THE OKLAHOMA BAR
Journal
Volume 89 — No. 25 — 9/22/2018

Court Issue

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THE OKLAHOMA BAR
Journal

Volume 89 – No. 25 – 9/22/2018

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

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

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OKLAHOMA BAR ASSOCIATION

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2018 OK 63

STATE OF OKLAHOMA EX REL. OKLAHOMA BAR ASSOCIATION, Complainant, v. ERNIE BEDFORD, Respondent.

SCBD #6677. September 10, 2018
As Corrected September 11, 2018

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 The State of Oklahoma, ex rel. Oklahoma Bar Association ("OBA") has presented the Court with an application to approve the resignation of Ernie Bedford ("Respondent"), from membership in the OBA. On August 16, 2018, Respondent filed his Affidavit of Resignation Pending Disciplinary Proceedings as set forth in Rule 8.1 of the Rules Governing Disciplinary Proceedings ("RGDP").[1] Therein, Respondent requested that he be allowed to resign his membership in the OBA and relinquish his right to practice law. The OBA filed its Application for Order Approving Resignation simultaneously with the affidavit. The application and accompanying affidavit reflect the following:

(A) Respondent's affidavit of resignation pending disciplinary proceedings was freely and voluntarily executed; the affidavit was not secured by subjecting Respondent to duress or coercion; and Respondent was aware of the consequences associated with submission of his resignation.

(B) Respondent acknowledged that his resignation is subject to approval by the Oklahoma Supreme Court. Notwithstanding, Respondent agreed to conduct himself as if the resignation was immediate, and he has surrendered his membership card to the OBA.

(C) Respondent attested to having personal knowledge of a grievance received by the OBA. Respondent's affidavit expressed his understanding that the OBA had initiated an investigation for the following matter:

DC 18-85 — Respondent is alleged to have improperly utilized a notary public stamp and seal issued to L.E.M. to notarize (1) a release of mortgage filed with the Tulsa County Clerk on or about August 15, 2017; and (2) seven client verifications associated with pleadings filed with the Tulsa County Court Clerk;[2]

(D) Respondent has waived any and all right to contest the OBA allegations created by the pending grievance investigations.

(E) Respondent states that he has familiarized himself with RGDP Rule 9.1, and has agreed to comply with the requirements therein within twenty (20) days following approval of his tendered resignation.[3]

(F) Respondent recognizes that he may only be reinstated to the practice of law after full compliance with the terms and procedures outlined by RGDP Rule 11. Respondent has also acknowledged that no application for reinstatement may be presented prior to five (5) years from the effective date of this order approving his resignation.

(G) Respondent's official roster address as shown from the affidavit and OBA records is Ernie Bedford, OBA # 651, P.O. Box 100, Addison, Texas 75001-0100.

(H) The OBA has not asserted that Respondent's conduct resulted in payment of monies from the Client Security Fund. Nevertheless, should the OBA receive, approve and pay any claims in the future, Respondent has agreed to reimburse the OBA for any such claims. Any and all reimbursements shall be paid to the OBA, prior to filing an application for reinstatement, including the principal amounts and applicable statutory interest expended by the Client Security Fund.

¶2 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the voluntary resignation of Ernie Bedford, pending disciplinary proceedings, should be approved and shall be effective upon the filing of this order in

the Office of the Clerk of the Oklahoma Supreme Court.

¶3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the name of Ernie Bedford shall be stricken from the roll of attorneys. Because resignation pending disciplinary proceedings is tantamount to disbarment, the Respondent may not make application for reinstatement prior to the expiration of five (5) years from the date of this order.

¶4 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Respondent shall comply with RGDP Rule 9.1 by notifying each of his clients having pending legal business of the need to promptly retain new legal counsel; filing a formal withdrawal from all cases pending before any tribunal; submitting the required affidavits attesting to compliance with Rule 9.1, together with a list of all clients notified; and presenting this Court with a list of any court or administrative body where the attorney was admitted to practice.

¶5 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that repayment of any sums expended from the Client Security Fund for monies paid to former clients of Respondent shall be a condition satisfied prior to any future reinstatement.

¶6 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any costs associated with the OBA's investigation and this proceeding have been waived.

¶7 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 10th day of September, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Reif, J., not participating.

1. 5 O.S.2011, ch. 1, app. 1-A.

2. Although Respondent alleges he was given permission to use the notary stamp/seal, L.E.M. was admittedly not present at the time the documents were executed. Respondent apparently had previously been a notary public; however his own commission had expired when the transactions took place.

3. RGDP Rule 9.1 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. (Emphasis added).

2018 OK 64

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Emma Barlie Arnett, Respondent.

SCBD No. 6676. September 10, 2018

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the Criminal Information and Judgment and Sentence on a plea of guilty. Emma Barlie Arnett entered a plea of guilty to Manslaughter 1st Degree, in violation of 21 O.S.2011, § 711, which occurred on August 27, 2017. Arnett was sentenced to twelve years in the custody of the Department of Corrections with the first four years to be served in custody and the last eight years to be suspended with supervision under the division of Probation and Parole.

¶2 Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." Having received certified copies of these papers and orders, this Court orders that Emma Barlie Arnett is immediately suspended from the practice of law. Emma Barlie Arnett is directed to show cause, if any, no later than **September 21, 2018**, why this order of interim suspension should be set aside. *See* RGDP Rule 7.3. The OBA has until **October 1, 2018**, to respond.

¶3 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon

which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Emma Barlie Arnett has until **October 16, 2018**, to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until **October 31, 2018,** to respond.

¶4 DONE BY ORDER OF THE SUPREME COURT on September 10, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 65

City of Tulsa and Own Risk #10435, Petitioner v. Jennifer Jean Hodge and the Workers' Compensation Court of Existing Claims, Respondents.

No. 113,571. September 11, 2018

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I

¶0 Petitioner/Employer sought review of the three-judge panel of the Workers' Compensation Court of Existing Claims which upheld the trial court's determination that Jennifer Hodge, Respondent/employee suffered a change of condition for the worse to her left leg/knee when she was injured in a medical facility where she was receiving medical treatment to a previously adjudicated body part. Employer urged there was insufficient evidence to support the trial court's decision because: (1) any injury arose from an intervening negligent act, and (2) there was no medical evidence to support a worsening of condition to employee's left leg/knee. The three-judge panel disagreed with Employer and affirmed the trial court. Employer then filed a Petition for Review and the Court of Civil Appeals vacated the decision of the three-judge panel. Ms. Hodge filed a Petition for Certiorari which was granted. We hold there is competent evidence to support the decisions from the trial court and the three-judge panel. *Williams Companies, Inc. v. Dunkelgod*, 2012 OK 96, 295 P.3d 1107.

COURT OF CIVIL APPEALS OPINION VACATED; ORDER OF THREE-JUDGE PANEL OF THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS AFFIRMED

Robert L. Briggs, Bobby Briggs Law Firm, 1722 S. Carson Ave., Suite A, Tulsa, Oklahoma 74119 and

Chad R. Whitten, The Whitten Law Firm, 9422 S. Elwood, Suite 100, Jenks, Oklahoma 74037-2317, for Petitioner,

Brandy L. Shores-Inman, Latham, Wagner, Steele & Lehman, P.C., 10441 S. Regal Blvd, Suite 200, Tulsa, Oklahoma 74133

Jordan S. Ensley, Latham, Wagner, Steele & Lehman, P.C., 10441 S. Regal Blvd, Suite 200, Tulsa, Oklahoma, 74133, for Respondent.

