of the doctrine of obstruction, which permits a lessee to "suspend operations under the terms of a lease contract pending determination of a communicated assertion that the lease is no longer valid and subsisting." *French*, 1986 OK 22, ¶ 5, 725 P.2d at 276 (citing *Allen v. Palmer*, 1948 OK 231, 209 P.2d 502; *Elsey v. Wagner*, 1946 OK 344, 183 P.2d 829; *Simons v. McDaniel*, 1932 OK 34, 7 P.2d 419); *accord Hoyt*, 1980 OK 1, ¶ 4, 606 P.2d at 562; *Jones v. Moore*, 1959 OK 23, ¶ 0, 338 P.2d 872, 873. Thus, unless he could prove that the wells were in need of repairs prior to the filing of his lawsuit in February 2015, Hall's attempt to invoke evidence of the wells' need for repairs in October 2015 would be barred.

73. *E.g.*, Appellant's Reply Br. 14-17.

74. *See id.* at 16-17.

75. *See supra* note 27 and accompanying text.

76. Marion Energy apparently filed for bankruptcy just one week after the sale of assets to Galmor. *See* ROA, Doc. 1308, Tr.Vol.III at 719:1-:3; *see also* Marion Energy Inc.'s Voluntary Pet., *In re Marion Energy Inc.*, No. 2:14-bk-31632 (Bankr. D. Utah filed Oct. 31, 2014).

77. *Steiger v. City Nat'l Bank of Tulsa*, 1967 OK 41, ¶¶ 22-24, 424 P.2d 69, 72.

78. *See supra* note 62 and accompanying text.

79. *Hoyt*, 1980 OK 1, ¶ 10, 606 P.2d at 563; *accord Pack*, 1994 OK 23, ¶ 15, 869 P.2d at 328; *French*, 1986 OK 22, ¶ 8, 725 P.2d at 277 (quoting *Greer v. Salmon*, 479 P.2d 294, 297 (N.M. 1970)); 4 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 47.3(a)(3), at 103 (1990); *Black's Law Dictionary*, *supra* note 59, at 221.

80. *Smith*, 2004 OK 10, ¶ 12, 85 P.3d at 834; *Stewart*, 1979 OK 145, ¶ 11, 604 P.2d at 858; *Townsend*, 1958 OK 265, ¶ 6, 332 P.2d at 37; *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 44, 336 P.2d at 1095; *Cotner*, 1958 OK 208, ¶ 5, 330 P.2d at 220.

81. *See French*, 1986 OK 22, ¶ 8, 725 P.2d at 277; *Hoyt*, 1980 OK 1, ¶ 10, 606 P.2d at 563 (citing cases from other jurisdictions).

82. *See Pack*, 1994 OK 23, ¶ 16, 869 P.2d at 328.

83. *Pack*, 1994 OK 23, ¶¶ 14-15, 869 P.2d at 328; *accord Hoyt*, 1980 OK 1, ¶¶ 9-10, 606 P.2d at 563 (stating that, at least when one considers a cessation of production during the secondary term of the lease, the term "production" means "production in paying quantities" for purposes of both the habendum clause and the cessation-of-production clause). *See generally* 15 O.S.2011 §§ 155, 157 and the case of *Panhandle Coop. Royalty Co. v. Cunningham ex rel. Estate of Jarboe*, 1971 OK 63, ¶ 15, 495 P.2d 108, 113, for the proposition that we are bound to consider all the provisions of a contract in construing the terms of a contract and to use each provision to help interpret the others.

84. *Pack*, 1994 OK 23, ¶¶ 14-21, 869 P.2d at 328-29; *accord* 4 Kuntz, *supra* note 79, § 47.3(b), at 105-06 ("[I]f the effect of the cessation of production clause is to modify the habendum clause under the circumstances, the 'production' required for the cessation of production clause should be the same as the production required to satisfy the habendum clause, and a 'cessation' of production should be the same as a cessation for purposes of the habendum clause."). As we reasoned in the *Pack* case, "[a]ny other conclusion would render the habendum clause useless after the primary term expires, [which would be] a conclusion clearly not intended by the parties to the lease." *Pack*, 1994 OK 23, ¶ 15, 869 P.2d at 328. If we were to decide that the term "production" as used in the cessation-of-production clause did not encompass mere capability, then after the primary term expires, the lessee would never be permitted to shut-in a well capable of production in paying quantities for a time period longer than that specified in the cessation-of-production clause (*e.g.*, 60 days) – even where the circumstances and equities demonstrate that a reasonable lessee might be entitled to more time (such as a scenario where obtaining a market requires more than 60 days for even the most zealous lessee). "Such a result ignores the express terms of the habendum clause which provide for the lease to continue after the primary term as long as the well is capable of production in commercial quantities" and would be "a conclusion clearly not intended by the parties to the lease." *Id.* Also, maintaining consistency from clause to clause in our definition of "produce" reveals that the purpose of the cessation-of-production clause is merely to operate as a savings clause that only applies when production – as defined in the habendum clause – ceases. *Id.* ¶ 16, 869 P.2d at 328; *see also Hoyt*, 1980 OK 1, ¶ 10, 606 P.2d at 563 (referring to the cessation-of-production clause as an agreement of the parties fixing a "period of grace" (quoting *Greer*, 479 P.2d at 297)), quoted in *French*, 1986 OK 22, ¶ 8, 725 P.2d at 277.

85. *Voiles v. Santa Fe Minerals, Inc.*, 1996 OK 13, ¶ 9, 911 P.2d 1205, 1208 (noting the *Pack* case "explained that a sixty-day cessation of production clause requires the well to be capable of producing in paying quantities, but that a lease capable of producing in paying quantities will not terminate under that clause"); *Pack*, 1994 OK 23, ¶ 21, 869 P.2d at 329 ("The cessation of production clause only requires the well be capable of producing gas in paying quantities. . . . Therefore, the lease will continue as long as the well is capable of production in paying quantities subject, of course, to any violation of any other express provisions such as the shut-in royalty clause or implied covenants such as the covenant to market."); *Hoyt*, 1980 OK 1, ¶ 10, 606 P.2d at 563 (stating the inverse: "If the lessee fails to resume operations within the 60-day period provided in this clause neither the cessation of production clause or the habendum clause is satisfied and the lease terminates upon the expiration of the given time period.").

86. *Pack*, 1994 OK 23, ¶ 16, 869 P.2d at 328.

87. *Id.* ¶¶ 16, 21, 869 P.2d at 328-29.

88. *See, e.g.*, Appellant's Br. 16-17 (citing *Fisher*, 1991 OK CIV APP 112, ¶¶ 13-18, 830 P.2d at 1386-88).

89. *Id.* at 16 (citing *Fisher*, 1991 OK CIV APP 112, ¶¶ 13-18, 830 P.2d at 1386-88).

90. *See Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 557 (Tex. 2002).

91. *Fisher*, 1991 OK CIV APP 112, ¶ 18, 830 P.2d at 1388.

92. *Pack*, 1994 OK 23, ¶¶ 8, 15, 21, 26, 869 P.2d at 326, 328-30.

93. *Id.* ¶¶ 4, 24, 869 P.2d at 325, 330 (citing *Gard*, 1978 OK 110, ¶ 26, 582 P.2d at 1314-15).

94. *Id.* ¶¶ 21, 27, 869 P.2d at 329-30.

95. Hall notes that his trial court petition alleges "[t]he Subject Leases have expired *by their own terms* as there has been no well attributable to the Subject Leases, upon the Subject Lands, capable of producing in paying quantities" and does not contain the words "implied," "covenant," or "market." Appellant's Br. 12 (quoting ROA, p.20, Pet. ¶ 19, at 14).

96. *Id.* at 12-13 (citing ROA, pp.1303-1305, Decision on the Merits at 1-3).

97. *See supra* Part III.B.

98. *See generally* ROA, pp.1304-1305, Decision on the Merits at 2-3.

99. *Pack*, 1994 OK 23, ¶ 21, 869 P.2d at 329 ("[T]he lease[s] will continue as long as the well[s] [are] capable of production in paying quantities subject, of course, to any violation of any other express provisions such as the shut-in royalty clause[s] or implied covenants such as the covenant to market.").

100. ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 4-8, 10-11, 55-57; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs.44-46, 52-56, 58, 65

101. ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Ex. 11 (signed on September 20, 2007, and establishing a primary term of three years).

102. *See Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 15, 139 P.3d 873, 877 ("In the absence of ambiguity or conflict with another enactment, our task is limited to applying a statute according to the plain meaning of the words chosen by the legislature . . . ."); *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 2005 OK 71, ¶ 6, 123 P.3d 5, 6-7 (citing *City of Durant v. Cicio*, 2002 OK 52, ¶ 13, 50 P.3d 218, 220; *World Publ'g Co. v. Miller*, 2001 OK 49, ¶ 7, 32 P.3d 829, 834)); *Cox v. State ex rel. Okla. Dep't of Human Servs.*, 2004 OK 17, ¶ 19, 87 P.3d 607, 615

(citing *Minie v. Hudson*, 1997 OK 26, ¶ 7, 934 P.2d 1082, 1086; *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶ 5, 687 P.2d 132, 134)); *Rath v. LaFon*, 1967 OK 52, ¶ 4, 431 P.2d 312, 314 ("There is no occasion for this court to search for the 'intent' of the Legislature in designating the location of the court in question. . . . 'The presumption is that the legislature expressed its intent in a statute and that it intended what is expressed.'" (quoting *Hamrick v. George*, 1962 OK 247, ¶ 7, 378 P.2d 324, 326)).

103. *Cox*, 2004 OK 17, ¶ 19, 87 P.3d at 615 (citing *McSorley v. Hertz Corp.*, 1994 OK 120, ¶ 6, 885 P.2d 1343, 1346; *Smicklas v. Spitz*, 1992 OK 145, ¶ 8, 846 P.2d 362, 366; *Oglesby v. Liberty Mut. Ins. Co.*, 1992 OK 61, ¶ 8, 832 P.2d 834, 839-40); *City of Midwest City v. Harris*, 1977 OK 7, ¶ 6, 561 P.2d 1357, 1358.

104. *Cox*, 2004 OK 17, ¶ 19, 87 P.3d at 615 (citing *Haney v. State*, 1993 OK 41, ¶ 5, 850 P.2d 1087, 1089; *Pub. Serv. Co. of Okla. v. State ex rel. Corp. Comm'n*, 1992 OK 153, ¶ 8, 842 P.2d 750, 752).

105. 52 O.S.Supp.2017 § 87.1(b); Act of May 25, 1977, ch. 77, § 1, 1977 O.S.L. 145, 146.

106. *Okla. Nat. Gas Co. v. Long*, 1965 OK 153, ¶¶ 12-15, 406 P.2d 499, 502-03; *Layton v. Pan Am. Petroleum Corp.*, 1963 OK 140, ¶ 0, 383 P.2d 624, 625; *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶¶ 0, 33, 336 P.2d at 1088, 1093; *Kunc v. Harper-Turner Oil Co.*, 1956 OK 118, ¶ 29, 297 P.2d 371, 376; *Godfrey v. McArthur*, 1939 OK 335, ¶ 14, 96 P.2d 322, 325; *see also Walker & Withrow, Inc. v. Haley*, 1982 OK 107, ¶ 5, 653 P.2d 191, 193 ("Since § 87.1 did not apply retroactively, the 1958 lease is still in force because there is a producing well upon lands located within the same well spacing unit."); *Wickham v. Gulf Oil Corp.*, 1981 OK 8, ¶ 14, 623 P.2d 613, 616 (stating "the previous law [provided] that the production of oil and gas in commercial quantities from any part of the leased premises during the primary term extended the lease not only as to the acreage committed to the drilling and spacing unit but also as to the lands lying outside of the unit area."); *Siniard v. Davis*, 1984 OK CIV APP 13, ¶ 12, 678 P.2d 1197, 1200-01 ("Prior to the enactment of the statutory Pugh clause . . . , production from the unit satisfied the habendum clause of the lease as to the part of the leased premises included in the unit and also as to the part of the leased premises outside of the unit."); *cf. Gypsy Oil Co. v. Cover*, 1920 OK 94, ¶¶ 0, 18, 189 P. 540, 540, 544 (citing *Pierce Oil Corp. v. Schacht*, 1919 OK 142, 181 P. 731).

107. *Kardokus v. Walsh*, 1990 OK 39, ¶ 5, 797 P.2d 322, 324; *Rein v. Humble Oil & Ref'g Co.*, 1965 OK 51, ¶ 13, 400 P.2d 800, 803; *Layton*, 1963 OK 140, ¶¶ 4-6, 383 P.2d at 625-26; *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 33, 336 P.2d at 1093; *Kunc*, 1956 OK 118, ¶ 29, 297 P.2d at 376.

108. Eugene Kuntz, *Statutory Well Spacing and Drilling Units*, 31 Okla. L. Rev. 344, 352 (1978).

109. 52 O.S.1971 § 87.1(d) ("In the event a producing well or wells are completed upon a unit where there are . . . two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit . . . in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit.").

110. *See supra* note 106 and accompanying text.

111. *See supra* note 107 and accompanying text.

112. *Wickham*, 1981 OK 8, ¶ 14, 623 P.2d at 616 (quoting Kuntz, *supra* note 108, at 344); *see also* Kuntz, *supra* note 108, at 353-54.

113. ¶ 14, 623 P.2d at 616.

114. ¶ 15, 678 P.2d at 1200 (emphasis added).

115. Report of the Oil & Gas Appellate Referee at 12, *In re Application of Sandridge Exploration & Prod., L.L.C. for Drilling & Spacing Units*, No. CD-201101938 (Okla. Corp. Comm'n filed Jan. 25, 2012).

116. Appellee's Answer Br. 25.

117. *See supra* ¶ 49.

118. *Martin ex rel. S.M. v. Phillips*, 2018 OK 56, ¶ 9, —— P.3d ——; *Udall v. Udall*, 1980 OK 99, ¶ 11, 613 P.2d 742, 745 ("Exceptions should not be read into a statute which are not made by the legislative body." (citing *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 1966 OK 155, 422 P.2d 840)).

119. The text of Article II, Section 23 reads: "No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law."

120. Kuntz, *supra* note 108, at 356 (emphasis added).

121. *Wickham*, 1981 OK 8, ¶ 15, 623 P.2d at 616.

122. *Id.* ¶¶ 14-15, 623 P.2d at 616.

123. *Id.* ¶ 15, 623 P.2d at 616.

124. *See* Appellee's Answer Br. 26-27.