OPINION

EDMONDSON, J.:

FACTS AND PROCEDURAL HISTORY

¶1 In 2010 the Workers' Compensation Court held that Ms. Hodge sustained an accidental injury on September 15, 2008 in the course of her employment. The trial court awarded her benefits for injuries to the left leg (knee), cervical spine, left shoulder, and whole body. The matter currently before this Court arises out of a subsequent claim filed by Ms. Hodge seeking additional benefits alleging she suffered a change of condition for the worse to the left leg (knee), cervical spine, left shoulder and whole body.

¶2 On February 20, 2012 Ms. Hodge was injured at a medical facility following a steroid epidural injection to the cervical spine. After the procedure, Ms. Hodge was still sedated and not fully awake when the staff placed her in a wheelchair to transport her to the recovery room. The wheelchair had no footrests. As Ms. Hodge was pushed down the hall, her feet drug on the tile floor, her knees went underneath the wheelchair causing it to suddenly stop and throwing her forward. Ms. Hodge testified: "that's what kind of woke me up and made me come to."[1] A physician reported that Ms. Hodge sustained a severe twisting of both her left and right knees as a result of this accident.[2] Ms. Hodge testified she was unable to stand immediately after the injury due to the swelling and pain in the left knee and experienced a type of pain that she did not have before the procedure.

¶3 Ms. Hodge sought additional medical treatment for the new injuries to her left leg.

Her physician opined that "the major cause of this patient's consequential left knee worsening and right knee injury is directly as a result of the injury she sustained on February 21, 2012 while undergoing an epidural steroid injection in the course of her medical maintenance regarding her lumber spine injury of September 15, 2008."[3]

¶4 The issues before this Court arise from an order entered on June 17, 2014 by the trial court determining Ms. Hodge sustained a change in physical condition for the worse to the left leg (knee) as a consequence of a fall that occurred following an epidural steroid injection on her neck during the continuing medical maintenance.[4] The court found that she had swelling and more limited range of motion to the left knee. Employer was ordered to provide medical treatment to Ms. Hodge as may be reasonable and necessary after the injury to her left leg (knee). The trial court denied her request for a change of condition for the worse to the cervical spine, left shoulder and whole body.

¶5 Employer filed a Petition for Review arguing: (1) there was insufficient medical evidence to support a change of condition for the worse to the left knee, and (2) any injury to the left knee resulted from an intervening cause for which employer was not legally responsible. Ms. Hodge filed a cross-appeal asserting that the evidence supported a finding that she suffered a change of condition for the worse to the left shoulder, cervical spine and sleep disorder.

¶6 The three-judge panel of the Workers' Compensation Court of Existing Claims conducted a hearing and issued an order affirming the decision of the trial court. Employer then filed a Petition in Error. The Court of Civil Appeals vacated the order issued by the three-judge panel and with respect to the left leg injury found:

> This is a new injury, possibly a tort, not a compensable change of condition for the worse. The City of Tulsa should have no responsibility for a wheelchair accident that occurred at a medical facility due to someone's inattention or carelessness. The fact that Claimant was at the medical facility to receive treatment for the adjudicated spinal injury does not alter the fact that a wheelchair accident was not a legitimate consequence of the work-related injury 3 1/2 years earlier.[5]

¶7 Ms. Hodge filed a Petition for Certiorari before this Court asserting that COCA decided a question of substance in a way not in accord with applicable decisions of this Court. We agree and vacate the Court of Civil Appeals opinion, and affirm the three judge panel's Order on Appeal Affirming the Decision of the Trial Court.

STANDARD OF REVIEW

¶8 The Court of Civil Appeals indicated the "any competent standard of review" was applied to this workers' compensation case. *Williams v. Dunkelgod*, 2012 OK 96, 295 P.3d 1107. We have explained that "competent evidence is that which tends to prove facts essential to the decision of the court." *Oklahoma Gas & Elec. Co. v. Black*, 1995 OK 38, ¶ 6, 894 P.2d 1105, 1107, citing, *Williams v. Vickers, Inc*., 1990 OK 108 ¶ 10, 799 P.2d 621, 624. When applying this standard, the duty of the appellate court in its review of the decision from the three-judge panel "is simply to canvass the facts, not with an object of weighing conflicting proof to determine where the preponderance lies, but only for the purpose of ascertaining whether those facts support the tribunal's decision." *Id.* That standard applies to this case.

ANALYSIS

Review of Evidence: Any Competent Evidence Standard

¶9 The Court of Civil Appeals found the any competent evidence standard of review applied to this matter. We have clearly stated that "competent evidence is that which tends to prove facts essential to the decision of the court." *Black*, 1995 OK 38, ¶ 6, 894 P.2d 1105, 1107. Likewise, we have been equally clear that when evaluating the decision from the three-judge panel, this standard guides the reviewing court to simply canvass the facts and ascertain whether the facts support the tribunal's decision. *Id.* When applying this standard, the reviewing court **does not** weigh conflicting proof to determine where the preponderance lies, but simply determines if the facts in the record support the conclusion reached by the trial court and three-judge panel. *Id.*

¶10 Next we will review the evidence in the record and determine if the facts tend to prove the trial court's findings as follows:

> THAT subsequent to that order, claimant sustained a change in physical condition for the worse to the LEFT LEG (KNEE) and claimant is now in need of further medical treatment, care and attention.
>
> -3-
>
> THAT the change of condition for the worse to the LEFT LEG (KNEE) occurred as a consequence of a fall following an epidural steroid injection on her NECK during the continuing medical maintenance. The claimant has swelling and more limited range of motion.

¶11 Ms. Hodge offered detailed testimony regarding the condition of her left knee prior to the February 2012 accident and the changes in the condition of her knee following the twisting injury. She testified about her feet dragging and being thrown forward causing immediate pain. In addition, the report from Dr. May, the treating physician, discusses specific findings that after the wheelchair accident Ms. Hodge suffered "consequential worsening of her left knee injury as evidenced by increased pain, swelling and weakness of the knee."[6] Dr. May opined "that the major cause of this patient's consequential left knee worsening and right knee injury is directly as a result of the injury she sustained on February 21, 2012 while undergoing an epidural steroid injection in the course of her medical maintenance regarding her lumbar spine injury of September 15, 2008."[7]

¶12 Employer conducted cross-examination of Ms. Hodge but did not proffer any witness at the hearing before the trial court. Employer's evidence consisted of the independent medical examination done by William R. Gillock, M.D., and other medical records. Dr. Gillock concluded in his report that there was no objective medical evidence of a physical change of condition for the worse.[8]

¶13 There is undisputed evidence that Ms. Hodge suffered some type of twisting to her left knee as a result of the wheelchair accident while receiving treatment for her prior work-related injury. Dr. May noted that following the wheelchair incident, "the claimant has swelling and more limited range of motion."[9] Dr. May's examination also revealed that Ms. Hodge had objective findings of swelling and weakness to the left knee. Further, Dr. May unequivocally opined that Ms. Hodge sustained a change in physical condition for the worse to the left leg (knee) and that such change "occurred as a consequence of a fall following an epidural steroid injection on her NECK during the continuing medical maintenance". The decision of the trial court and three-judge panel *must* be upheld if the record contains facts to support the conclusions reflected in the decision. We hold that the record before us contains abundant evidence to support the decision of the three-judge panel on review of the trial court's order.

Consequential Injury Caused by Intervening Carelessness of Medical Provider

¶14 Employer argued before the three-judge panel that the injury sustained by Ms. Hodge was not a consequential injury relating to her initial work-related injury, but rather was a separate intervening accident. The three-judge panel did not agree and affirmed the order from the trial court. Employer petitioned for a review of the panel's decision and the Court of Civil Appeals found that:

> This is a new injury, possibly a tort, not a compensable change of condition for the worse.

¶15 This conclusion by COCA and the Employer's argument that Ms. Hodge's injuries were the result of an intervening accident and not compensable is not in accord with our longstanding decisions in this area. It is well settled with respect to workers' compensation claims, an employer is liable for all legitimate consequences following an accident *including unskillfulness or error of judgment of a physician treating an injury. Booth & Flinn Ltd. v. Cook*, 1920 OK 320, ¶ 6, 193 P. 36, 38. An employee is entitled to recover for the full extent of the disability resulting from the work-related injury even where "the same has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician." *Barnsdall Refining Co. v. Ramsdall*, 1931 OK 258, ¶ 5, 299 P. 499, 501. More recently, this Court held an employee suffered a consequential injury arising out of and in the course of employment when his neck was injured during treatment for his previously adjudicated work-related injuries to the back and right knee. *Phillips v. Duke Manufacturing, Inc.*, 1999 OK 25, 980 P.2d 137. We explained at length:

> The claimant in the present case has suffered a new injury during the treatment of his original injury. The neck injury is a consequence of treatment for the original knee and back injury just as the complications

> from hernia surgery are a result of treatment for a hernia. The neck injury has caused a new disability which prevents the claimant from working. . . . *The neck injury was the result of an accident during treatment.* It is claimant's new disability which entitles him to temporary total disability benefits and the first injury does not preclude compensation for the second.

Phillips, 1999 OK 25, ¶ 12, 980 P.2d at 140.

¶16 The evidence in this record supports the conclusion that Ms. Hodge sustained a change in physical condition for the worse to her left knee and that such change occurred as a consequence of a fall during an epidural steroid injection on her neck during the continuing medical maintenance. Accordingly, we order the decision of the Court of Civil Appeals is vacated and the decision of the three-judge panel is affirmed.

CONCUR: GURICH, V.C.J., EDMONDSON, COLBERT, and REIF, JJ.

CONCUR BY REASON OF STARE DECISIS: KAUGER, J.

DISSENT: COMBS, C.J., WINCHESTER, WYRICK, and DARBY, JJ.

EDMONDSON, J.:

1. Transcript of Proceedings Before the Honorable Eric W. Quandt, June 5, 2014, *Jennifer Jean Hodge, Claimant vs. City of Tulsa, Respondent,* WCC No. 2008-13251J, Oklahoma Workers' Compensation Court of Existing Claims.

2. Record, pps. 176-178, Corrected Report of Anne S. May, M.D., Crestwood Clinic, P.C., 9-10-12, *Jennifer Jean Hodge, Claimant v. City of Tulsa, Respondent,* WCC No. 2008-13251J, Oklahoma Workers' Compensation Court of Existing Claims.

3. *Id.*

4. Order for Change of Condition and Authorizing Medical Treatment, *Jennifer Jean Hodge, Claimant v. City of Tulsa, Respondent,* WCC No. 2008-13251J, Oklahoma Workers' Compensation Court of Existing Claims.

5. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, Case No. 113,571, *City of Tulsa, Petitioners, vs. Jennifer Jean Hodge and The Workers' Compensation Court of Existing Claims, Respondents.*

6. Record, pps. 176 - 178, Corrected Report of Anne S. May, M.D., September 10, 2012, Case No. 113,571, *City of Tulsa and Own Risk #10435, Petitioners, vs. Jennifer Jean Hodge and the Workers' Compensation Court of Existing Claims, Respondents.*

7. *Id.*

8. Record, pps. 211- 218, Report of William R. Gillock, M.D., March 4, 2013, Case No. 113,571, *City of Tulsa and Own Risk #10435, Petitioners, vs. Jennifer Jean Hodge and the Workers' Compensation Court of Existing Claims, Respondents.*

9. Record, pps. 171- 172, Order for Change of Condition and Authorizing Medical Treatment, *Jennifer Jean Hodge, Claimant v. City of Tulsa, Respondent, City of Tulsa (Own Risk #10435), Ins. Carrier;* Court Number 2008-13251J, Workers' Compensation Court of Existing Claims, State of Oklahoma.

2018 OK 66

STATE OF OKLAHOMA, ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. BRIAN A. CURTHOYS, Respondent.

SCBD No. 6558. September 10, 2018

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 The State of Oklahoma, ex rel. Oklahoma Bar Association (Complainant) has presented this Court with an application to approve the resignation of Brian A. Curthoys, OBA No. 12630, (Respondent) from membership in the Oklahoma Bar Association. Respondent seeks to resign pending disciplinary proceedings and investigation into alleged misconduct, as provided in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A. Upon consideration of the Complainant's application and Respondent's affidavit in support of resignation, we find:

1. Respondent executed his resignation on July 1, 2018.

2. Respondent acted freely and voluntarily in tendering his resignation; he was not subject to coercion or duress, and was fully aware of the consequences of submitting his resignation.

3. Respondent acknowledged that the Office of the General Counsel of the Oklahoma Bar Association had received and was investigating grievances concerning representation of the following parties: (1) Ralph Mackey; (2) Fikes Center, Inc.; (3) David Dobson, Sharon Dobson and Fern Sunderland; (4) Drs. John and Honey Karr; (5) Mike and Jennifer Hoel: (6) William Paul Sommer; (7) Sawhorse Investments; (8) John and Carol Sanders; and (9) Charles and Lyanna Talley. The common gravamen of each of these grievances is that Respondent failed to safekeep client funds and property. In addition, grievances (2)-(6) averred that Respondent failed to properly represent the respective clients, while grievance (9) stated Respondent failed to diligently represent the clients. Respondent has waived the right to contest the allegations set forth in these grievances and in doing so relieves the Complainant from proving professional misconduct based on said allegations.

4. Respondent is aware that the allegations concerning the conduct specified in paragraph three above, if proven, would constitute violations of Rules 1.1, 1.2,1.3, 1.4, 1.15(a)(d), 8.1(a)(b), 8.3(a) and 8.4(a), (c) and (d) of the Oklahoma Rules of Professional Conduct, 5 O.S. 2011, Ch. 1, App. 3-A. Said conduct would also violate Rules 1.3 and 5.2 of the Oklahoma Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, and his oath as an attorney.

5. Respondent further acknowledges that as a result of his conduct the Client Security Fund may receive claims from his former clients. He agrees that should the Oklahoma Bar Association approve and pay such Client Security Fund claims, he will reimburse the fund the principal amount and the applicable statutory interest prior to filing any application for reinstatement.

6. Respondent recognizes and agrees he may not make application for reinstatement to membership in the Oklahoma Bar Association prior to the expiration of five years from the effective date of this Court's approval of his resignation; he acknowledges he may be reinstated to practice law only upon compliance with the conditions and procedures prescribed by Rule 11 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.

7. Respondent has agreed to comply with Rule 9.1 of the Rules Governing Disciplinary Proceeding, 5 O.S. 2011, Ch. 1, App. 1-A.

8. Respondent's resignation pending disciplinary proceedings is in compliance with Rule 8.1 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.

9. Respondent's name and address appears on the official roster maintained by the Oklahoma Bar Association as follows: Brian A. Curthoys, 8252 S. Harvard Ave., Tulsa, OK 74137.

10. Costs have been incurred by Complainant in this matter in the amount of $962.85 and Respondent has agreed to reimburse said costs. Respondent shall reimburse said costs within 180 days of the approval of his resignation.