125 Even Professor Kuntz failed to observe any problem under the takings clauses with prospective application of section 87.1(b): "It is submitted that the amendment would be unconstitutional if applied to an existing lease, regardless of whether it is held by production from a unit *and that it must therefore be construed to apply only to leases granted after the effective date of the amendment*." Kuntz, *supra* note 108, at 356 (emphasis added).

126. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 (1982).

127. *Croxton v. State*, 1939 OK 504, ¶ 22, 97 P.2d 11, 18 ("Police regulations which are reasonable are not inhibited by the Constitution, though invading its letter, since the exercise of police power is so essential to the public welfare that it is presumed that such exercise within reasonable limits was not intended to be prohibited, but, on the contrary, guaranteed by the general declared purpose of civil government and the manifest purpose of the Constitution." (quoting *State v. Redmon*, 114 N.W. 137, 137 (Wis. 1907))); *cf. Palazzolo*, 533 U.S. at 627 ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned." (emphasis added)).

128. Okla. Const. art. V, § 57.

129. *Id.*

130. *Compare* Senate Journal, 36th Leg., 1st Reg. Sess. 684-85 (Okla. 1977) (showing the Conference Committee's amendments, including the new language for subpart (b) and the addition of "imposing certain time limitations" to the bill's title), *with id.* at 42 (showing the original title of the bill, which did not contain the phrase "imposing certain time limitations"). *See generally* Kuntz, *supra* note 108, at 354 (showing Professor Kuntz's conclusion that this phrase must be what the Legislature intended for describing the contents of subpart (b): "The portion of the title which is not clearly descriptive of some other provision of the act, and which apparently was intended to describe this important new provision, is the phrase 'imposing certain time limitations.'").

131. *Stewart v. Okla. Tax Comm'n*, 1946 OK 132, ¶ 10, 168 P.2d 125, 128 (citing *Lowden v. Luther*, 1941 OK 412, 120 P.2d 359); *Lowden v. Washita Cty. Excise Bd.*, 1941 OK 153, ¶ 10, 113 P.2d 370, 371 (citing *Gibson Prods. Co. v. Murphy*, 1940 OK 100, 100 P.2d 453; *Chi., Rock Island & Pac. Ry. Co. v. Excise Bd. of Stephens Cty.*, 934 OK 392, 34 P.2d 274; *Dabney v. Hooker*, 1926 OK 751, 249 P. 381; *State ex rel. City of Durant v. Bonner*, 1922 OK 130, 208 P. 825; *Okla. City Land & Dev. Co. v. Hare*, 1917 OK 389, 168 P. 407; *In re Comm'rs of Ctys. Comprising 7th Judicial Dist.*, 1908 OK 207, 98 P. 557).

132. *Lowden*, 1941 OK 153, ¶ 13, 113 P.2d at 372 (quoting *Steinkamp v. Bd. of Comm'rs of Decatur Cty.*, 200 N.E. 211, 211 (Ind. 1936)).

133. *Stewart*, 1946 OK 132, ¶ 10, 168 P.2d at 128 (citing *Nat'l Mut. Cas. Co. v. Briscoe*, 1940 OK 487, 109 P.2d 1088); *accord In re Initiative Petition No. 347, State Question No. 639*, 1991 OK 55, ¶ 17, 813 P.2d 1019, 1027; *Cont'l Oil Co. v. State Bd. of Equalization*, 1972 OK 29, ¶ 5, 494 P.2d 645, 647; *Lowden*, 1941 OK 412, ¶ 8, 120 P.2d at 361.

134. Appellee's Answer Br. 27.

135. *See supra* ¶ 59 (stating that the statutory Pugh clause "simply places *a time limitation* upon the lessee's ability to hold a lease on Pugh Clause Lands without drilling a well thereon" (emphasis added)); *cf. supra* ¶ 43 (observing that "Galmor's predecessors never drilled wells upon the Pugh Clause Lands *within the time limitations established by section 87.1(b)*" (emphasis added)).

136. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 12-17, 58-61; ROA, Doc. 1311, Tr.Vol.VI at Def.'s Exs. 47-50, 57, 59-63.

137. *See* ROA, Doc. 1309, Tr.Vol.IV at Pl.'s Exs. 12-17, 58-61.

138. *See id.* at Pl.'s Exs. 16, 60.

139. *See id.* at Pl.'s Ex. 61 (signed on January 10, 2008, and establishing a primary term of three years).

140. *See Pack*, 1994 OK 23, ¶ 8, 869 P.2d at 326 ("[I]n order to extend the fixed term of ten years 'and acquire a limited estate in the land covered thereby the lessee must have found oil or gas upon the premises in paying quantities by completing a well thereon prior to the expiration of such fixed term.'" (quoting *Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 36, 336 P.2d at 1094)); *Roach v. Junction Oil & Gas Co.*, 1919 OK 103, ¶ 5, 179 P. 934, 936 ("It was a condition precedent to the right of defendant to continue operations beyond the period of five years that oil and gas or either of them should be found upon the premises in paying quantities . . . ."); *Curtis v. Harris*, 1919 OK 305, ¶ 4, 184 P. 574, 575 ("Under the express and unequivocal terms of the lease, the rights of both parties were to terminate January 8, 1917, if a well was not completed . . . . The lease terminated by its terms on the 8th of January, no well having been drilled . . . .").

Debrief Session for Bar Members Set for Aug. 14

Opportunity for Free CLE

By Angela Ailles Bahm

Your Legislative Monitoring Committee has continued to work for you. We have planned another opportunity for you to get some free CLE. Instead of trying to capture all the bills that were signed into law in an article, we have scheduled a legislative debrief session. It will take place Aug. 14 at 11:30 a.m. at the Oklahoma Bar Center, and it will be telecast. Attendees of the in-person program will get two hours of free CLE. There is a $100 fee for those taking advantage of the live webcast.

The format will be much like Reading Day. Presenters will choose bills from their area of expertise they believe are most impactful to the practice. If you are a Legislative Monitoring Committee member, you already have access to the entire list of bills signed by Gov. Fallin. We are also planning on having a panel of legislators. I imagine they may have some interesting tales to tell of this last session. The debrief session will include lunch, and we will conclude about 1:30 p.m. A link to online registration will be available at www.okbar.org/members/CLE – pending the conversion to another online CLE registration system. Even though it's free, registering for the in-person program is important to ensure enough food for lunch is ordered.

UPDATE ON SIGNIFICANT BILLS

As an update, in my last column I included a list of significant bills OBA Legislative Liaison Clay Taylor discussed during OBA Day at the Capitol. They all died, but for HB 2941 that affects title insurance and title work. It was signed by the governor on May 10.

I hope you voted in the primaries! The 2019 Legislature will have many new members. As I am sure you have heard, the Senate will have a new leader, Sen. Greg Treat. Senate Minority Leader John Sparks is termed out, and a new minority leader will be elected. Senate Judiciary Chair Anthony Sykes also termed out and will be replaced. I expect the House will retain leadership with Rep. Charles McCall, and the House Judiciary chair should re-main with Rep. Chris Kannady, who both defeated challengers in the primary.

I look forward to seeing you in August. As always, if you have any suggestions to improve the committee, please write me at angela.ailles-bahm.ga2e@statefarm.com.

ABOUT THE AUTHOR

Angela Ailles Bahm is the managing attorney of State Farm's in-house office and serves as the Legislative Monitoring Committee chairperson.

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2018 OK CR 21

JAMES RICHARD IRWIN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2016-1161. June 14, 2018

OPINION

LEWIS, VICE PRESIDING JUDGE:

¶1 James Richard Irwin, Appellant, was tried in a non-jury trial and convicted of Count 1, felony stalking, in violation of 21 O.S.Supp.2015, § 1173; and Counts 4 through 7, violation of a protective order, a misdemeanor, in violation of 22 O.S.2011, § 60.6, in Comanche County District Court, Case No. CF-2016-10. He also pled guilty before trial to Count 2, assault and battery, and Count 3, malicious injury to property. The Honorable Mark R. Smith, District Judge, sentenced Irwin to five (5) years imprisonment and a $1,000 fine in Count 1; ninety (90) days imprisonment, a $1,000.00 fine, and $3,028.73 restitution in Count 2; one (1) year imprisonment, a $500.00 fine, and $661.20 restitution in Count 3; and one (1) year imprisonment and a $500.00 fine in each of Counts 4 through 7, ordering the sentences in Counts 3 through 7 served concurrently.

FACTS

¶2 After a two-month relationship with the victim ended, Appellant continued to make unwanted and threatening contact with her. On one occasion, Appellant confronted and physically assaulted a male friend of the victim. That same day, Appellant vandalized the victim's car with spray paint. The victim sought an emergency order of protection against Appellant, which was served on him the following day.

¶3 In violation of the protective order, Appellant followed the victim in his truck after she left a friend's house. Appellant pulled in front of her and slammed on his brakes, forcing her to take evasive action. Appellant then pointed a handgun out the window and shot it at her car. Appellant also continued to harass the victim and violate the protective order by sending text messages and leaving notes on her car window.

ANALYSIS

¶4 In his only proposition of error, Appellant argues that his convictions for felony stalking (Count 1) in violation of a protective order, and four (4) violations of the protective order (Counts 4-7), violate the statutory prohibition against multiple punishments for a single criminal act, 21 O.S.2011, § 11, as well as the constitutional prohibition against double jeopardy. He failed to raise these objections at trial, waiving all but plain error. *Simpson v. State,* 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. Ap-pellant must therefore show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Id*.

¶5 Proper analysis of a section 11 claim focuses on the relationship between the crimes. If two or more crimes truly arise out of one act, section 11 prohibits prosecution and punishment for more than one crime. Section 11 does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct. *Davis v. State,* 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. Traditional double jeopardy analysis is conducted only if section 11 does not apply. *Mooney v. State,* 1999 OK CR 34, ¶ 14, 990 P. 2d 875, 883.

¶6 The crime of stalking, as pertinent here, is the willful, malicious, and repeated following or harassment of another in a manner that would cause a reasonable person to feel frightened, intimidated, threatened, harassed, or molested, and which actually causes the person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. 21 O.S.Supp. 2015, § 1173(A)(1), (2). When the defendant stalks another while a protective order is in effect, with actual notice of the order, stalking is a felony. § 1173(B)(1). The crime of violating of a protective order includes the violation of the order after its service on the defendant. 22 O.S.2011, § 60.6(A)(1). The State concedes that Appellant's convictions for stalking and violating the protective order arise from the same criminal acts under *Davis*. We agree. Appellant feloniously stalked the victim

by willfully, maliciously, and repeatedly harassing her in violation of the protective order. Punishment of Appellant by terms of imprisonment and fines totaling $2,000.00 for violating the protective order plainly violates section 11. Counts 4 through 7 are therefore reversed and remanded with instructions to dismiss.

DECISION

¶7 The Judgment and Sentence in Count 1 is **AFFIRMED**. The Judgment and Sentence in Counts 4 through 7 are **REVERSED** and **REMANDED** with instructions to dismiss. 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 COMANCHE COUNTY HONORABLE MARK R. SMITH, DISTRICT JUDGE

APPEARANCES AT TRIAL

Teressa Williams, 1309 W. Gore Blvd., Lawton, OK 73501, Attorney for Defendant

Jordan Cabelka, Evan Watson, Asst. District Attorneys, 315 S.W. 5th St., Lawton, OK 73501, Attorneys for State

APPEARANCES ON APPEAL

Ricki J. Walterscheid, P.O. Box 926, Norman, OK 73072, Attorney for Appellant

Mike Hunter, Attorney General, Robert Whittaker, Assistant Attorney General, 313 E. 21st St., Oklahoma City, OK 73015, Attorneys for Appellee

OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Concur in Results
HUDSON, J: Concur
KUEHN, J: Concur
ROWLAND, J: Concur

July

4 **OBA Closed** – Independence Day

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

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

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

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

11 **OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Mike Mayberry 405-521-3927

12 **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

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

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

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

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

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

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

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

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

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

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

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

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

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

Robert L. Bailey of Norman died Feb. 9. He was born Aug. 28, 1922, in Muskogee. **After serving as a Navy seabee in WWII,** he attended Northwestern University. He received his J.D. from the OU College of Law in 1948. **Mr. Bailey served during the Korean War in the Office of the U.S. Army Judge Advocate General Corps.** He served Cleveland County and the state of Oklahoma as a Cleveland County attorney, state representative, state senator, city attorney for Moore, assistant district attorney, Oklahoma Pardon and Parole Board member and an appellate judge for the Oklahoma Court of Civil Appeals. After his retirement, he served as an "active retired" district judge for Cleveland County. Mr. Bailey served as president and chairman of the board of Oklahoma National Bank.

Nita R. Giles of Oklahoma City died Oct. 29, 2017. She was born July 19, 1949, in Chickasha. She graduated from OSU with a bachelor's degree in 1971. Ms. Giles went on to receive her J.D. from the OU College of Law in 1974. From 1971 through 1973, she served as a law clerk and legal intern in the State Attorney General's Office. She also served as a law clerk for Judge Hez Bussey of the Oklahoma Court of Criminal Appeals. During this time, she also consulted at the Department of Human Services. In 1977, Ms. Giles served as an assistant regional attorney for the U.S. Department of Health and Human Services in Dallas. She returned to Oklahoma City in 1978 to work as a staff attorney for the Oklahoma Department of Human Services. In 1979, she was contracted with the national and regional office for Child Support Enforcement, assisting with the collection and enforcement of child support. In 1981, she consulted for the Oklahoma Department of Human Services. She opened her own law practice in 1982, practicing health care law until her retirement in 2011.

John G. Johnson of Oklahoma City died Feb. 17. He was born Oct. 2, 1949, in Waurika. He graduated from OU with a bachelor's degree in zoology in 1973 and a J.D. from the OCU School of Law in 1975. He practiced in Midwest City for several years and was elected as mayor of the city in 1990. He also served as a municipal judge for Del City and Midwest City for 10 years. Following his term as mayor, Mr. Johnson began working with the Association of Central Oklahoma Governments serving as deputy director and later executive director. He retired December 2017.

William Joseph Jarvis of Oklahoma City died May 13, 2017. He was born July 1, 1971, in Jackson, Mississippi. He was a graduate of Tulsa Union High School. Mr. Jarvis went on to receive a bachelor's degree in business administration from OU in 1999. He received his J.D. from the OCU School of Law in 2003. He began his career at Phillips, McFall, McCaffrey, McVay & Murrah Law Firm. He later cofounded Cazes, Looby & Jarvis Law Firm and finished his career as senior real estate counsel with Hobby Lobby Stores Inc. Mr. Jarvis enjoyed watching movies, sports, playing games and cooking.