11. Respondent's resignation should be approved.

12. This Order accepting respondent's resignation is to be effective as of July 2, 2018, the date the application for approval of his resignation was filed in the Court.

¶2 It is therefore **ORDERED** that Complainant's application is approved and Respondent's resignation is accepted and approved effective July 2, 2018.

¶3 It is further **ORDERED** that Respondent's name be stricken from the Roll of Attorneys and that he make no application for reinstatement to membership in the Oklahoma Bar Association prior to five years from July 2, 2018.

¶4 It is further **ORDERED** that Respondent comply with Rule 9.1 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A and shall reimburse the Complainant $962.85, the costs of investigating of the grievances set forth herein.

¶5 **DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10th DAY OF Sept., 2018**.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, REIF,

WYRICK, and DARBY, JJ.

NOT PARTICIPATING: GURICH, V.C.J.

2018 OK 67

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Colin Richard Barrett, Respondent.

SCBD No. 6656. September 11, 2018

ORDER IMPOSING FINAL DISCIPLINE OF SUSPENSION

¶1 This Court suspended the law license of the Respondent, Colin Richard Barrett, on May 30, 2017, for failure to pay 2017 membership dues to the Oklahoma Bar Association. The Respondent's name was stricken from the Oklahoma Bar Association membership rolls on June 11, 2018, for his failure to pay the 2017 membership dues.

¶2 On November 17, 2016, the Respondent entered a plea of guilty to a misdemeanor charge of Driving Under the Influence in Ala-

bama. Respondent received a suspended sentence of 180 days and was placed on probation for 24 months. The Oklahoma Bar Association filed rule 7 disciplinary proceedings against the Respondent on May 21, 2018, based on the 2016 Alabama conviction for Driving Under the Influence. The Proof of Service shows that the Notice of Guilty plea was originally mailed to the Respondent at his official roster address in Oklahoma and returned "Unable to Forward." The Notice was then sent by certified mail to the Respondent at an address in Alexander City, Alabama, and the certified mail card was returned signed by a "Susan Barrett."

¶3 On May 23, 2018, this Court issued a reverse show cause order asking the Respondent to show cause, no later than June 8, 2018, why he should not be immediately suspended from the practice of law. The Order was sent to the Respondent's official roster address in Oklahoma and returned "Unable to Forward." The order was then mailed to the address in Alexander City, Alabama, and was not returned.

¶4 To this date, the Respondent has never entered an appearance or responded to the notice or this Court's show cause order mailed to him. He is in complete default in these proceedings. "The integrity of the judicial system demands that lawyers, who are officers of the court, respect its authority." *State ex rel. Okla. Bar Ass'n v. Giger,* 2003 OK 61, ¶ 34, 72 P.3d 27, 38. A person who holds a bar license is required to promptly and adequately respond to allegations of misconduct when lawfully requested to do so. *State ex rel. Oklahoma Bar Ass'n v. Whitebrook*, 2010 OK 72, ¶ 23, 242 P.3d 517, 522. Lawyers who fail to answer formal charges of misconduct, and fail to appear and to participate in disciplinary proceedings, show disregard for this Court's authority and reveal "how little they value their license to practice law." *State ex rel. Oklahoma Bar Ass'n v. Haave*, 2012 OK 92, ¶ 15, 290 P.3d 747, 752. "Lawyers who fail to discharge these minimal burdens to protect their own interests cannot be expected or trusted to act to protect the interests of clients, the public and the legal profession." *Id.*

¶5 On June 25, 2018, the Oklahoma Bar Association filed a response to this Court's show cause order stating that Respondent had provided no legal basis as to why an order of interim suspension should not be issued, or why a final order of discipline should not be entered. The OBA further stated that apart from the Respondent's failure to pay his membership dues, the OBA had not discovered any evidence that would facially demonstrate Barrett's unfitness to practice law. The OBA asked the Court to enter such Orders as it deemed appropriate.

¶6 Rule 7.2 of the Rules Governing Disciplinary Procedure provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." 5 O.S.2011, ch. 1, app. 1-A (RGDP). In a Rule 7 summary disciplinary proceeding, this Court exercises exclusive original jurisdiction to carry out its nondelegable responsibility to discipline lawyers and to regulate the practice of law as may be necessary to safeguard the interests of the public, the judiciary, and the legal profession. *State ex rel. Oklahoma Bar Association v. Shofner*, 2002 OK 84, ¶ 5, 60 P.3d 1024, 1026. This Court considers de novo every aspect of a disciplinary inquiry. *State ex rel. Oklahoma Bar Association v. Livshee*, 1994 OK 12, ¶ 5, 870 P.2d 773.

¶7 In determining the final discipline to be imposed, we first find that the record reflects Respondent has received sufficient notice and opportunity to be heard in accord with due process established for disciplinary proceedings. *See State ex rel Oklahoma Bar Association v. Whitebook*, 2010 OK 72, ¶ 21, 242 P.3d 517, 522. Notice by mail to a lawyer's official roster address satisfies due process. *State ex rel. Oklahoma Bar Association v. Knight*, 2018 OK 52, ¶ 2, 421 P.3d 299, 301. We next find that Respondent's final conviction furnishes clear and convincing evidence that he committed the criminal act alleged against him.

¶8 To this date, Respondent has not paid his Bar membership dues. In this disciplinary proceeding, he has never responded or otherwise offered any explanation for his conduct. He has not requested a hearing, filed a brief, or submitted any evidence to support any mitigation of final discipline. Respondent's continued failure to pay his Bar membership dues even after his suspension, resulting in his name being stricken from the membership rolls, his complete failure to respond to these disciplinary proceedings against him, and his criminal conviction, combine to reflect adversely on the

Respondent's trustworthiness and fitness as a lawyer.

¶9 **IT IS THEREFORE ORDERED** that Respondent is hereby suspended from the practice of law in Oklahoma for six months. The suspension is effective from the date of this order until March 10, 2019. Respondent's failure to respond or defend has kept the costs of this proceeding at a minimum and, therefore, no costs are assessed to Respondent.

¶10 **IT IS FURTHER ORDERED** that the Clerk of this Court shall mail a copy of this order to the Respondent at his Official Roster Address and at his address in Alexander City, Alabama, and to the Office of the General Counsel of the Oklahoma Bar Association.

DONE IN CONFERENCE BY ORDER OF THE SUPREME COURT ON SEPTEMBER 10, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

¶11 Combs, C.J., Winchester, Edmondson, Colbert, Reif, Wyrick and Darby, JJ., concur;

¶12 Gurich, V.C.J. and Kauger, J., dissent.

2018 OK 68

TRINA L. ENGLES, Petitioner, v. MULTIPLE INJURY TRUST FUND and THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS, Respondents.

No. 114,833. September 18, 2018

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 On January 15, 2010, the Workers' Compensation trial court found that the petitioner, Trina L. Engles, was a "physically impaired person," and was permanently and totally disabled from a combination of her November 18, 1998, non-work related injury and her December 2, 2005, work related injury. Ultimately she was awarded benefits from the Multiple Injury Trust Fund based on the most recent Court of Civil Appeals decision.

THE OPINION OF THE COURT OF CIVIL APPEALS IS VACATED. CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THE VIEWS EXPRESSED IN THIS OPINION.

Gus A. Farrar, Tulsa, Oklahoma, for Petitioner.

Leah P. Keele, LATHAM, WAGNER, STEELE & LEHMAN, P.C., Tulsa, Oklahoma, for Respondents.

Winchester, J.

¶1 The issue before this Court is whether the claimant's adjudication of a preexisting nonwork related disability made simultaneously with adjudication of aggravating a preexisting work-related injury, could support an award of permanent and total disability.

FACTS AND PROCEDURE

¶2 Petitioner Trina Engles received temporary total disability benefits on August 4, 2006, for a December 2, 2005 injury. She had fallen backwards in a chair at work, which caused the injury. She filed her Form 3 about a month later. On January 15, 2010, Ms. Engles received permanent partial disability benefits for the neck injury. She had previously suffered a nonwork-related injury in 1998. That injury occurred from an electrocution and fall at her home. She had multiple back and neck surgeries as a result.

¶3 Ms. Engles filed for MITF benefits on February 14, 2011, citing a 1998 injury and the January 15, 2010 order. The trial court made a *Crumby* finding for a preexisting injury in that order. The trial court awarded her MITF benefits, recognizing her as permanently and totally disabled. Another division of the Court of Civil Appeals vacated the order, holding the court lacked jurisdiction because Ms. Engles was not a physically impaired person under the Workers' Compensation Act. The court remanded the case.

¶4 After remand, Ms. Engles sought to set her claim for trial to address medical treatment and a change of condition for the worse in January 2012. The trial court reopened the claim and found Ms. Engles had suffered a change of condition for the worse from its January 15, 2010 order. Ms. Engles' employer appealed to a three-judge panel, but then all parties entered into a compromise settlement of $6,300 on May 28, 2015, for Ms. Engles' claims to her head, neck, back, eyes, and all other body parts.

¶5 Ms. Engles again filed for MITF benefits, listing her compromise settlement as her most recent injury. She also listed her prior 2005 injury (and resulting 2010 order) and the 1998 non-work-related injury. MITF denied her

claim. The trial court found Ms. Engles not to be a physically impaired person under the law as it existed after her first 2005 injury nor before she entered into her compromise settlement. Ms. Engles filed a petition for review.

¶6 The Court of Civil Appeals reversed the Workers' Compensation Court of Existing Claims. That court first recognized Ms. Engles as a physically impaired person under the 2005 version of 85 O.S., § 172. It identified two separately adjudicated injuries, the 2010 PPD order (from the 2005 injury) and the 2015 compromise settlement. The court reasoned that because a compromise settlement is an adjudication as contemplated by the law, it represented a separate adjudication from 2010 order. The court relied upon *Multiple Injury Trust Fund v. McCauley*, 2015 OK 84, 374 P.3d 773, to dismiss the requirement of a subsequent adjudicated injury, and 85 O.S. Supp. 2005 § 172(E) (superseded Aug. 26, 2011) to hold that an employer's last claim for benefits could be reopened to give rise to MITF benefits. The court then addressed the trial court's decision that Ms. Engles was not permanently and totally disabled. The court identified no competent evidence to support the trial court's decision, reasoning that MITF's 2011 physician's report did not address Ms. Engles' change of condition and found that the physician's subsequent 2015 letter was not an admissible medical report because it failed to meet the requirements of a medical report under Rule 20. The court then remanded the case to the trial court to allow MITF to amend its medical report.

¶7 MITF filed a timely petition for certiorari, and it argues that this Court has never before addressed the conclusion and holding of the Court of Civil Appeals. It argues the holding is that a PTD benefit claimant against MITF may reopen an underlying case during the pendency of a claim against MITF, settle the reopened claim, and then use the settlement to later obtain a MITF award after another division of the Court of Civil Appeals ruled there was no jurisdiction for claimant's claim of benefits against MITF. MITF also argues the court did not follow this Court's jurisprudence, arguing it ignored the law-of-the-case doctrine. MITF claims the court did not correctly apply the statute, ignoring the Court's case law that a change of condition for the worse was not a subsequent injury under § 172. MITF contends that Ms. Engles is not eligible for benefits as she only has one previous adjudicated injury and her change of condition for the worse just reopened the original injury. Finally, MITF argues the court determined the competence of evidence sua sponte, contradicting this Court's case law.

DISCUSSION

¶8 *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, ¶7, 360 P.3d 499, 502, provides the background for the Fund. The Legislature established the Special Indemnity Fund, now known as the Multiple Injury Trust Fund, to encourage employment of previously impaired workers. Its sole purpose is to "insulate employers from having to pay permanent total disability benefits to a previously impaired worker who suffers an additional work-related injury." That injury must prevent the worker from returning to any gainful employment. *Multiple Injury Trust Fund v. Sugg*, 2015 OK 78, ¶7, 362 P.3d 222, 225.

¶9 The employee must be a physically impaired person. The applicable statute in the case before us is 85 O.S.Supp., 2005, § 171. Title 85 O.S.Supp., 2005, § 171 provided:

> "For the purpose of Sections 171 through 176 of this title, the term "physically impaired person" means a person who as a result of accident, disease, birth, military action, or any other cause, has suffered the loss of the sight of one eye, the loss by amputation of the whole or a part of a member of his body, or the loss of the use or partial loss of the use of a member such as is obvious and apparent from observation or examination by an ordinary layman, that is, a person who is not skilled in the medical profession, or any previous adjudications of disability adjudged and determined by the Workers' Compensation Court or any disability resulting from separately adjudicated injuries and adjudicated occupational diseases even though arising at the same time."

Once this status of "physically impaired person" is established, the dispositive issue is whether the employee is permanently and totally disabled, and entitled to an award against the Fund. 85 O.S.Supp., 2005, § 172(B)(3).[1] A *Crumby* finding is an adjudication of a preexisting disability at the same time of the award of the subsequent worker's compensation disability as described in the case of *J.C. Penney Co. v. Crumby*, 1978 OK 80, 584 P.2d

1325. A *Crumby* finding is not a previous adjudication as required by § 172. *Sugg*, 2015 OK 78, ¶11, 362 P.3d at 226.

¶10 In her brief for her petition for review, Ms. Engles argued she was a physically impaired person because her two adjudications were the 2005 injury (January 15, 2010 order) and her 1998 injury. But the Court in *Ball*, 2015 OK 64, ¶ 17, 360 P.3d 499, 507, rejected this approach: "A *Crumby* finding of a preexisting disability made simultaneously with an adjudication of an on-the-job injury may not be combined with that adjudicated injury to render the Claimant a physically impaired person."

¶11 There is also nothing in the briefs filed by the parties to indicate that Ms. Engles presented lay testimony to establish she had "the use or partial loss of the use of a member such as is obvious and apparent." The parties only presented physician testimony. Therefore, Ms. Engles could only be a physically impaired person under § 171's "previous adjudications." As MITF argues, Ms. Engles suffered no subsequent injury after her 2005 injury. Without a subsequent adjudicated injury, Ms. Engles cannot be a physically impaired person and the court lacks jurisdiction against MITF.

¶12 In addition, the Court of Civil Appeals, Division III, in ¶ 12 of the opinion of February 14, 2014, correctly concluded Ms. Engles was not a "physically impaired person" for the purposes of the Worker's Compensation Act, and the Workers' Compensation Court did not have jurisdiction to impose liability on the MITF for Ms. Engles's injuries. This opinion was not appealed. An appellate court's decision on an issue of law becomes the law of the case once the decision is final, in all subsequent stages of the litigation. *Tibbetts v. Sight and Sound Appliance Centers, Inc*., 2003 OK 72, ¶ 10, 77 P.3d 1042, 1049.