Angelyn Jones of Muskogee died April 3. She was born Aug. 19, 1925, in Miami. She graduated from Northeastern State College and went on to study law at the OU College of Law and Northwestern University School of Law in Evanston, Illinois, where she received her J.D. in 1948. She practiced law in Chicago until 1953, then moved to Wagoner to practice with her father. In 1954, Ms. Jones became a judge for Wagoner County and served in that office until 1969. She served as an associate district judge from 1969 to 1975, when she retired from the bench to practice law with her husband. She was active in numerous community organizations, including the First United Methodist Church, Friendship Sunday School Class, Study Club Unlimited and Arts and Crafts Literacy Club. She was also a member of the National Society of Daughters of the American Revolution.

Daniel Alan Loeffler of Oklahoma City died April 2. He was born Nov. 3, 1977, in Oklahoma City. After completing high school at Christian Heritage Academy, he earned a Bachelor of Arts in philosophy from Wheaton College, where he was also a pitcher for the baseball team. In 2003, he earned his J.D. from the University of Michigan Law School where he served as an editor for the *Michigan Law Review.* Upon graduation, he spent a year as a law clerk for

Chief Judge Roger Gregory of the U.S. Court of Appeals for the 4th Circuit in Richmond, Virginia. In 2005, his legal career continued in Washington, D.C., with the firm Kellogg, Hansen, Todd, Figel & Frederick. Mr. Loeffler returned to Oklahoma City in 2008 and joined the law firm McAfee & Taft in 2010. He made a career shift in 2012 to in-house legal counsel for Federal Corp., a fourth-generation family business and became president of the company in 2013.

Thomas Wayne McKenzie of Fort Worth, Texas, died March 16. He was born July 23, 1949, in San Francisco. He was a 1977 graduate of the University of Arizona and earned a bachelor's degree in political science with a minor in psychology. He received his J.D. from the Texas Wesleyan School of Law in Fort Worth, Texas, in 1994. Before obtaining his J.D., Mr. McKenzie worked for the Texas Child Welfare System from 1975 until 1983. He was a supervisor and lead program director of the Texas Department of Protective and Regulatory Service. From 1994 until his death he practiced law in Fort Worth and Oklahoma City. He was the president of the Safe Haven Women's Shelter from 1998 to 2005. Memorial donations may be made to the 2018 Overnight Walk Organization of Dallas and the American Foundation for Suicide Prevention.

Matthew Oman Morris of Jet died Jan. 15. He was born July 28, 1948, in Kalamazoo, Michigan. He was a 1966 graduate of Loy Norrix High School and a 1970 graduate of Brigham Young University. Mr. Morris received his J.D. from the OCU School of Law and earned other post-graduate degrees from Arizona State University and Western Michigan University. He was a longtime member of the American Planning Association. He had a long and varied career in city planning, public administration and law. He also taught a number of college courses. Mr. Morris was proud to work with the Seminole Nation of Oklahoma. Following his retirement, he served as a town board member in Jet. He loved history and keeping up with current events.

Steven L. Parker of Tecumseh died April 18. He was born Jan. 24, 1941, in Idabel. He was a 1959 graduate of Gray High School in Idabel. After high school, he attended Eastern University and Northeastern University. In 1978, he earned his J.D. from the OU College of Law. Mr. Parker established his private practice in Tecumseh where he practiced law for 39 years. He was the very first district judge for the Choctaw tribe and also served as a Board of Immigration Appeals judge for many years. He was an accomplished author. He was also a member of the Broadway United Methodist Church in Tecumseh and the Tecumseh Rotary Club. He loved riding horses, playing tennis, racquetball and basketball. Memorial donations can be made to the Broadway United Methodist Church of Tecumseh.

Derek Shane Parks of Oklahoma City died July 17, 2017. He was born Oct. 14, 1974, in Seminole. He is a 1992 graduate of Seminole High School. In 1996, he graduated from Oklahoma Christian University with a bachelor's degree in finance. Mr. Parks received his J.D. in 1999 from the OU College of Law where he was a member of the Phi Delta Phi Legal Fraternity. After working for various law firms, in 2001 he began his career in construction management, working for CMS Construction. From 2011 until the time of his passing he worked in construction management and provided legal counsel for companies including Synergy Construction Services LLP, Oilfield Plastics Inc., Enviro Systems Inc. and Pillar Contracting Inc. He enjoyed traveling, camping, fishing and riding ATVs.

Royse M. Parr of Tulsa died April 8. He was born Sept. 11, 1935. After graduating from OSU, **he served as a captain in the U.S. Army Counterintelligence**. He received his J.D. in 1964 from the TU College of Law. For 25 years, Mr. Parr served as vice chairman of the Tulsa County Election Board. As an avid baseball fan, he co-authored *Glory Days of Summer: The History of Baseball in Oklahoma and Allie Reynolds, Super Chief.* He was a member of the Society of American Baseball Researchers. Memorial contributions may be extended to Boy Scout Troop 20 of Boston Avenue United Methodist Church or the Alzheimer's Association for research.

Ronald L. Shaffer of Tulsa died April 5. He was born July 16, 1936, in Henryetta. He attended OSU and later earned his J.D. from the TU College of Law. After passing the bar, he worked in the Tulsa County District Attorney's Office for 17 years and was chief prosecutor for 12 of those years. In 1981, Mr. Shaffer was appointed as a special judge and in 1983 he was elected district judge for Tulsa County. He was a district

judge until his retirement in 2007. He was a member of numerous organizations including the Akdar Shrine, Pilgrim-Rock Mason Lodge and Tulsa Court Jesters. Mr. Shaffer was an adjunct professor at Tulsa Community College and a Meals on Wheels volunteer. One of his most fulfilling accomplishments was fostering 11 children over a 10-year period. Memorial contributions may be made to Union Special Olympics, 619 S. Fir Ct., Broken Arrow, 74012 or a charity of your choice.

Kerry Leigh Wagner of Edmond died April 22. She was born July 24, 1956, in McAlester. She graduated from McAlester High School in 1974, attended Stephens College for equestrian studies and later the University of Missouri – Columbia earning a bachelor's degree in education and a master's degree in horticultural education. Ms. Wagner received her J.D. in 1992 from the OCU School of Law. She began practicing with Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks and in 1997 started Wagner Law Firm. She enjoyed horses, pets, cooking, bonsai, orchids, gardening and travel. Memorial donations may be made to the Oklahoma City Community Foundation Kerry Gossett Wagner Memorial Fund at www.occf.org/memorialgifts or to the Holy Trinity Lutheran Church building fund.

Court of Civil Appeals Opinions

2018 OK CIV APP 47

IN THE MATTER OF THE ADOPTION OF J.M.B., a minor child, AVERY BUYCKES, Appellant, vs. MICHAEL WHITE and PHYLLIS WHITE, Appellees.

Case No. 116,186. February 8, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE KURT G. GLASSCO, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Jessika Tate, Gilbert J. Pilkington, Jr., Tulsa, Oklahoma, for Appellant

Catherine Z. Welsh, Jim C. McGough, Matthew J. Hall, Mark A. Zannotti, Brian D. Carter, WELSH & MCGOUGH, PLLC, Tulsa, Oklahoma, for Appellees

Angela N. Monroe, ASSISTANT PUBLIC DEFENDER, OFFICE OF THE PUBLIC DEFENDER, Tulsa, Oklahoma, for Minor Child

KEITH RAPP, JUDGE:

¶1 The trial court respondent, Avery Buyckes (Buyckes), appeals a Judgment determining that he has no standing to object to the adoption of JMB by the maternal grandparents, Michael and Phyllis White (Grandparents). JMB is represented by counsel in these proceedings.

BACKGROUND

¶2 JMB was born on February 9, 2013. JMB's mother, Cokesha D. Phillips (Mother) is deceased and her date of death is September 16, 2016. At the time of her death she was married to Timothy D. Phillips (Presumed Father). They were lawfully married on September 22, 2000,[1] and remained married until Mother's death.[2] JMB's birth certificate lists Presumed Father as Father.[3]

¶3 Grandparents filed a petition to adopt JMB. Presumed Father previously consented to Grandparents' custody in a sworn document where he listed himself as "father."[4] He does not object to the adoption.

¶4 In their petition, Grandparents allege that Buyckes may claim to be the natural father of JMB. The petition states that Buyckes filed a paternity action in Tulsa County District Court, and might claim an interest in the adoption proceeding. Grandparents asserted that Buyckes had not been adjudicated as the natural father, so he had no standing. Alternatively, Grandparents moved for an order allowing the adoption without his consent because he has not provided support for JMB or maintained a positive relationship with JMB. Counsel for JMB also filed a challenge to Buyckes' standing.

¶5 The court in Buyckes' paternity case entered an "Interim Temporary Order" which ordered that he pay child support and an arrearage for child support and provided for supervised visitation.[5] Buyckes relies on this interim support order as one basis for finding that he is the natural father of JMB and argues that it refers to him as "father" of JMB. However, the paternity action never became final with an adjudication of parentage and was still pending when the present case was heard.[6] Buyckes testified that he did not have the money to continue the case.

¶6 In addition to the support order, Buyckes relies on a DNA test showing that he was not excluded as father and that the test shows a relationship between Buyckes and JMB to have a 99.99% probability.[7] He also points out that JMB has Buyckes as his last name. At the hearing on the standing motion, Buyckes submitted into evidence a Department of Human Services form, "Acknowledgment of Paternity" which he and Mother signed.[8]

¶7 Buyckes filed a handwritten objection to the adoption where he asserted his claim of being the natural father.[9] Grandparents and counsel for JMB challenged his standing.

¶8 After a hearing where evidence of the foregoing facts was presented, the trial court determined that Buyckes did not have standing and his objection to the adoption was therefore moot. In addition, the trial court ruled that: (1) Paternity was not decided; (2) The DHS child support order did not determine that Buyckes was the father; (3) Buyckes' "paternity case was moot because the mother

had passed away and him being determined the father could only be by agreement;" and, (4) "Natural father was permitted to file an application on paternity and submit authority."[10] Buyckes appeals.

STANDARD OF REVIEW

> Standing, as a jurisdictional question, may be correctly raised at any level of the judicial process or by the Court on its own motion. This Court has consistently held that standing to raise issues in a proceeding must be predicated on interest that is "direct, immediate and substantial." Standing determines whether the person is the proper party to request adjudication of a certain issue and does not decide the issue itself. The key element is whether the party whose standing is challenged has sufficient interest or stake in the outcome.

In re Estate of Doan, 1986 OK 15, ¶ 7, 727 P.2d 574, 576.

¶9 Standing presents a jurisdictional issue. *Bank of America, NA v. Kabba*, 2012 OK 23, ¶ 4, 276 P.3d 1006, 1008. Jurisdictional questions are reviewed *de novo. Jackson v. Jackson*, 2002 OK 25, ¶ 2, 45 P.3d 418, 421-22. Under this standard, the appellate court has "plenary, independent and non-deferential" authority to examine a trial court's legal rulings. *Id.*

ANALYSIS AND REVIEW

¶10 The trial court correctly concluded that there has not been a judicial determination of paternity in Buyckes' paternity case. The Record shows only that an interim temporary support order plus visitation has been entered. Likewise, the trial court correctly determined that an adoption case is not the forum for determining paternity.

¶11 The result is that the adoption record now shows that there is an individual who has evidence of being the natural father of the child to be adopted. However, that individual has been found to lack standing in the adoption proceedings because he has not shown that he achieved paternity status in the *legal sense.*

¶12 Thus, there is a difference between the *status* of being a biological father and the *status* of being a father in the legal sense. The law has nothing to do with the former. However, situations arise where it is necessary for the law to define the status of fatherhood *in a legal sense.* The Uniform Parentage Act provides for establishing the mother-father-child relationship in a legal sense. 10 O.S.2011, § 7700-201.[11]

¶13 The consequences from the record are twofold. First, the facts show that an individual has evidence of being the biological father but has not been allowed to pursue his rights in an adoption proceeding. The second, is that the adoption proceeding is clouded with the uncertainty that a critical process of adjudication of fatherhood in a legal sense and addressing that status accordingly in the adoption proceedings has been left out. That is not in the best interests of the child or the adopting parents.

¶14 The solution is to join the paternity case under the Uniform Parentage Act and the adoption case. The statute permits this to be done. 10 O.S.2011, § 7700-610(A); see 12 O.S.2011, § 2018.[12] Moreover, Mother's death does not preclude proceeding with the paternity case.[13] Thus, absence of jurisdiction of one party does not prevent an adjudication of parenthood as to the other party. 10 O.S.2011, § 7700-604(C). Moreover, the statute makes a mother a permissive, not mandatory party. 10 O.S.2011, § 7700-603.[14] The abatement statutes do not call for abatement of a paternity action brought by a putative father. 12 O.S.2011, §§ 1051-1052.

¶15 The trial court may then bifurcate the proceedings and determine paternity. Thereafter, depending on the outcome, the matter can proceed to determine whether consent to adoption is necessary on other grounds. Therefore, this Court rules that the trial court erred by not consolidating the Buyckes paternity action and the adoption case, separately determining paternity, and then proceeding accordingly with the adoption case.

CONCLUSION

¶16 This is a case where Grandparents wish to adopt the son of their deceased daughter. The child's mother was married well before and after the child's birth, so her husband is, by statute a "Presumed Father." He does not object to the adoption.

¶17 However, another person, Buyckes, claims to be the natural father and he objects to the adoption. Buyckes filed a timely paternity action, which was pending when the adoption case was filed. In the paternity case, the court entered an interim child support order directing Buyckes to pay child support. In addition, he has a genetic test indicating that he is the natural father. The child carries his last name

and he has a DHS Form signed by him and the child's mother attesting to his paternity. The birth certificate shows Presumed Father as the father.

¶18 Grandparents and the child challenge Buyckes standing. The trial court correctly ruled that the paternity case temporary child support order is not an adjudication of parenthood.

¶19 However, the trial court erred by dismissing Buyckes' objection for lack of standing. Instead, the trial court should have consolidated the paternity case and the adoption case and bifurcated the paternity case for trial. Then, depending on the outcome, Buyckes might be found to lack standing or his standing might be confirmed. In the latter case, the matter can then proceed to ascertain whether his consent is not needed for other reasons.