¶13 The Court of Civil Appeals, Division IV, in its June 15, 2017, opinion concluded that Ms. Engles had separately adjudicated injuries, which were the January 15, 2010, order and the May 28, 2015, compromise settlement. The court cited 85 O.S.2011, § 339(C) (superseded Feb. 1, 2014), that a compromise settlement "shall be deemed binding upon the parties thereto and a final adjudication of all rights pursuant to the Workers' Compensation Code." The court then relied upon *McCauley,* 2015 OK 84, 374 P.3d 773, to support its conclusion that the injury need not be a subsequent injury. But *McCauley* does not support this analysis. In *McCauley,* the claimant had no subsequent injury, but because he had three separately adjudicated cumulative-trauma injuries, the Court held the "general rule [was] inapplicable." 2015 OK 84, ¶ 6, 374 P.3d at 775. Here, Ms. Engles has one adjudicated injury, the key difference. Because Ms. Engles suffered no subsequent injury after her 2005 injury, she cannot be a physically impaired person and the court lacks jurisdiction against MITF. Reopening a lone injury and characterizing the resulting compromise settlement as a second adjudicated injury cannot establish jurisdiction over MITF.

THE OPINION OF THE COURT OF CIVIL APPEALS IS VACATED. CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THE VIEWS EXPRESSED IN THIS OPINION.

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

Colbert and Reif, JJ. - dissent

Winchester, J.

1. 85 O.S.Supp., 2005, § 172(B)(3) provided: "For actions in which the subsequent injury occurred on or after November 1, 2005, if such combined disabilities constitute permanent total disability, as defined in Section 3 of this title, then the employee shall receive full compensation as provided by law for the disability resulting directly and specifically from the subsequent injury. In addition, the employee shall receive full compensation for permanent total disability if the combination of injuries renders the employee permanently and totally disabled, as above defined, all of which shall be computed upon the schedule and provisions of the Workers' Compensation Act. The employer shall be liable only for the degree of percent of disability which would have resulted from the subsequent injury if there had been no preexisting impairment. In permanent total disability cases the remainder of the compensation shall be paid out of the Multiple Injury Trust Fund and may be paid in periodic payments, as set forth in Section 22 of this title. The compensation rate for permanent total disability awards from the Multiple Injury Trust Fund shall be the compensation rate for permanent partial disability paid by the employer in the last combinable compensable injury. Permanent total disability awards from the Multiple Injury Trust Fund shall be payable for a period of fifteen (15) years or until the employee reaches sixty-five (65) years of age, whichever period is the longer. Permanent total disability awards from the Multiple Injury Trust Fund shall accrue from the file date of the court order finding the claimant to be permanently and totally disabled."

2018 OK 69

JARED UPTON, Petitioner, v. CITY OF TULSA and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 115,557; Comp. w/1155,58; 115,717
September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on November 17, 2016. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response,* 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester and Darby, JJ., concur;

¶4 Kauger and Edmondson, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J. and Reif, J., dissent;

¶6 Colbert and Wyrick, JJ., recused.

2018 OK 70

RUSSELL STUBBLEFIELD, Petitioner, v. OASIS OUTSOURCING, INC., AMERICAN ZURICH INSURANCE COMPANY and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 115,717; Comp. w/115,557; 115,558 September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on January 20, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response,* 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester and Darby, JJ., concur;

¶4 Kauger and Edmondson, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J. and Reif, J., dissent;

¶6 Colbert and Wyrick, JJ., recused.

2018 OK 71

ALPHONSO HENRY, Petitioner, v. IC BUS OF OKLAHOMA, LLC and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 116,149. September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on June 19, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial

Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response*, 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester, Wyrick and Darby, JJ., concur;

¶4 Kauger and Colbert, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J., Edmondson and Reif, JJ., dissent.

2018 OK 72

SHELIA TWYMAN, Petitioner, v. KIBOIS COMMUNITY ACTION FOUNDATION, COMPSOURCE MUTUAL and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 116,163. September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on June 2, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response*, 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester, Wyrick and Darby, JJ., concur;

¶4 Kauger and Colbert, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J., Edmondson and Reif, JJ., dissent.

2018 OK 73

ROBERT LUNT, Petitioner, v. EZ MART STORES, INC. and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 116,174. September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on June 19, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide.

This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response*, 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester, Wyrick and Darby, JJ., concur;

¶4 Kauger and Colbert, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J., Edmondson and Reif, JJ., dissent.

2018 OK 74

KALESHA GORDEN, Petitioner, v. BRAUMS INC. and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 116,276. September 18, 2018

MEMORANDUM OPINION

COMBS, C.J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc, on July 31, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge awarded Petitioner Permanent Partial Disability (PPD). Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. The ALJ found the use of the AMA Guide to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion, *Hill v. American Medical Response*, 2018 OK 57, ____P.3d_____, 2018 WL 3121718. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Combs, C.J., Winchester, Wyrick and Darby, JJ., concur;

¶4 Kauger and Colbert, JJ., concur by reason of stare decisis;

¶5 Gurich, V.C.J., Edmondson and Reif, JJ., dissent.

2018 OK 75

DONNA FOX, as Personal Representative of Ronald J. Fox, Deceased, Plaintiff/ Respondent, v. JAMES R. MIZE and VAN EATON READY MIX, INC., Defendants/ Petitioners, and FEDERATED MUTUAL INSURANCE COMPANY, Defendant.

No. 116,489. September 18, 2018

CERTIORARI TO THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OKLAHOMA, HONORABLE THAD BALKMAN

¶0 On July 29, 2015, a motor vehicle accident occurred between Ronald J. Fox and James R. Mize. Mr. Fox, who was riding a motorcycle at the time of the collision, was pronounced dead at the scene from a head injury. Mr. Mize was driving a tractor-trailer for his employer, Van Eaton Ready Mix, at the time of the collision. The Plaintiff, the personal representative of Mr. Fox's estate, brought suit in the District Court of Cleveland County against Mr. Mize for negligence and negligence per se and sued Van Eaton for negligence and negligence per se under the theory of respondeat superior. Plaintiff also asserted direct negligence claims against Van Eaton for negligent hiring, training, and retention, and negligent entrustment. Van Eaton stipulated that Mr. Mize was acting in the course and scope of his employment at the time of the collision and sought dismissal of the Plaintiff's direct negligence claims, arguing that negligent hiring and negligent entrustment were unnecessary, superfluous, and contrary to public policy because Van Eaton had already admitted to being Mize's employer for purposes of vicarious liability. The district court dismissed the negligent hiring claim but allowed the negligent entrustment claim to

proceed. Van Eaton requested certification of the district court's decision under 12 O.S. 2011 § 952(b)(3), which was granted. Van Eaton next filed a petition with this Court seeking review of the certified interlocutory order. We accepted certiorari.

Upon consideration, we conclude that an employer's liability for negligently entrusting a vehicle to an unfit employee is a separate and distinct theory of liability from that of an employer's liability under the respondeat superior doctrine. An employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim.