¶20 Therefore, the judgment of the trial court is reversed and the cause is remanded for further proceedings in accord with this Opinion.

¶21 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS**.

BARNES, P.J., and GOODMAN, J., concur.

KEITH RAPP, JUDGE:

1. Marriage Certificate, Record, p. 57.

2. Thus, Timothy D. Phillips' status as of the time this case was filed is that of "Presumed Father" pursuant to statute. 10 O.S.2011, § 7700-102(16); 10 O.S.2011, § 7700-294.

3. Record, p. 59.

4. Petitioners' Ex. 4.

5. Respondent's Ex. 2. The Uniform Parentage Act requires entry of a support order when a party has petitioned to be determined the father. 10 O.S.2011, § 7700-624.

6. Buyckes filed the paternity action within two years of the birth of JMB. The trial court took judicial notice of the entire proceedings as case FP 12-398. Respondent's Ex. 4 is the DHS record of Buyckes' support payments. It shows that not all payments have been made. Buyckes testified that he has made additional payments not reflected on the payment record. Tr., p. 41.

7. *See* 10 O.S.2011, § 7700-621, as amended, for rules regarding admissibility of genetic testing.

8. Respondent's Ex. 1. Admitted into evidence, Tr. p. 37. The signature dates are dim, but appear to be February 10, 2013, the day after JMB's birth, and that is Buyckes' testimony. Tr., p. 40. The document is filed stamped by DHS on June 14, 2013. The difference between the filed date and the execution date is not explained. The DHS Form asks whether Mother was married to another at the time of birth, and "yes" is checked and Presumed Father's name is inserted. The Form directs the signatories to have this person complete an additional Form and attach that additional Form. This additional Form is not attached. The Transcript refers to Respondent's Ex. 3 (same as Petitioners' Ex. 6) as a DHS Form "Denial of Paternity" but this document was not admitted into evidence. Tr. p. 38. The document is not included in the Exhibits package in the appellate Record. Buyckes maintained that Presumed Father signed this document. A presumed father can sign a denial of paternity which is valid when it conforms to the statute. 10 O.S.2011, § 7700-303.

9. Record, p. 51.

10. This last ruling occurred after discussions about the perceived inability of Buyckes to proceed in the paternity case because of the pending adoption case taking precedence. Buyckes' counsel asked the trial judge to take up the paternity issue notwithstanding the trial court's ruling that paternity was not an issue in the adoption. The trial court stated that Buyckes could file an application for consideration. Tr., pp. 57-58.

11. For fathers, the statute provides in Section 7700-201(B):

> Establishment of Mother-Child and Father-Child Relationships
> . . . .
> B. The father-child relationship is established between a man and a child by:
> 1. An unrebutted presumption of the man's paternity of the child under Section 8 of the Uniform Parentage Act;
> 2. An effective acknowledgment of paternity by the man under Article 3 of the Uniform Parentage Act, unless the acknowledgment has been timely rescinded or successfully challenged;
> 3. An adjudication of the man's paternity;
> 4. Adoption of the child by the man; or
> 5. As otherwise provided by law.

12. Section 7700-610(A) provides:

> Joinder of Proceedings
> A. Except as otherwise provided in subsection B of this section, a proceeding to adjudicate parentage may be joined with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, dissolution of marriage, annulment, legal separation, probate or administration of an estate, or other appropriate proceeding. (Emphasis added.)

13. *See In re Estate of Poole*, 799 N.E.2d 250 (Ill. 2003)(Uniform Parentage Act permits man to bring paternity action even though child is deceased).

14. Section 7700-603 reads:

> The following individuals *may be joined* as parties in a proceeding to adjudicate parentage:
> 1. The mother of the child; and
> 2. A man whose paternity of the child is to be adjudicated. (Emphasis added.)

2018 OK CIV APP 48

CHARLES PUMMILL; MARK PARRISH; and CHRIS PARRISH, JR., Plaintiffs/Appellees, vs. HANCOCK EXPLORATION LLC; YALE OIL ASSOCIATION, INC.; CHEVRON U.S.A., INC.; CIMAREX ENERGY CO.; and CIMAREX ENERGY CO. OF COLORADO, Defendants/Appellants.

Case No. 114,703. January 5, 2018

APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY, OKLAHOMA

HONORABLE RICHARD G. VAN DYCK, TRIAL JUDGE

AFFIRMED

Robert N. Barnes, Patranell Britten Lewis, BARNES & LEWIS, L.L.P, Oklahoma City, Oklahoma

Kerry Caywood, Angela Caywood Jones, PARK, NELSON, CAYWOOD, JONES, L.L.P., Chickasha, Oklahoma and

Bradley E. Beckworth, Jeffrey J. Angelovich, Susan Whatley, NIX, PATTERSON & ROACH, L.L.P., Daingerfield, Texas, for Plaintiffs/Appellees

Richard B. Noulles, Bradley W. Welsh, GABLEGOTWALS, Tulsa, Oklahoma

Jeromy E. Brown, McCALLA BROWN PATEL, LLP, Chickasha, Oklahoma and

Nathan K. Davis, SNELL & WILMER, L.L.P., Denver, Colorado, for Defendants/Appellants

J. Kevin Hayes, Pamela S. Anderson, Dawson A. Brotemarkle, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C., Tulsa, Oklahoma and

Craig Rainey, GPA MIDSTREAM ASSOCIATION, Tulsa, Oklahoma, for Amicus Curiae GPA Midstream Association

John J. Griffin, Jr., L. Mark Walker, Harvey D. Ellis, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Independent Petroleum Association

Mark D. Christiansen, McAFEE & TAFT, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Oil & Gas Association

Rex A. Sharp, REX A. SHARP, P.A., Prairie Village, KS for Amicus Curiae Tony R. Whisenant

Terry L. Stowers, Douglas E. Burns, BURNS & STOWERS, P.C., Norman, Oklahoma, for Amicus Curiae Coalition of Oklahoma Surface and Mineral Owners

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

¶1 Defendants, Hancock Exploration LLC; Yale Oil Association, Inc., Chevron U.S.A., Inc., Cimarex Energy Co., and Cimarex Energy Co. of Colorado, appeal from the district court's entry of a declaratory judgment, following a bench trial on remand, in favor of Plaintiffs, Charles Pummill, Mark Parrish, and Chris Parrish, Jr. The trial court rejected Defendants' claim that they were allowed to proportionately charge certain expenses against Plaintiffs' royalty payments.

¶2 The question of consequence on appeal involves Defendants' challenge to the trial court's determination of when the natural gas at issue here became a "marketable product." Finding that the trial court's decision of this fact-intensive issue is supported by competent evidence and is in accord with law, we affirm.

BACKGROUND

¶3 This is the second time this matter has been before the Court of Civil Appeals. In the first appeal, Case No. 111,096, the Supreme Court vacated an opinion by COCA's Division I, and affirmed in part and reversed in part the trial court's summary judgment in Plaintiffs' favor. After finding that disputed fact issues remained undetermined, the Court remanded the case for trial. *See Pummill v. Hancock Exploration LLC*, 2014 OK 97, 341 P.3d 69 (corrected order) ("*Pummill I*").

¶4 The record reflects that Plaintiffs, Charles Pummill, Chris Parrish, Jr., and Mark Parrish (collectively, Lessors or Plaintiffs), are descendants of the original mineral interest owners/lessors of two oil and gas leases on 160 acres in the SE/4 of Section 32, Township 9 North, Range 8 West, in Grady County (the property). The property now is part of a 640-acre, drilling and spacing unit from which the Parrish-Novotny No. 1-32 Well (the 1-32 well), has produced natural gas since 1985. Plaintiffs' interests derive from leases entered into in 1966 between the original lessors, Ethel Marie Pummill and Mabel Lee Parrish, and Jules Bloch. The women each retained royalty interests in production. The Parrish lease contains a "gross proceeds" royalty clause, while the Pum-mill lease contains a "market price at the well" clause.[1] Neither party to this litigation contends the language difference in the royalty clauses makes a difference when determining the point at which gas produced under the leases is a "marketable product."

¶5 The original lessee, Jules Bloch, assigned leasehold interests that ultimately were acquired by Defendants Hancock, Yale, and Chevron, as well as by Bloch's own company, Bloch Petroleum, LLC, which originally was named as a defendant in this case.[2] Each of these companies is a current lessee and a non-operating working interest owner in the 1-32 well.

¶6 Defendant Cimarex Energy Co. of Colorado has been the operator of the 1-32 well since 1999.[3] Cimarex Colorado is a wholly owned subsidiary of Defendant Cimarex Energy Co. (collectively, Cimarex). Cimarex does not own an interest in the 1-32 well, but other wholly-owned subsidiaries of Cimarex Energy own net revenue interests totaling approximately 40%. Since June 2005, Cimarex has marketed production from the 1-32 well and also has calculated and distributed royalty payments to royalty owners, including Plaintiffs.

¶7 Plaintiffs filed this action in October 2011, claiming Defendants had improperly interpreted the leases so as to negate the implied covenant to market gas. They claimed Defendants had refused to bear all of the costs necessary to create a marketable product, and had

underpaid Plaintiffs by improperly charging certain expenses against Plaintiffs' royalty interests.

¶8 Defendants denied Plaintiffs' claims and asserted various affirmative defenses. Cimarex also counterclaimed, disputing Plaintiffs' interpretation of "marketability" and arguing that if the court found the lease provisions did not negate an implied covenant to market, then it should enter judgment declaring that gas from the 1-32 is "marketable at the custody transfer meter" located near the well. The custody transfer meter connects to a pipeline/gathering system owned by a group of entities collectively referred to by the parties as "Enogex/Enable" or "Enogex."[4] At all times relevant here, Enogex/Enable has gathered and transported the 1-32 gas to its off-lease processing plants, where it extracts natural gas liquids (NGLs) and delivers residue gas for sale into high pressure intra- or interstate pipelines. Cimarex specifically requested a declaration that it could proportionately charge Plaintiffs for processing costs incurred at the Enogex/Enable plants, as well as a determination that it could charge "any costs incurred for gas production" from the 1-32 well as long as "the other requisites for charging such costs to royalty owners" have been met under *Mittelsteadt v. Santa Fe Minerals, Inc.*, 1998 OK 7, 954 P.2d 1203.[5]

¶9 Plaintiffs moved for summary judgment. As described in *Pummill I*, the trial court granted Plaintiffs' request and entered a lengthy judgment declaring that (1) neither the "gross proceeds" nor "market price at the well" lease language abrogated the "implied covenant to market" inherent in each lease, and, consequently, gas royalty payments under each lease were "free of all costs to create a marketable product"; (2) Defendants' use of a "percentage of proceeds" (POP) or "percent of index" (POI) form of gas purchase contract or service agreement with third parties instead of a "cash fee gathering agreement," did not change the amount of royalty owed under the leases; and (3) Defendants owed Plaintiffs royalty on gas from the 1-32 well "used off the lease or in the manufacture of products at the gas plant per the terms of the leases." A fourth issue, concerning interest owed by Defendants, was not disputed, and also was included in the court's judgment.

¶10 Defendants appealed. In June 2014, COCA Division I, finding the trial court's order adequately explained its decision, unanimously affirmed pursuant to Okla.Sup.Ct.R. 1.202(d). *See* Case No. 111,096 (opinion issued June 27, 2014). Defendants sought certiorari, which the Supreme Court granted. It thereafter vacated COCA's opinion, affirmed the trial court's judgment as to statutory interest, reversed its judgment as to the three other issues, and remanded, stating:

> The appellants [Defendants] identified four issues in their appeal of the judgment of the district court: Issue 1. The express language of their leases does not abrogate or negate the implied covenant to market in any way; Issue 2. The current or future use of a POP, POI or any other form of contract, instead of a fee based agreement with Enogex, does not change the amount of royalties due under the leases; Issue 3. Appellants are entitled to receive royalties on gas used off the lease or in the manufacture of products at the gas plant; and Issue 4. Appellants owe interest on royalties not timely paid without prior demand from the royalty owners.
>
> The briefs filed and the oral argument held before this Court on November 5, 2014, reveal that facts which could affect the resolution of the district court Issues I through III need to be addressed before the fact-finder, the district court. The parties at the oral argument affirmed that Issue IV was not contested.
>
> Accordingly, certiorari is granted. The opinion of the Court of Civil Appeals is vacated. The judgment of the district court is affirmed in part and reversed in part and remanded with instructions to hear and decide the disputed fact issues.

Pummill I, 2014 OK 97, 341 P.3d 69 (corrected order).

¶11 On remand, the parties submitted to the trial court a "Stipulation of Undisputed Facts" (Stipulation), 49 joint exhibits, and numerous other exhibits and evidence. Both sides submitted proposed findings of fact and conclusions of law. Trial occurred in October 2015, at which time the court heard testimony from the parties, expert witnesses, and representatives of "non-party midstream companies" testifying on behalf of Defendants.

¶12 The trial court found in favor of Plaintiffs on their claims and against the Cimarex enti-

ties on their counterclaim. It entered a 74-page, multiple-part judgment explaining its decision and incorporating almost verbatim Plaintiffs' proposed findings of fact and conclusions of law. Relying heavily on Oklahoma Supreme Court case law, particularly *Mittelstaedt* and *Wood v. TXO Production Corp.*, 1992 OK 100, 854 P.2d 880, the court held, *inter alia*, that:

¶13 – None of the language in either lease abrogated the "implied covenant to market" long recognized in Oklahoma, particularly because neither lease describes any costs that may be charged against the lessor's royalty. Because each lease had an implied covenant to market, all gas royalty payments under each lease were "free of costs [required] to create a marketable product," regardless of "whether such costs are incurred on or off the lease." The court noted that, to the extent certain costs – such as those associated with compression, gathering, dehydration and processing – are needed to create a marketable product, if a lessee wants to deduct such costs from a lessor's royalty, it must say so directly in the lease. The court pointed to evidence of other leases entered into by lessees and/or Cimarex "spell[ing] out" that royalty owners are to share in such costs. Order at ¶ 16.

¶14 – Regardless of Defendants' "past, current or future" use of a POP or POI form of contract with a gas gatherer or purchaser, such contracts did not and would not change the amount of royalty due under the leases, as long as the POP and POI contracts involve performing the same services necessary to render the gas capable of being sold on the commercial market.[6]

¶15 – Defendants owed Plaintiffs royalty on gas from the 1-32 well that was used off the lease by Defendants or Enogex/Enable in gas gathering systems, gas plants, and transmission pipelines. The court looked to the "express terms of the Plaintiffs' leases" in reaching this conclusion. It also noted that, since at least 2002, Cimarex's corporate policy was to pay royalty on gas consumed by Enogex/Enable in its gathering system and compressors located off the lease. The court rejected Defendants' claim that they were entitled to deduct in-kind fuel fees resulting from Enogex/Enable's consumption, off the lease, of gas from the well as fuel to run its gathering system (e.g., compressors and other equipment) and gas plants.