AFFIRMED

Bart Jay Robey, Chubbuck Duncan & Robey, P.C., Oklahoma City, OK, for Defendants/Petitioners

Clyde A. Muchmore, Crowe & Dunlevy, Oklahoma City, OK, for Defendants/Petitioners

Monty L. Cain, Cain Law Office, Oklahoma City, OK, for Plaintiff/Respondent

Michael M. Blue, Blue Law, Oklahoma City, Oklahoma, for Plaintiff/Respondent

Michael F. Smith, Allison Verret, McAfee & Taft, Tulsa, OK, for Amicus Curiae The State Chamber of Oklahoma

GURICH, V.C.J.,

Facts & Procedural History

¶1 This cause arises from a motor vehicle accident between Ronald J. Fox and James R. Mize that occurred on July 29, 2015, near Sunnylane Road and Indian Hills Road in Norman, Oklahoma. Mr. Mize was traveling northbound on Sunnylane Road in a tractor-trailer owned by his employer, Van Eaton Ready Mix, Inc., when he made a left turn onto Van Eaton's property. According to the traffic collision report, Mr. Mize made an improper turn in front of oncoming traffic. Mr. Fox, who was travelling southbound on Sunnylane Road on a motorcycle, collided with Mr. Mize's tractor-trailer and was declared dead at the scene from a head injury. The report provided that Mr. Fox made no improper driving action and that neither driver appeared to be speeding at the time of the collision. Mr. Mize held a Class "A" commercial driver's license subject to the Federal Motor Carrier Safety Regulations (FMCSR), and Van Eaton stipulated that Mr. Mize was acting in the course and scope of employment at the time of the collision. Mr. Mize was taken from the scene to Norman Regional for a blood test, which showed he was under the influence of a prescription narcotic banned by the FMCSR at the time of the accident.

¶2 Plaintiff, Donna Fox, filed this lawsuit as the personal representative of Ronald J. Fox's estate and brought claims against Mr. Mize for negligence and negligence per se. Plaintiff brought the same claims against Van Eaton under the theory of respondeat superior. Plaintiff also included direct negligence claims against Van Eaton for negligent hiring, training, and retention, and negligent entrustment.[1] Plaintiff contends Van Eaton had a duty to prohibit Mr. Mize from operating its commercial motor vehicle while under the banned narcotic and that Van Eaton knew or should have known Mr. Mize was taking the narcotic. Plaintiff alleges Van Eaton knew Mr. Mize was taking the substance because it was prescribed to Mr. Mize as a result of an on-the-job injury he suffered for which he filed a workers' compensation claim against Van Eaton.

¶3 Van Eaton filed a partial motion to dismiss, arguing the direct claims of negligent hiring and negligent entrustment were unnecessary, superfluous, and contrary to public policy because Van Eaton had already admitted to being Mize's employer for purposes of vicarious liability. The district court denied Van Eaton's motion as to the negligent entrustment claim and granted Van Eaton's motion as to the negligent hiring claim. Van Eaton filed a motion to reconsider, which was denied by the district court. Plaintiff amended her Petition to conform to the district court's partial dismissal so that the remaining claims included her negligence and negligence per se claims against Mr. Mize, the respondeat superior claim against Van Eaton, and the direct claim against Van Eaton for negligent entrustment. Thereafter, Van Eaton filed an application to certify the district court's order for immediate interlocutory appeal. The district court granted the application for immediate interlocutory appeal pursuant to 12 O.S. 2011 § 952(b)(3). Van Eaton timely filed a Petition for Certiorari to this Court.

¶4 On December 4, 2017, we granted certiorari review in this case to address a recurring issue in the state and federal district courts across the state; that is, whether an employer's stipulation that an employee was acting in the

course and scope of employment at the time of a collision bars a plaintiff's negligent entrustment claim against the employer. State district courts have reached inconsistent results,[2] and the federal district courts of this state are likewise split on the issue.[3] For the reasons set forth below, we conclude that an employer's stipulation that an employee was acting in the course and scope of employment at the time of a collision does not, as a matter of law, bar a plaintiff's negligent entrustment claim against the employer.

Standard of Review

¶5 A motion to reconsider does not technically exist as part of Oklahoma's statutory scheme of pleading. Smith v. City of Stillwater, 2014 OK 42, ¶ 10, 328 P.3d 1192, 1196. If timely filed, however, a motion to reconsider may be regarded as one for new trial under 12 O.S. 2011 § 651 (if filed within ten (10) days of the filing of the judgment, decree, or appealable order), or it may be treated as a motion to modify or to vacate a final order or judgment under the terms of 12 O.S. 2011 §§ 1031 and 1031.1 (if filed after ten (10) days but within thirty (30) days of the filing of the judgment, decree, or appealable order). Smith, 2014 OK 42, ¶ 10, 328 P.3d at 1196.

¶6 The standard of review for both denial of a motion for a new trial and denial of a motion to modify or to vacate a final order or judgment is abuse of discretion. Capshaw v. Gulf Ins. Co., 2005 OK 5, ¶ 7, 107 P.3d 595, 600. A trial court abuses its discretion when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. Childers v. Childers, 2016 OK 95, ¶ 28, 382 P.3d 1020, 1027. However, "if the propriety of the trial court's denial of the 'motion for reconsideration' rests on the underlying correctness of its decision to dismiss," then the abuse of discretion question is settled by our de novo review. Smith, 2014 OK 42, ¶ 11, 328 P.3d at 1197. "De novo review involves a plenary, independent, and non-deferential examination of the trial court's legal rulings." Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, ¶ 3, 315 P.3d 359, 361.

Analysis

¶7 The purpose of a motion to dismiss "is to test the law that governs the claim, not the underlying facts." Cates v. Integris Health, Inc., 2018 OK 9, ¶ 7, 412 P.3d 98, 102. Van Eaton argues that, as a matter of law, any theory of direct liability against an employer, including negligent entrustment, must be dismissed when the employer stipulates that an employee was in the course and scope of employment at the time of the accident. According to Van Eaton, Mize's negligent entrustment claim was "legally barred as soon as vicarious responsibility was established."[4] We disagree.

¶8 Oklahoma law has long recognized separate causes of action for respondeat superior and negligent entrustment.[5] A respondeat superior cause of action is grounded in vicarious liability, which "is imposed by law when one person is made answerable for the actionable conduct of another."[6] More specifically, respondeat superior holds the master liable for injury proximately resulting from the negligent act of a servant done while in the course and scope of the servant's employment with the master. Mid-Continent Pipeline Co. v. Crauthers, 1954 OK 61, ¶ 19, 267 P.2d 568, 571. Under a respondeat superior cause of action, "the servant's liability is an indispensable requisite for the master's liability." Hatcher v. Traczyk, 2004 OK CIV APP 77, ¶ 8, 99 P.3d 707, 710.

¶9 In contrast, a negligent entrustment cause of action is based on direct liability, or "nonvicarious" liability, as this Court has phrased it. Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co., 1980 OK 193, ¶ 15, 621 P.2d 1155, 1161. Negligent entrustment requires proof that "an individual supplies a chattel for the use of another whom the supplier knows or should know is likely to use the chattel in a way dangerous and likely to cause harm to others." Pierce v. Okla. Prop. & Cas. Ins. Co., 1995 OK 78, ¶ 17, 901 P.2d 819, 823. Negligent entrustment of a vehicle does not require proof of "agency or [an] employment relationship between the owner and the person entrusted to drive the vehicle."[7] "Liability for negligent entrustment arises from the *act of entrustment*, not the relationship of the parties." Sheffer, 2013 OK 48, ¶ 17, 306 P.3d at 550. The Restatement (Second) of Agency § 213 provides:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:

(c) in the supervision of the activity; or

(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.[8]

Particularly relevant to the case before us, comment h to § 213 provides:

h. Concurrent negligence of master and servant. In addition to liability under the rule stated in this Section, *a master may also be subject to liability if the act occurs within the scope of employment. See §§ 219-267. In a given case the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment.* In such cases, the fact that the employer was personally negligent may be important, however, in jurisdictions in which punitive damages are awarded. See § 217C. Likewise an employer may be subject to a penalty. See § 217D. Furthermore, in actions in which both the employer and the employee are joined because of conduct of the employee, a verdict finding the employee not liable and the employer liable may be supported if there is evidence of personal negligence on the part of the employer. See § 217B.[9]