¶16 – Cimarex failed to sustain its burden of proof on its counterclaim. The court rejected Defendants' contention that gas from the 1-32 is a "marketable product," for purposes of calculating royalty payments, at the custody transfer meter located near the wellhead. The Court, in its core analysis, found that production was not complete until gas from the 1-32 was "delivered to the place of sale in marketable form," and that the evidence showed that this condition did not occur, in this case, until the gas was subjected to various additional field processes by Enogex/Enable.[7] The court cited Defendants' witnesses' testimony that "'field services' include gathering, compression, dehydration and processing," as well as industry publications describing the function of midstream companies as one of transforming gas into a marketable product and suggesting that gas does not become marketable until it is capable of being sold in the commercial interstate market. The court also held, however, that it was "not ruling . . . that gas can never be marketable at the well," and described a situation where gas from a well was capable of entering a high-pressure gathering pipeline at the wellhead or at a lease transfer meter.

¶17 – Finally, the court held that even if it agreed with Defendants' marketability argument, Defendants had not presented evidence of all the elements required by *Middlestaedt* to show that the costs in question could be proportionately charged against royalties. It found, therefore, that Defendants could not deduct from Plaintiffs' royalty payments "any costs incurred . . . for gathering, compression, dehydration, and processing of the gas," and that Defendants failed to meet their burden of proving that "the processing fees (or any other fees charged by the midstream company Enogex/Enable to Cimarex for field services performed prior to the tailgate of its gas processing plants) were reasonable, enhanced the value of an already marketable product and increased royalty in proportion to the fee charged."

¶18 Defendants brought this appeal. In addition to the parties' briefs, we are aided by amici curiae briefs filed by individuals or associations with the approval of the Supreme Court on behalf of both sides to this litigation.[8]

STANDARD OF REVIEW

¶19 Pursuant to 12 O.S.2011 § 1654, declaratory judgments are "reviewable in the same manner as other judgments." *Okla. City Zoo-*

logical Tr. v. State ex rel. Pub. Emp. Relations Bd., 2007 OK 21, ¶ 5, 158 P.3d 461; *Lockett v. Evans*, 2014 OK 34, ¶ 3, 330 P.3d 488. "A suit for declaratory judgment pursuant to § 1651 is neither strictly legal nor equitable, but assumes the nature of the controversy at issue." *Macy v. Okla. City School Dist. No. 89*, 1998 OK 58, ¶ 11, 961 P.2d 804; *see also Carpenter v. Carpenter*, 1982 OK 38, ¶ 17, 645 P.2d 476 (whether declaratory judgment is legal or equitable depends on "essential nature" of case). Thus, determining the proper standard of review in a declaratory judgment action requires that we evaluate the nature of the case generally, considering the relief sought, the pleadings filed, and the parties' rights and remedies. *See Wickham v. Simpler*, 1946 OK 357, ¶ 13, 180 P.2d 171.

¶20 Here, the primary relief sought by Plaintiffs, and ultimately, by Defendants, concerned their competing views of the point at which gas production from the well became a "marketable product" for purposes of calculating royalties due under the Pummill and Parrish leases. Defendants asserted defenses that included a five-year statute of limitations, and both parties referred to the matter as a contract dispute. The Supreme Court has recognized that oil and gas leases are "contracts," and has characterized an oil and gas producer's liability under a lease as "purely contractual" in nature. *See, e.g., Howell v. Texaco, Inc.*, 2004 OK 92, ¶¶ 25-26, 112 P.3d 1154 (citing *Bunger v. Rogers*, 1941 OK 117, ¶ 5, 112 P.2d 361, and *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1229-30 (7th Cir. 1996)).

¶21 We find the action before us is a contract dispute, with neither party seeking relief in the form of an injunction, accounting, termination or cancellation of the leases, or other equitable relief. An action on a contract generally is treated as an action at law, with disputed fact questions submitted to a jury – or to the court when the matter is set for bench trial – for decision. *See, e.g., Antrim Lumber Co. v. Bowline*, 1969 OK 161, ¶ 28, 460 P.2d 914. The following passage from *K&H Well Service, Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, applies here:

> The judgment presented for review is a compilation of both findings of facts and conclusions of law. When, as here, the case is tried to the court, its determination of facts [is] accorded the same force as those made by a well-instructed jury. If any competent evidence supports the trial court's findings of fact, the same will be affirmed.

Id., ¶ 9 (emphasis added, footnotes omitted); *see also Soldan v. Stone Video*, 1999 OK 66, ¶ 6, 988 P.2d 1268; and *Baer, Timberlake, Coulson & Cates, P.C., v. Warren*, 2010 OK CIV APP 112, ¶ 2, 241 P.3d 1155. We further note that there is a "presumption of correctness" afforded to a trial court's findings of fact, even if those findings were adopted by the court from written findings prepared by counsel with minimal changes. *Golsen v. ONG Western, Inc.*, 1988 OK 26, ¶ 5, 756 P.2d 1209.

¶22 Thus, presuming that the implied covenant to market has not been expressly negated as a matter of law (an issue that Defendants do not argue on appeal), the question of whether Defendants have fulfilled their duty under that covenant – including the question of whether they have underpaid royalties – presents an issue of fact.[9] This Court will not disturb the trial court's factual findings if they are supported by any competent evidence, including reasonable inferences derived from that evidence.

¶23 To the extent that issues of law are presented, however, they are reviewed *de novo*, since an appellate court has plenary, independent and non-deferential authority to reexamine a trial court's legal rulings. *K&H Well Serv.*, 2002 OK 62 at ¶ 9. Issues of law include matters such as statutory construction, and the interpretation of ambiguous contract provisions "'where the ambiguity can be cleared by reference to other provisions or where the ambiguity arises from the contract language and not from extrinsic facts.'" *Scungio v. Scungio*, 2012 OK 90, ¶ 9, 291 P.3d 616 (quoting *Okla. Oncology & Hematology, P.C. v. U.S. Oncology, Inc.*, 2007 OK 12, ¶ 27, 160 P.3d 936). Here, the parties have stipulated to certain facts, and to the extent that conflicting inferences reasonably cannot be drawn from those facts, our review is *de novo. See, e.g., Rist v. Westhoma Oil Co.*, 1963 OK 126, 385 P.2d 791 (syllabus 4).

ANALYSIS

¶24 Defendants' primary contention on appeal is that the trial court committed reversible error in finding – as a matter of fact – that gas produced from the 1-32 well is not a "marketable product" at the custody transfer meter or any other point prior to the Enogex/Enable plant tailgate. Defendants also claim error in the court's other determinations of fact. Because those other determinations depend on resolution of the "marketable product" question, we address the latter issue first.

Competent Evidence Supports the Trial Court's "Marketable Product" Finding

¶25 The issue of when natural gas first becomes "marketable" has been the source of much contention and consternation in both legal and oil and gas circles for several years. One writer has noted:

> A majority of states and the federal government require the lessee to bear all or most of the cost of making oil and gas marketable. One rationale is that there really isn't "production" – and all states require the lessee to bear the costs of production – until there is a marketable product. Another is that when the lessee bears the implied duty to market, it must pay all related costs as it does with the other implied duties. The most influential author on implied covenants, Maurice Merrill, phrased this rationale as follows:
>
> > If it is the lessee's obligation to market the product, it seems necessarily to follow that his is the task also to prepare it for market, if it is unmerchantable in its natural form. No part of the costs of marketing of or preparation for sale is chargeable to the lessor.
>
> With some significant variations . . . the leading decisions requiring lessees to bear marketing costs are in Colorado, Kansas, Oklahoma, and West Virginia; . . . In states that take this approach, the term "at the well" is not viewed as sufficiently specific to authorize deduction of costs incurred after the wellhead. The term (which after all does not specifically say anything about costs) is treated as silent on deductions or as ambiguous, with ambiguities generally construed against the lessee.
>
> . . .
>
> In marketable-product states, courts continue to see fervent battles over where gas becomes marketable, with costs incurred after that point deductible. In general, courts in these states have resisted letting isolated wellhead sales determine marketable value in today's deregulated natural gas market, in which active markets generally are found not at or near the well but instead at the outlet of processing plants or the inlet of the mainline pipelines located far downstream. Logically, marketability should be linked to the duty to get the best price reasonably possible, a price that in modern gas markets is almost always found at an after-the-processing-plant location.

McArthur, J.B., "U.S. Oil and Gas Implied Covenants and their Functions . . .," 61 RMMLF-INST 29-1, § 29.03[4][c](2015) (footnotes omitted).

¶26 Oklahoma law is clear that a lessee has an implied duty to obtain a "marketable product," including the cost of preparing the gas for market and getting the gas to the place of sale in marketable form. *Wood*, 1992 OK 100 at ¶¶ 9-12. As a general rule, the lessee may not deduct from royalty payments the costs of gathering, transportation, compression, dehydration, or blending if those costs are required to create a marketable product, unless the lease provides otherwise. *See Mittelstaedt*, 1994 OK 7 at ¶¶ 20-22; *Wood*, 1992 OK 100 at ¶¶ 9-11; *TXO Prod. Corp. v. State ex rel. Comm'nrs of the Land Office*, 1994 OK 131, ¶¶ 11-17, 903 P.2d 259 ("CLO"). The duty to market further includes the obligation to obtain the best price available.[10] *Howell v. Texaco, Inc.*, 2004 OK 92, ¶ 22, 112 P.3d 1154.

¶27 The lessee's obligation is not unlimited. In *Mittelstaedt,* where the Court considered a "gross proceeds" lease, the Court recognized that, although expenses to obtain marketable production are not chargeable against royalty, reasonable "post-production expenses" might be applied against the royalty if the expenses involve "enhancing the value" of an already marketable product, and the lessee shows that the expenditures resulted in a proportionate increase in royalty revenue. The Court stated:

> [T]his clause [*i.e.*, the "gross proceeds" clause], when considered by itself, prohibits a lessee from deducting a proportionate share of transportation, compression, dehydration, and blending costs when such costs are associated with creating a marketable product. However, we conclude that the lessor must bear a proportionate share of such costs if the lessee can show (1) that the costs enhanced the value of an already marketable product, (2) that such costs are reasonable, and (3) that actual royalty revenues increased in proportion with the costs assessed against the nonworking interest. Thus, in some cases a royalty interest may be burdened with post-production costs, and in other cases it may not.

1998 OK 7 at ¶ 2 (emphasis added).

¶28 *Mittelstaedt* made clear that a lessee has the burden of proving the elements required to charge post-production expenses against royalty owners' interests, including that a marketable product exists. Unfortunately, the Court did not define the meaning of "marketable product," nor has it done so since.[11]

¶29 Defendants argue the trial court's finding that the 1-32 gas was not marketable at or near the wellhead was an abuse of discretion and unsupported by the evidence. They urge this Court to adopt a definition of "marketable" identical to that of the Supreme Court of Kansas in *Fawcett v. Oil Producers, Inc., of Kansas*, 352 P.3d 1032, 1034 (Kan. 2015)(court syllabus), that "production is merchantable once the operator has put it into a condition acceptable to a purchaser in a good faith transaction." Defendants contend their evidence of industry custom and practice, of the quality of the 1-32 gas at the custody meter, and of the existence of hypothetical buyers for gas at the wellhead, supports only their view, *i.e.*, that the gas is a "marketable product" at either or both of those points.

¶30 We recognize that Defendants presented evidence conflicting with Plaintiffs' evidence on these issues. We disagree, however, with Defendants' conclusion that Plaintiffs' evidence does not support the trial court's judgment.

¶31 It is undisputed that raw gas from the 1-32 is both low in pressure and saturated with water vapor, and that it must be compressed and dehydrated even to be accepted into the Enogex/Enable pipeline near the well. It is also undisputed that the 1-32 gas must undergo further field services and processes – including multiple additional stages of compression and dehydration, and extraction of NGLs – before residue gas is acceptable for delivery, at the tailgates of Enogex/Enable's gas plants,[12] to the high-pressure, Enable Oklahoma Intrastate Transmission (EOIT) pipeline or to one of four high-pressure interstate pipelines,[13] and for sale to downstream purchasers in industrial, consumer, and other markets.

¶32 There are no high-pressure lines at the 1-32 well. While Defendants produced evidence that there is, theoretically, a "market" for wellhead gas to a limited group of potential purchasers – "midstream" companies who might purchase raw or minimally processed gas, likely under a POP or POI contract for further processing and sale downstream – Defendants produced no evidence that in actual practice Cimarex makes any sales until the gas reaches the EOIT or one of the four interstate pipelines.

¶33 Cimarex pays royalty based on the price it receives for the latter sales, less certain deductions it charges against royalty payments as detailed in the Stipulations.[14] These charges have varied over the years that Cimarex has operated the 1-32, depending on service or sale contracts applicable to the well, or according to Cimarex corporate policy. Under Cimarex's current service agreement with Enogex, Enogex performs additional field services although title to the gas is retained by Cimarex, as operator, until it is sold.

¶34 Plaintiffs admit that after the residue gas leaves the tailgates of the Enogex/Enable gas plants, the gas is a marketable product. The parties' Joint Stipulation details the several times since 2002 that Cimarex has changed the amount and method of calculating royalties, both in terms of the specific expenses it has proportionately charged against royalty owners' payments and the point at which it began taking those deductions. Cimarex also has periodically issued refunds of withheld payments.

¶35 Since February 2012, Cimarex has deducted from Plaintiffs' royalty payment a proportionate share of the in-kind transportation fuel gas charge incurred for transporting residue gas on the EOIT pipeline. Since April 2013, pursuant to company policy, Cimarex also has deducted the proportionate cost of a cash transportation fee incurred on the EOIT pipeline. However, Cimarex and the other working interest owners have alone borne the cash gathering fee, cash compression fee, and in-kind fuel fees for gas used off the lease but in the gathering system and compressor located upstream of the Enogex gas plants. At all times except February to December 2012, Enogex has retained the value of all extracted NGLs and Cimarex has not paid royalties based on that value.[15]

¶36 Defendants' witnesses testified that from 1966 through 1985, most gas production in Oklahoma was sold "at the well" to a federally regulated intra- or interstate pipeline company and lessees would pay royalties on proceeds at that location. However, it is undisputed that Cimarex is not in the wellhead market and therefore makes no actual sales of 1-32 gas at the well to any purchaser.

¶37 Plaintiffs' evidence as to industry custom and practice during the 1960s to 1980s was that the practices described by Defendants' witnesses were not the case in central Oklahoma, where the 1-32 is located. Plaintiffs' expert testified that in central Oklahoma during that time, producers, rather than interstate pipelines, owned gathering systems and gas plants, and sales were made away from the wellhead, so that "once again, marketable product [was] at the tailgate" of a gas processing plant. Plaintiffs also introduced multiple exhibits and statements in industry corporate publications referring to the work of midstream service providers as delivering the processing services needed to render gas "marketable" or put it in a "marketable condition." Such exhibits included at least one joint exhibit, JX 48, a flyer from an Enogex affiliate, stating in part:

> The quality of natural gas varies and can present problems to gas pipelines distributors, appliance manufacturers and consumers. Because some natural gas must be processed before it meets quality specifications and can be used as fuel, Enogex Products LLC provides processing services to the natural gas industry to ensure that the gas is marketable and safe for delivery to and use by consumers.

¶38 The trial court's decision focused on the undisputed evidence that the market in which Defendants have chosen to participate, and the first, actual sale of gas from the 1-32, does not in fact occur until after the gas is further compressed, treated, dehydrated, separated, and processed so that it is acceptable for transport in high-pressure pipelines. The court also focused on the fact that Cimarex claimed it was at this point that the operator could obtain the best price for the gas – *i.e.*, at the "tailgate" of the plants, where gas is transferred into high-pressure lines. Cimarex admitted that it has a duty to obtain the highest and best price for the gas.

¶39 As we noted above, the trial court further found it significant that – even assuming arguendo that the gas is a marketable product at the wellhead – Defendants provided no evidence that actual royalty revenues would increase in proportion with the costs assessed against non-working interests, *i.e.*, the costs that Defendants claimed were needed to "enhance the value" of an already marketable product. In addition, the court noted that Defendants' former co-defendant, Bloch Petroleum, had admitted it agreed with Plaintiffs' position. Although Defendants argue Bloch's position resulted from "coercion" by Plaintiffs in settling with Bloch, this factor nonetheless was evidence that the trial court was entitled to weigh and consider.

¶40 After reviewing the record and the parties' briefs, we find competent evidence supports the trial court's decision that gas from the 1-32 is not an "already marketable product" as required by *Mittelstaedt* at either the wellhead or the custody transfer meter. Despite Defendants' evidence that the gas might have been acceptable for sale to a limited group of buyers at the wellhead, such sales were undisputedly purely hypothetical. Evidence of hypothetical sales of raw product to a limited group of potential purchasers to whom such gas would be acceptable, does not readily lend itself to a conclusion that the product being sold is "marketable" in a free and competitive market. And again, this was an aspect of the evidence that the trial court was entitled to take into account in resolving the factual question of marketability. A finding that gas from the 1-32 is not marketable until it reaches the tailgate of the Enogex plants is more consistent with the Supreme Court's description of "market value" in *Howell v. Texaco,* as being based on what a product will sell for, between a willing buyer and seller, in "a free and open market." 2004 OK 92 at ¶ 17.

¶41 We further agree with the trial court that Defendants failed to sustain their burden of proving they are entitled to deduct proportionate post-production costs from royalty owner shares under *Mittelstaedt*. Reading *Mittelstaedt* in conjunction with other Supreme Court decisions on the same subject reveals that the Court has never been as interested in drawing a hard line on when gas is "marketable" as it has been in assuring that royalty is paid according to the terms of the lease, and that royalty owners are not deprived of the best deal that a producer can make.

¶42 The duty to create a marketable product is a corollary to the implied duty to market. The duty involves not only bringing the gas to market but also obtaining the best price reasonably possible. The key point of *Mittelstaedt*, in many ways, was its requirement that a lessee must demonstrate to a questioning royalty owner that the terms of a lease are being fulfilled. That demonstration cannot be made without showing that the other elements of *Mittelstaedt* have been met. In this case, Defendants' briefs do not direct us to evidence showing that

"actual royalty revenues increased in proportion with the costs assessed against the nonworking interest," nor do they even argue that point.

¶43 Defendants argue nonetheless that we should adopt the Kansas Supreme Court's holding in *Fawcett*, where the Court "declined to equate 'marketable condition' with the specifications of a downstream mainline transmission line." The Court in *Fawcett* made clear that it was rejecting the royalty owners' request that the Court adopt the latter definition "as a matter of law or fact," 352 P.3d at 1039, and specifically held:

> We hold that when a lease provides for royalties based on a share of proceeds from the sale of gas at the well, and the gas is sold at the well, the operator's duty to bear the expense of making the gas marketable does not, as a matter of law, extend beyond that geographical point to post-sale expenses. In other words, the duty to make gas marketable is satisfied when the operator delivers the gas to the purchaser in a condition acceptable to the purchaser in a good faith transaction. . . .

Id. at 1042. The Court reversed summary judgment in favor of the royalty owners. It held the operator fulfilled its "duty to market" with its sale of gas "at the wellhead" in arms' length, good faith transactions to third parties who in turn processed the gas before it entered the interstate pipeline system.[16] The Court noted that it was "sensitive to the potential for claims of mischief given an operator's unilateral control over production and marketing decisions," but further noted the operator's good faith and prudence had not been questioned in the case. *Id.*

¶44 *Fawcett* has limited application here, for at least three reasons. First and most obviously, we are bound to follow Oklahoma precedent. As the trial court here recognized, *Mittelstaedt* and *Wood* clearly apply to this matter. Secondly, we do not find language in Fawcett suggesting that the Kansas Court intended to overturn the existing rule that a lessee-operator has the duty to make gas marketable and that it must do so free of cost for field services to royalty owners. *See* 352 P.3d at 1033 (syllabus by the Court). Finally, *Fawcett* is factually distinguishable in that the first, actual sales of gas occurred at the wellhead, and the lease language clearly made reference to royalties measured by sales "at the mouth of the well" or "if sold at the well" in contrast to the "gross proceeds" language at issue here. That said, however, we believe that even if we used the definition of "marketable production" used in *Fawcett*, we would reach the same result under the circumstances presented in this case, pursuant to our standard of review of whether the trial court's decision here is supported by competent evidence. We have found that such is the case, and for this reason the trial court's decision on the marketability question must be affirmed.

The Trial Court's Decisions Concerning POP and PIP Contracts and Fuel Gas as Subject to Royalty

¶45 Defendants' complaints about the trial court's other holdings depend in large part on their success in having the trial court's marketable product decision overturned. The trial court held that Defendants' "past, current, or future" use of contract forms that incorporate the same services as their service agreement with Enogex/Enable will not change the amount of royalty due under the Plaintiffs' leases. We find this decision is legally sound under the facts presented, and as long as the basic facts remain unchanged – *i.e.*, that the first, arms' length sale of 1-32 gas by Defendants does not occur until the processed gas reaches the tailgates of the Enogex/Enable gas plants, and Defendants remain unable to demonstrate the other elements required by Mittelstaedt. Although neither this Court nor the trial court can give an advisory opinion as to the consequences of Defendants' future conduct in operating and managing gas transactions regarding the well, we find no error in the trial court's declaration that, in essence, states Defendants may not employ POP and PIP contracts simply in order to avoid the court's decision concerning allocating costs as set forth in its order.

¶46 Similarly, Defendants' argument that they do not owe royalty on 1-32 gas used off the lease depends on their characterization of off-lease operations as "enhancing the value" of an already marketable product – a characterization that failed in the trial court. Defendants also do not address the trial court's holding that royalty is owed on this gas under the express terms of the Parrish and Pummill leases. We therefore find no error in the trial court's holding on this issue, as well.

Defendants' Claim Concerning the Effect of This Decision

¶47 In what appears to be a final grasp at unwarranted drama, in their last proposition

of error Defendants accuse the trial court of wrongly imposing "an implied covenant that the lessee alone will bear 100% of the off-lease costs of gathering, compression, dehydration and processing." They contend that the court's failure to find in their favor on marketability will have wide-ranging, destructive ramifications for the oil and gas industry, and that the court essentially has made them, as oil and gas producers, 100% liable for all costs of production as concerns royalty payments. This description exaggerates the extent to which the issue presented here can be applied outside the limited realm of this case. It also ignores the requirements that *Mittelstaedt* places on lessees in Defendants' position, particularly in its failure to recognize that Defendants did not present evidence going to each of the elements of *Mittelstaedt*.

CONCLUSION

¶48 The trial court's decision that gas from the 1-32 well is not a marketable product at or near the wellhead is supported by competent evidence, and the court's determination that Defendants failed to sustain their burden of proof under *Mittelstaedt* is correct as a matter of law. Defendants may not deduct from Plaintiffs' royalties the proportionate expenses associated with preparing the gas for sale to an interstate pipeline downstream from the well. We find no error in the trial court's holding that POP and PIP contract forms may not be used to avoid Defendants' royalty obligations that the court found apply here, nor do we find error in its decision concerning royalties payable on 1-32 gas used in Defendants' or midstream service companies' operations off the Parrish and Pummill leases.

¶49 The trial court's judgment is therefore affirmed.

¶50 **AFFIRMED**.

GOODMAN, J. (sitting by designation), and FISCHER, J. (sitting by designation), concur.

P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

1. The Parrish lease "gross proceeds" provision reads as follows:

> 2nd. To pay lessor for gas from each well where gas only is found, the equal one eighth (1/8) of the gross proceeds at the prevailing market rate, for all gas used off the premises . . . .

The Pummill lease "market price at the well" provision reads:

> 2nd. To pay lessor for gas of whatsoever nature or kind produced and sold or used off the premises, or used in the manufacture of any products therefrom, one eighth (1/8) of the market price at the well for the gas sold, used off the premises, or in the manufacture of products therefrom . . . .

Both leases contain the following provisions:

> 3rd. To pay lessor for gas produced from any oil well and used off the premises, or for the manufacture of casing-head gasoline or dry commercial gas, one-eighth (1/8) of the proceeds, at the mouth of the well, at the prevailing market rate for the gas during which time such gas shall be used . . . .
>
> Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of lessor.

2. According to the parties' Stipulation of Undisputed Facts, ¶¶ 62 through 68, a class action was filed against Bloch Petroleum in March 2011 after it was discovered (in late 2010) that the company had never paid royalties on gas sales from the 1-32 well. Bloch Petroleum did not oppose class certification, and ultimately paid class members 100% of past royalties due without deduction of any costs or expenses. Plaintiffs dismissed this action as to Bloch Petroleum after the company filed an answer disputing neither the "factual allegations" of Plaintiffs' petition as related to Bloch Petroleum, nor "the legal position asserted by Plaintiffs." Record, pp. 20 & 25. Defendants contend Bloch's concessions were made as part of the class action lawsuit settlement, and the parties agree that the concessions do not bind any other parties.

3. Cimarex Colorado was known as Gruy Petroleum Management Co. from 1999 to 2005.

4. Prior to 2013, the entities included Enogex, LLC, Enogex Gathering & Processing, and Enogex Gas Gathering, LLC. In 2013, Enogex Gas Gathering, LLC, changed its name to Enable Gas Gathering, LLC; Enogex Gathering and Processing changed to Enable Gathering & Processing, LLC; and Enogex, LLC, changed to Enable Oklahoma Intrastate Transmission, LLC. Also in 2013, Enable Midstream Partners, LP, was created to operate Enogex LLC and CenterPoint Energy, Inc. Stipulation of Undisputed Facts at ¶ 21.

5. This contention further reflects Defendants' agreement that both leases should be interpreted in the same manner when determining the question of marketability, without regard to the differences in royalty clause language in each lease.

6. POP and POI contracts are often used for sales of gas at the wellhead to midstream companies that further compress, dehydrate, treat, and process the gas, including separating out natural gas liquids (NGLs) and residue gas, in order to render the gas capable of being accepted into a high pressure, intra- or interstate pipeline in the commercial interstate market. See Amicus Brief of GPA Midstream Association; and Corrected Order at pp. 40-42.

7. The court stated it found "compelling evidence that gas from the Parrish-Novotny 1-32 Well is not a marketable product until the field processes of gathering, compression, dehydration and processing have occurred at or before the tailgate of the [Enogex/Enable] gas plant[s]." Corrected Order at p. 67, ¶ 69.

8. Amici curiae briefs supporting the position of Defendants/Appellants were filed by the Oklahoma Independent Petroleum Association, the Oklahoma Oil & Gas Association, and GPA Midstream Association. Amici curiae briefs filed in support of Plaintiffs/Appellees were by Tony R. Whisenant and the Coalition of Oklahoma Surface and Mineral Owners.

9. The separate opinion in *Mittelstaedt* described Oklahoma case law as erroneously treating marketability as a question of law, see 1998 OK 7 at ¶ 15 (Opala, J., and Watt, J., dissenting in part); however, the majority in *Mittelstaedt* did not describe the issue as such nor did prior cases dealing with the issue. The majority opinion reviewed case law concerning the implied duty to market, noting that the issues involved in the cases required a fact-intensive analysis as to which costs are deductible and which are not. In this regard, *see also Garman v. Conoco, Inc.*, 886 P.2d 652, n.28 (Colo. 1994)(cited with approval in *Mittelstaedt*, 1998 OK 7 at ¶¶ 15-16)(majority opinion), where the Court described the issue of whether a lessee has reasonably met its duty to market as one of fact.

10. The duty to obtain the best price is frequently the object of cases in which an operator may have engaged in self-dealing or some similar situation where a conflict of interest is clear: "Today the industry is mired in natural gas cases over lessees who pay on values they claim should be set in wellhead sales, yet keep for themselves higher prices they reap when they make their first true sales of gas downstream beyond gas processing plants." McArthur, J.B., "U.S. Oil and Gas Implied Covenants and their Functions . . .," 61 RMMLF-INST 29-1, § 29.03[4](2015).

11. Although of limited applicability here, in *Howell v. Texaco, Inc.*, 2004 OK 92 at ¶¶ 17-20, the Court considered the question of market value of produced gas "at the wellhead" where the first arms-length sale of gas occurred after the gas was processed. The marketability of the gas "at the wellhead" was not at issue, and the defendants' claim that gas was marketable at the wellhead was not challenged by royalty owners. The Court noted the definition of "market value" as "the price

negotiated by a willing buyer, not obligated to buy, and a willing seller, not obligated to sell, in a free and open market," *id.*, ¶ 17, and described three ways to establish market value: (1) "first and most preferred," an "actual arms-length sale" at the wellhead for the best price available (an intra-company sale is not acceptable); (2) the "prevailing market price" method, determined through arms-length offers to purchase from the same well, close in time to the sale at issue; and (3) the "work-back method," in which market value "at the wellhead is calculated by subtracting allowable costs and expenses from the first downstream, arm's length sale" away from the well. *Id.*, ¶¶ 18-20 (emphasis added). Because there were no actual, arm's length sales of gas at the well, the Court held the royalty owners were entitled to payments based on the higher of either the prevailing market price of the gas as sold, or the price obtained by using the "work back" method – a method which of necessity requires that gas at the wellhead is already "marketable" before the method may be employed, since it contemplates that only "allowable" costs may be deducted. *See id.* "Whenever a producer is paying royalty based on one price but it is selling the gas for a higher price, the royalty owners are entitled to have their payments calculated based on the higher price." *Id.*, ¶ 22.

12. The plants are located 20 to 33 miles away from the 1-32 well site.

13. The interstate pipelines identified by the parties are ANR Pipeline, Enable Gas Transmission, LLC, Natural Gas Pipeline Co. of America LLC, and Panhandle Eastern Pipeline.

14. According to the Joint Stipulation, at ¶ 59:

> The gross value on which Cimarex pays Plaintiffs' royalty is based on the weighted average sales price (WASP), which is the average price that Cimarex receives for sales of residue gas to various customers at the Enogex West pool point located on EOIT downstream of Enogex/Enable's gas processing plants. At these points of sale the residue is at least 600 psi and is acceptable by EOIT and the 4 interstate pipelines connected to EOIT. . . . The WASP is based on sales beyond the gas plant tailgate. . . . In other words, Cimarex pays Plaintiffs royalty based on the sales price received by it, less the costs deducted under Cimarex' royalty policy, *i.e.*, the cash transportation fee and transportation in-kind fuel gas charge for residue gas incurred by Cimarex beyond the gas plant tailgates under the Enogex Service Aagreement.

15. From February to December 2012, Cimarex and Enogex had a Gas Processing Agreement under which Cimarex also sold the NGLs processed from the 1-32 stream, and Cimarex paid royalties on those sales.

16. The leases in question required the operator to pay based on proceeds "from the sale of gas as such at the mouth of the well .: or "if sold at the well." 352 P.3d at 1039. Like the POP and PIP contracts discussed in this opinion, the price paid for the raw gas in *Fawcett* was based on a formula that started with the price the third parties were paid for processed gas; and royalties were also based on that price, with proportionate charges made against royalties for costs between the first sale and the second. The Court noted, "As such, if the question were whether those negotiated formulas produce an adequate price, the answer would seem to require a fact-based analysis to determine whether the operator entered into good faith sales and whether the terms of those sales were reasonable under the circumstances." *Id.*

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, June 7, 2018

F-2017-627 — Steven Joseph McElroy, Appellant, was tried by jury for the crime of First Degree Murder in Case No. CF-2015-8136 in the District Court of Oklahoma County. The jury returned a verdict of guilty on the lesser related offense of First Degree Manslaughter and recommended as punishment 40 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Steven Joseph McElroy has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., recuse.

C-2017-627 — Lester Havis, Petitioner, entered a blind plea of guilty to the crimes of Count I - Trafficking in Methamphetamine; Count II - Possession of Cocaine; and Count III - Manufacture of CDS/Possession of Material with Intent to Manufacture (Crack Cocaine), all after former conviction of one felony, in Case No. CF-2016-137 in the District Court of Pushmataha County. After a hearing, the Honorable Jana K. Wallace sentenced Petitioner to thirty (30) years imprisonment on each of Counts I and III, to run concurrently, and ten (10) years imprisonment in Count II, to run consecutively to the other sentences, followed by one year post-imprisonment supervision; and imposed fines of $25,000.00 (Count I), $100.00 (Count II), and $50,000.00 (Count III). Petitioner timely filed an application to withdraw his pleas. After a hearing, at which Petitioner was represented by new counsel, the trial court denied the motion. Petitioner timely filed this petition for writ of certiorari. Petition for Certiorari DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

C-2017-971 — Petitioner Brendon Edward Marusak entered blind pleas of guilty to First Degree Burglary (Count I); Lewd or Indecent Acts with a Child under 16 year (Count IV); and Unlawful Possession of a Controlled Dangerous Substance (VII) in the District Court of Carter County, Case No. CF-2013-487. In the same case, Petitioner also entered pleas of *nolo contendere* to Kidnapping (Count II); Lewd or Indecent Acts with a Child under 16 years (Counts III and VI); and Rape (with the victim under the age of 14) (Count V). The pleas were entered after the State rested in a non-jury trial and were accepted by the Honorable Dennis R. Morris, District Judge. Petitioner was sentenced to terms of imprisonment for twenty (20) years in Count I, twenty-five (25) years in each of Counts II and III; ten (10) years in each of Counts IV and VII, with an additional five thousand dollar ($5,000.00) fine in Count VII; life in Count V; and forty (40) years in Count VI, all sentences ordered to run consecutive. Petitioner, represented by counsel, timely filed an Application to Withdraw Guilty Plea and an Amended Application to Withdraw Guilty Plea. After a hearing on the application, the request to withdraw the pleas was denied. Petitioner appeals the denial of his motion. The Petition for a Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-0197 — Appellant, Brenda Kaye Alexander, was charged June 4, 2014, with Child Abuse. She entered a plea of no contest on September 10, 2014. Sentencing was deferred to September 9, 2024, with rules and conditions of supervised probation. On July 28, 2016, the State filed an application to accelerate Appellant's deferred sentence. Following an acceleration hearing on October 10, 2016, Appellant's deferred sentence was accelerated. Appellant was sentenced to ten years imprisonment. Appellant appeals from the acceleration of her deferred sentence. The acceleration of Appellant's deferred sentence is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

Thursday, June 14, 2018

J-2018-205 — D.P.S., Appellant, appealed to this Court from an order entered by the Honorable Eric Yarborough, Associate District Judge, denying Appellant's motion to certify as a child, or in the alternative a youthful offender; deny-

ing Appellant's motion to dismiss; and ordering that Appellant should be held accountable as an adult in Case No. CF-2016-65 in the District Court of Greer County. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2017-05 — On May 21, 2013, Appellant Preston W. Merrihew, represented by counsel, entered a no contest plea to Count 1, Robbery with a Firearm, Count 2, First Degree Burglary, and Count 3, Feloniously Pointing a Firearm in Tulsa County Case No. CF-2012-2247. Sentencing was deferred for ten (10) years, during which time Merrihew was subject to terms and conditions of probation. On January 17, 2014, Merrihew's deferred sentences were accelerated and Merrihew was sentenced to thirty (30) years for Count 1, fifteen (15) years for Count 2 and eight (8) years for Count 1. On January 23, 2015, Merrihew's sentences were modified as follows: Counts 1 and 2, fifteen (15) years, and Count 3, eight (8) years, all suspended, subject to terms and conditions of probation. On April 20, 2016, the State filed an Application to Revoke Merrihew's suspended sentences. The application alleged Merrihew violated his terms and conditions of probation by failing to provide a urine sample as required; by committing the crimes of Malicious Injury to Property and Domestic Assault and Battery as charged in Tulsa County Case No. CF-2016-564; and committing the crimes of Possession of a Stolen Vehicle and Leaving the Scene of a Collision Involving Property in Tulsa County Case No. CF-2016-1062. On December 14, 2016, the District Court of Tulsa County, the Honorable Kelly Greenough, District Judge, revoked Merrihew's suspended sentences in full. The revocation of Merrihew's suspended sentences is AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., CONCUR; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-35 — Cameron Ray Heath, Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon (two counts) in Case No. CF-2015-202 in the District Court of Pontotoc County. The jury returned verdicts of guilty and set punishment at fifteen years as to each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Cameron Ray Heath 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-2017-3696 — James Vasco Jones, Appellant, was tried by jury for the crime of Murder in the First Degree (Felony Murder-Kidnapping) in Case No. CF-2015-3956 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence James Vasco Jones has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, June 8, 2018

116,553 — Arno Honstetter, an individual, Plaintiff/Appellee, vs. National Reining Horse Association, an Oklahoma Corporation, Defendant/Appellant. Defendant/Appellant, National Reining Horse Association (NRHA), appeals from the trial court's grant of a temporary injunction to Plaintiff/Appellee, Arno Honstetter, in his action against NRHA for a temporary injunction of his suspension. In 2016, Plaintiff participated in an NRHA Hearing, where he admitted to his alleged horse abuse. The Hearing Committee then sentenced Plaintiff to suspension, probation, and a fine. He rightfully appealed, but they affirmed their decision and his punishment. He then filed suit alleging the Committee failed to be fair, reasonable, and impartial. We find that they upheld these values and he consented to their complete governance as a NRHA member. Furthermore, we find that this governance is subverted by the granted injunction. Upon review, we hold that the trial court erred in granting a temporary injunction to Plaintiff. Consequently, we reverse. REVERSED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

Friday, June 15, 2018

115,716 — State of Oklahoma, ex rel. John D. Doak, Insurance Commissioner, Plaintiff/Appellee, vs. Red Rock Insurance Company, a licensed insurer in the State of Oklahoma, Respondent/Appellee, and The Bankers Bank, Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Appellant, The Bankers Bank, appeals from the trial court's order denying Appellant's proofs of claim in this receivership proceeding to liquidate Respon-

dent, Red Rock Insurance Company. Insurance Commissioner John D. Doak is the receiver. At issue is the interpretation of an insurance contract (Policy) issued by Red Rock. Appellant filed the proofs of claim seeking coverage for litigation costs associated with defending an action in Kansas. The trial court denied Appellant's proofs of claim, holding the Policy's "professional services" coverage did not apply to the allegations set forth in the Kansas litigation. We conclude the trial court's judgment is neither against the clear weight of the evidence nor contrary to law or established principles of equity. We further hold, with an exception not relevant to the decision, that the trial court's detailed findings of fact and conclusions of law adequately explain the decision. AFFIRMED UNDER RULE 1.202 (d). Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

117,021 — Natasha Vanpatten, an individual, Plaintiff/Appellant, vs. Thomas A. Johnston, Defendant/Appellees, and Dale & Lee's Service, Inc., Defendant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Plaintiff/Appellant, Natasha VanPatten, appeals from the trial court's grant of summary judgment to Defendants/Appellees, Thomas A. Johnston, Jr. and Betty J. Johnston, in this premises liability action. In May 2018, Plaintiff slipped and fell while buying hair products at a store she frequents regularly. The owners contracted Dale & Lee's Service to repair plumbing issues. The repair resulted in a grey "mush" in part of the parking lot. Plaintiff noticed the "mush" while exiting her car but neglected to move spots or avoid it. She walked through the mush, made multiple purchases and returned to her car, where she slipped and fell. We find Defendants owed Plaintiff no duty to warn of open and obvious hazards. The trial court correctly granted summary judgment. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 2)
Wednesday, June 6, 2018

116,362 — Bayview Loan Servicing, LLC, Plaintiff/Appellee, vs. Connie Smith, Defendant/Appellant, and Spouse of Connie Smith, if married; John Doe, as Occupant of the Premises; Jane Doe, as Occupant of the Premises; Wilserv Credit Union; and Oklahoma Central Credit Union f/k/a Wilserv Credit Union, Defendants. Appeal from an order of the District Court of Wagoner County, Hon. Dennis Shook, Trial Judge, granting summary judgment in favor of Bayview Loan Servicing, LLC, in this mortgage foreclosure action. The issue presented is whether the trial court erred in concluding Bayview was entitled to judgment as a matter of law. SunTrust alleged in its petition that the unpaid principal balance was $85,948.84. SunTrust and Bayview both asserted no payments were made since at least April 1, 2013. However, Defendant claimed otherwise, and Bayview's evidence shows otherwise. The figure listed as the amount of indebtedness in the motion for summary judgment and the figure the trial court ultimately found as the amount of indebtedness was $83,040.59. Although the trial court's order states as an uncontroverted fact that no installment payments due April 1, 2013, and after have been made, under the evidence of record, Defendant paid on the Note after that time. Clearly, material issues of fact remain in dispute about payments made on the Note and Bayview's role in refusing information about the loan modification agreement. Factual disputes preclude summary judgment, requiring reversal of the trial court's order. The decision of the trial court is reversed and the case is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J.; and Fischer, J., concur.

Thursday, June 7, 2018

116,475 — Donna Cadiz, Plaintiff/Appellant, vs. City of Woodward, Defendant/Appellee. Appeal from an order of the District Court of Woodward County, Hon. Justin P. Eilers, Trial Judge, granting Defendant's motion for summary judgment. Plaintiff claims that she "sat down on a park bench at Rotary Park in Woodward, Oklahoma when the park bench collapsed causing [her] to fall on the concrete area by the park bench." Plaintiff alleges that the park bench "was in a defective and dangerous condition" and that Defendant "had a nondelegable duty to maintain its park benches in a reasonably safe condition for the public including the park bench that collapsed when [she] sat down." After a hearing, the trial court granted "Defendant's [m]otion for [s]ummary [j]udgment to the extent based on the lack of admissible evidence supporting a finding that Defendant was on actual or constructive notice of a defect in the subject park bench." The parties agreed that Defendant had no actual notice of any unsafe condition in the bench. Examining the record *de novo*, we come to the same conclusion as the trial court, that Plaintiff has

failed to present material raising as a disputed fact the existence of the bench's defective condition for a length of time and under circumstances sufficient to trigger an inference of constructive notice. We agree with the trial court that there is no evidence in the record from which a reasonable person could infer Defendant had constructive notice of a problem. Without a factual dispute as to constructive notice, there can be no breach of duty, and Plaintiff's negligence claim cannot proceed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Wednesday, June 13, 2018

115,911 — In the Matter of A.H. and S.H., Deprived Children: Kimberly Houtz, Appellant, vs. State of Oklahoma, Appellee. Appeal from orders of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge, following a jury verdict to terminate Mother's parental rights to her minor children, AH and SH. We are asked to review whether the State of Oklahoma proved by clear and convincing evidence that Mother has a medical condition rendering her incapable of caring for AH and SH and that AH has been in foster care for 15 of the most recent 22 months. We answer both questions in the affirmative and affirm the trial court's decision terminating Mother's parental rights to both children. We must, however, vacate in part the order terminating Mother's parental rights to SH because it improperly recites that the jury found her parental rights to SH should be terminated because SH had been in foster care for 15 of the last 22 months. State has shown by clear and convincing evidence that Mother's parental rights to AH and SH should be terminated pursuant 10A O.S. Supp. 2013 § 1-4-904(B)(13), and to AH pursuant to 10A O.S. Supp. 2013 § 1-4-904(B)(15). It was error for the trial court to terminate Mother's parental rights to SH pursuant to 10A O.S. Supp. 2013 § 1-4-904(B)(15). Accordingly, we affirm in part, reverse in part, and remand with directions to correct the order. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Friday, June 15, 2018

115,314 — State of Oklahoma, ex rel., David W. Prater, District Attorney of the Seventh Prosecutorial District, Plaintiff/Appellant, vs. One Hundred Nineteen Thousand Eight Hundred Twenty & No 100ths Dollars ($119,820.00) in U.S. Currency, Defendant, Quoclong Da Ngo, Claimant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Trial Judge. Plaintiff/Appellant State of Oklahoma (State) appeals from a June 3, 2016 order entering judgment in favor of Claimant/Appellant Quoclong Da Ngo (Claimant) restoring $119,820.00 in U.S. currency (Defendant Currency). State argues that the trial court erred in determining that Claimant had standing, that State did not present facts to establish a nexus between the Defendant Currency and a violation of the Uniform Controlled Dangerous Substance Act. AFFIRMED UNDER RULE 1.202(b) and (d). Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

115,987 — David Paul English and A.E., Plaintiffs/Appellees, vs. B.S., Defendant/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jeff Virgin, Judge. Defendant/Appellant B.S. (B.S.) appeals from a "Summary Order" granting the Motion to Clarify Order of Protection filed by Plaintiffs/Appellees David Paul English (Father) and his daughter A.E. (A.E.). The court explicitly noted that it was not adding any language to the previously entered Order of Protection (VPO) and, instead, was interpreting the VPO as prohibiting B.S. from attending events that B.S. knows A.E. will also be attending. Because the VPO provided that B.S. was to have no contact with A.E., we reject B.S.'s claim that the Summary Order was an improper modification of the VPO. We also find the Summary Order does not violate B.S.'s constitutional rights to free assembly and to an education. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,569 — Nationstar Mortgage, LLC, Plaintiff/Appellee, vs. Kathalene G. Terrell, Defendant/Appellant. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Mike Norman, Judge. Defendant/Appellant Kathalene G. Terrell (Borrower) appeals from a summary judgment granted to Plaintiff/Appellee Nationstar Mortgage, LLC (Mortgagee) in Mortgagee's action to foreclose its mortgage on certain real property owned by Borrower. The undisputed evidence shows Borrower's post-default payments were not sufficient to reinstate the loan. Further, we find there was no evidence to support an inference that Mortgagee denied Borrower's request for

an alternate repayment plan because of Borrower's disability. Accordingly, Mortgagee was entitled to summary judgment on its foreclosure claim and Borrower's counterclaim for discriminatory housing practices as a matter of law. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Tuesday, June 5, 2018

116,387 — Craig Hodgens and Home Rescuers, LLC, Plaintiffs/Appellants, vs. Sudawan McFall, Trustee of The William C. McFall Revocable Lifetime Trust Dated April 25, 2007, Defendant, Robert F. Morgin, Jr., and Craig Brown, Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. Plaintiffs Craig Hodgens and Home Rescuers, LLC, appeal two district court orders, filed April 17 and August 22, 2017. The first order awarded an attorney's fee as a sanction in favor of Defendants Robert F. Morgin, Jr. and Craig Brown (Trust Attorneys), while the second order denied Plaintiffs' request to vacate an earlier default judgment entered against them. Based on our review of the facts and applicable law, the April 17, 2017, order dismissing Plaintiffs' petition and March 22, 2017, order granting sanctions are vacated. VACATED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,407 — Cindy Walker, Petitioner/Appellant/Counter Appellee, vs. Danny Walker, Respondent/Appellee/Counter Appellant. Appeal from an Order of the District Court of Choctaw County, Hon. Kenneth R. Farley, Trial Judge. Both parties appeal the trial court's September 1, 2016, Decree of Dissolution of Marriage. Based on our review of the facts and applicable law, we find no errors of law or abuse of discretion. We affirm the Decree under review. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, June 6, 2018

115,531 — Cecil Watkins, an individual, and Callie Watkins, an individual, Plaintiffs/Appellants, v. Solid State Controls, Inc., an Oklahoma corporation; and Global Production Solutions, Inc., an Oklahoma corporation, Defendants/ Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Thad Balkman, Trial Judge. Cecil Watkins and Callie Watkins appeal an order denying their motion for new trial. Based upon our review of the facts and applicable law, we reverse and remand for further proceedings consistent with this opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,980 — Manuel Alfonso Diaz, IV, Petitioner/Appellant, v. Nancy A. Diaz, Respondent/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. J. Anthony Miller, Trial Judge, finding an implied agreement between the parties to hold property as though married and ordering the division of Husband's 401(k). Husband testified the parties never discussed sharing the 401(k) as community property, noting also that the parties did not live together for several years while he worked in various other states. Wife believed there was an implied agreement to hold all their property as if married, noting they held everything jointly and filed joint tax returns. The trial court ultimately found the parties had an implied agreement to hold property as if married. Although the evidence in this case was conflicting, the trial court's conclusions are supported by the record. The trial court's order is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Monday, June 11, 2018

116,379 — Jean B. McGill Exemption Trust, in the right of Noble Investments, Inc., an Oklahoma corporation, Plaintiff/Appellant, v. Susie McRight and Mike McRight, Defendants/Appellees. Appeal from the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. The allegations set forth in the petition filed in this case were previously made in a prior action involving the same parties. The prior action resulted in an opinion of this Court in which we affirmed an award of summary judgment against Plaintiff. In the present action, Plainfiff is seeking to re-assert and re-litigate the same cause of action adjudicated in the prior action, and we therefore conclude the trial court propertly granted Defendants' motion to dismiss the present action on the basis of claim preclusion. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Wednesday, June 13, 2018

116,285 (Companion with Case No., 116,284) — Continental Resources, Inc., Appellant, v. Fairfield Mineral Company, LLC, The Corporation Commission of The State of Oklahoma, Composed of The Honorable Dana L. Murphy, Chairman, The Honorable J. Todd Hiett, Vice-Chairman, and The Honorable Bob Anthony, Appellees. Appeal from an Order of The Oklahoma Corporation Commission, Oklahoma County. Continental Resources, Inc. (Continental), the applicant before the Oklahoma Corporation Commission (OCC) appeals the OCC's Order entered on the application. Fairfield Mineral Company, L.L.C. (Fairfield) protested Continental's application and is an appellee here along with the OCC. This appeal concerns the interpretation of the Oklahoma 2011 Shale Reservoir Development Act, now known as the Oklahoma Extended Horizontal Well Development Act. This appeal presents the same issues as the companion appeal, and we reach the same conclusion. Therefore, this Court holds that the OCC did not err in denying Continental's pooling application to aggregate formations for purposes of election and relinquishment. The Order of the OCC is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., concurs, and Wiseman, J. (sitting by designation), concurs in result.

116,284 (Companion with Case No. 116,285) — Continental Resources, Inc., Appellant, v. Fairfield Mineral Company, LLC, The Corporation Commission of The State of Oklahoma, Composed of The Honorable Dana L. Murphy, Chairman, The Honorable J Todd Hiett, Vice-Chairman, and The Honorable Bob Anthony, Appellees. Appeal from an Order of the Oklahoma Corporation Commission, Oklahoma County. Continental Resources, Inc. (Continental), the applicant before the Oklahoma Corporation Commission (OCC) appeals the OCC's Order entered on the application. Fairfield Mineral Company, L.L.C. (Fairfield) protested Continental's application and is an appellee here along with the OCC. This is an action involving application and interpretation of the 2011 Shale Reservoir Development Act (SRDA), as amended prior to 2017. Continental drilled the Ritter well as a multiunit horizontal well. The well is targeted to a single formation and evidence demonstrated that two additional formations would qualify as an "associated common source of supply (ACSS)." There are in total four shale formations involved in this proceeding. The evidence demonstrated that the four formations were separately designated units and that Continental treated them as such in its application and planning. Continental seeks to aggregate the four shale formations so as to require an election on the Ritter well or relinquishment of rights to drill in all four shale formations. The OCC denied the request and entered an Order which pooled the targeted formation and its ACSS and made separate provisions for the other formations. This Court concludes that the OCC's denial was in accord with general pooling law principles applicable at the time of the decision. In addition, this Court concludes that SRDA limits the number of formations to be included in a shale formation pooling to "affected units." Here, the evidence demonstrated that only the Woodford and its ACSS formations are "affected units." Therefore, the OCC reached the correct result in its application of SRDA. The decision of the Oklahoma Corporation Commission is affirmed. This Court recognizes that the Legislature has enacted substantial amendments to the statutes under examination here. This Opinion is limited to the facts of this case. This Court expresses no views whatsoever about the meaning and effect of the amendments to the statutes regarding the facts of this case. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., and Wiseman, J. (sitting by designation), concur.

Thursday, June 14, 2018

115,671 — In the Matter of the Termination of The Orval E. Cowan Revocable Living Trust, In the Matter of the Termination of The Geraldine B. Cowan Family Trust a/k/a The Geraldine B. Cowan Revocable Living Trust, In the Matter of the Estate of Orval E. Cowan, Deceased, T. Craig Cowan and Marcella Cowan, Appellants, v. Mark Cowan, Appellee. Appeal from an Order of the District Court of Blaine County, Hon. Paul K. Woodward, Trial Judge. This is a multiple set of appeals involving a dispute among siblings about how their mother's (Geraldine B. Cowan, "Geraldine") trust was managed by their father, Orval E. Cowan ("Orval") after Geraldine died. The trial court's judgment includes disposition of all the appealed cases. Orval and Geraldine Cowan created trusts during their lifetime. These trusts were designed to minimize estate taxes and to pass specific real property to specific children. Geraldine died first and Orval succeeded her as trustee of her Trust. In his capacity as trustee, Orval sold the two tracts

involved here. One that was designated to go to Mark Cowan was sold to Craig Cowan. The other that was designated to go to five children was sold to Rodney Cohen. The trial court ruled that the prices paid for the two tracts were not fair to the Trust. The evidence pertaining to Orval's right to sell, his actions as trustee regarding tax allocations, and the fairness of the consideration was in sharp conflict. Although Orval's powers as trustee included a power of sale, nevertheless he was a fiduciary and not an independent owner of the property sold. As a fiduciary, Orval had the obligation to obtain a fair price for the property he sold and the trial court received evidence showing he did not do so. After review, this Court finds that the trial court's judgment of rescission based upon the unfairness of the consideration for the sales is not against the clear weight of the evidence. Therefore, the judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,385 — Gordon Dorcey Gilstrap, Buddie Paul Gilstrap, Terry D. Harvey, Danna Fears, Virginia L. Smith, Darlene Blenkers, Joseph Abraham Brodsky, Earl Dean Graham, Faye Graham, Iris B. Vaughan, Rob McDonald and Phillip D. McDonald, Plaintiffs/Appellants, v. Jeremy Hawkins; Rebecca Lindsey; Shelly Denise Baum; Robert Darryl Miller; Cheryl Lanise Miller; Forrest David Dennis; Mary Lee Vardas; Steve Vardas; Lonnie Chrismon, Trustee of the Trust created under the Last Will and Testament of Pansy Chrismon s/p/a Pansy Viola Chrismon, deceased; Lonnie Chrismon; Sharon Newberry; Gary Chrismon; Sheree Taylor; and the Estate of Virgil Guy Kennedy, deceased, Defendants/Appellees. Appeal from the District Court of Stephens County, Hon. G. Brent Russell, Trial Judge. Plaintiffs filed this quiet title action in 2015. The issue presented on appeal is whether certain language found in a deed is effective as a reservation of a royalty interest in favor of Defendants. We conclude that within the four corners of the deed, the intent to reserve the specified interest is unambiguous and clearly expressed. Therefore, we affirm the trial court's order reaching this same conclusion. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Friday, June 15, 2018

116,453 — Richard Lynn Dopp, Plaintiff/Appellant, vs. Mark Knutson, et al., Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

Tuesday, June 19, 2018

116,033 — James Blake Wilson, Plaintiff/Appellant, vs. Steven C. Anagnost, M.D., Defendant/Appellee, and TOS d/b/a The Spine and Orthopedic Institute, AHS Hillcrest Medical Center LLC, and Hillcrest Healthcare System, an Oklahoma Corporation, Defendants. Appellant's Petition for Rehearing of Court's Order filed May 4, 2018, and Brief in Support, filed May 21, 2018, is *DENIED*.

115,915 — TSG Tulsa Retail, L.L.C., Plaintiff/Appellant, vs. Independent School District #9 of Tulsa County, Oklahoma, Defendant/Appellee. Appellant's Petition for Rehearing, filed May 10, 2018, is *DENIED*. Appellee's Petition for Rehearing and Brief in Support, filed May 10, 2018, is *DENIED*.

(Division No. 2)
Monday, June 11, 2018

114,498 — Adam Factor, Plaintiff/Appellee, vs. Western Express, Inc. and Thomas Schneider, Defendants/Appellees, and YRC, Inc., d/b/a YRC Freight, Old Republic Insurance Company, Yellow Transporation, Inc., f/k/a Yellow Freight Systems, Inc., James Crittenden, Mako Lines, Inc., Companion Property & Casualty Insurance Co., Peoples Insurance, the Estate of Lubomir Tsisyk, National Casualty Company, Western Freight Carrier, Inc., Granite State Insurance Company, Acord Insurance Company, Augustin Sahagun, Mark McKinley, McKinley Ranches, Colorado Casualty Insurance Company, Jack Alexander, Gorgis H. Ori, Fischer, Trucking, Inc., Harco National Insurance Company, Jeff Kramer, Cristian Transport, Inc., Progressive Northern Insurance Company, and Jose Vaszuez, Defendants, and Cristian Transport, Inc., Third-Party Plaintiff, and Kerry Thomas, Transportation Logistics Corporation International d/b/a Wil.Trans, New Prime, Inc. d/b/a Prime Inc., and Payroll Plus Corporation, Third-Party Defendants. Appellee's Petition for Rehearing is hereby *DENIED*.

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