¶10 Van Eaton makes several arguments in support of its position that as a matter of law, any theory of direct liability against an employer, including negligent entrustment, must be dismissed when the employer stipulates that an employee was in the course and scope of employment at the time of the accident. First, Van Eaton argues that if both a respondeat superior and a negligent entrustment claim are allowed to proceed simultaneously, the employee driver will be prejudiced if evidence of his prior bad acts is allowed to be heard by the jury. In McCarley v. Durham, 1954 OK 35, 266 P.2d 629, this Court found it was not error to admit evidence of a pre-accident record to prove knowledge in a negligent entrustment action, even though the evidence might have been inadmissible against the driver to prove negligence in causing the accident. See also Green v. Harris, 2003 OK 55, ¶ 18, 70 P.3d 866, 870. The trial courts of this state regularly determine when relevant evidence is inadmissible because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S. 2011 § 2403. Parties to a case may also request, and the trial court can give, a limiting instruction explaining what a jury may or may not infer from a particular piece of evidence. See, e.g., Tansy v. Dacomed Corp., 1994 OK 146, n.7, 890 P.2d 881, 890. The case before us has yet to be tried to a jury. Van Eaton's argument in this regard is an evidentiary issue to be dealt with in the first instance by the trial court if and when the case goes to trial; it does not require dismissal of the negligent entrustment claim as a matter of law.

¶11 In that same vein, Van Eaton also argues that because punitive damages could be awarded for the respondeat superior claim, the Plaintiff cannot assert an additional punitive damages claim against Van Eaton for her negligent entrustment claim. Again, as this Court has noted, "[w]hen recovery against the employer for an act of his servant is rested on prior knowledge of the servant's propensity to commit the very harm for which damages are sought, the basis of liability invoked is not respondeat superior but rather the employer's own negligence in not discharging the unfit servant." Dayton, 1980 OK 193, ¶ 17, 621 P.2d at 1161. Whether the employer's prior knowledge rises to the level of gross negligence is a fact issue to be determined in the course of the litigation. Id. In contrast, punitive or exemplary damages may be assessed against an employer under the doctrine of respondeat superior *if an employee's conduct* "would serve to justify an exemplary damages award against the employee as an individual tortfeasor." Thiry v. Armstrong World Inds., 1983 OK 28, ¶ 9, 661 P.2d 515, 520; see also Bierman v. Aramark Refreshment Servs., Inc., 1997 OK 9, 935 P.2d 289. Thus, an employer's exposure to punitive damages "could differ significantly based on whether the focus of the punitive damages inquiry was the wrongful [or] negligent conduct of the agent or the negligent conduct of the employer." Chamberlain v. Thomas, No. 5:11-cv-01430-HE, 2012 WL 4355908, at *1 (Sept. 24, 2012). In addition, "that focus might well impact . . . the question of what evidence is admissible to establish the basis for punitive damages." Id.

¶12 The Plaintiff may "invoke and advance all affordable theories in a single trial." Smedsrud v. Powell, 2002 OK 87, n.32, 61 P.3d 891, 897; see also 12 O.S. 2011 § 2008(e)(2) (allowing a litigant "not only to plead inconsistently, but also be allowed to rely on inconsistent theories or defenses *throughout trial*" (emphasis added)). "Not until all proof has been adduced may the trial court eliminate from submission theories unsupported by evidence." Powell, 2002 OK 87, ¶ 18, 61 P.3d at 898. "If there is proof to support multiple theories, all must be submitted under proper instructions." Id. While our law is clear that "inconsistent judgments or *double recovery may not be permissible,* [a] party is not prevented from fully litigating the inconsistent theories or defenses at trial."[10] Again, trial courts across the state regularly instruct juries that "no double recovery is allowed for the same injury."[11] Therefore, we conclude that Van Eaton's argument in this regard is also an evidentiary issue to be dealt with in the first instance by the trial court and does not require dismissal of the negligent entrustment claim as a matter of law.

¶13 Finally, Van Eaton argues that this Court's decision in Jordan v. Cates, 1997 OK 9, 935 P.2d 289, requires dismissal of the negligent entrustment claim. In Jordan, a customer went into a convenience store, and an altercation ensued between the customer and an employee of the store. The customer sued the employee for battery and alleged that the convenience store was vicariously liable for the acts of its employee under the doctrine of respondeat superior. The customer also alleged the convenience store was negligent in hiring and retaining the employee because the store knew or should have known the employee had violent tendencies. The store stipulated the altercation occurred while its employee was acting in the course and scope of employment, and we said that "[w]hen an employer stipulates that an employee is acting within the scope of employment at the time of the altercation and punitive damages are available against it under a theory of respondeat superior, an additional claim for negligent hiring exposes the employer to no additional liability." Id., ¶ 21, 935 P.2d at 294.

¶14 The facts in Jordan are distinguishable from the case at bar because Jordan involved a battery claim against the employee and a negligent hiring claim against the employer. Because the Plaintiff in this case did not appeal the district court's dismissal of the negligent hiring claim, we need not determine whether a negligent hiring claim should be treated differently than a negligent entrustment claim.[12] Upon consideration, we conclude that an employer's liability for negligently entrusting a vehicle to an unfit employee is a separate and distinct theory of liability from that of an employer's liability under the respondeat superior doctrine. An employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim.

¶15 At the motion to dismiss stage, a court must "take all factual allegations in the petition as true and draw all reasonable inferences therefrom." Cates, 2018 OK 9, ¶ 7, 412 P.3d at 101. "If relief is possible under any set of facts that can be gleaned from the petition, the motion to dismiss should be denied." Id., ¶ 7, 412 P.3d at 101. Because Plaintiff Donna Fox alleged sufficient facts, which if taken as true, might entitle her to relief on her negligent entrustment claim, we conclude the trial court correctly denied Van Eaton's motion to dismiss with regard to the negligent entrustment claim.

Conclusion

¶16 Employers employing unfit and unqualified drivers cannot insulate themselves from a negligent entrustment claim simply by stipulating that the employee driver was acting in the course and scope of employment. The Plaintiff has the right to determine the facts she will allege and the claims she will pursue.[13] Van Eaton does not get to make that choice for her by stipulating that its employee was in the course and scope of employment at the time of the accident. The trial court's denial of Van Eaton's motion to dismiss the negligent entrustment claim is affirmed, and the case is remanded to the trial court for further proceedings consistent with today's pronouncement.

AFFIRMED

¶17 ALL JUSTICES CONCUR.

GURICH, V.C.J.,

1. Plaintiff Donna Fox originally included claims against Defendant Federated Mutual Insurance Company. Plaintiff dismissed all claims against Federated Mutual Insurance Company without prejudice on June 23, 2017.

2. In the last three years, we have intervened in several state court actions, issuing supervisory writs to allow the respective plaintiffs to proceed with negligent entrustment claims against the respective defendant employers even though the defendant employers admitted course and scope of employment. See Ferguson v. Hon. Mary Fitzgerald, Case No. 116,407 (Nov. 13, 2017); Le v. Hon. Paul Hesse, Case No. 116,243 (Sept. 19, 2017); Brantley v. Hon. Thomas Prince, Case No.

115,434 (Dec. 5, 2016); Serv. Experts, Inc. v. Hon. Lori Walkley, Case No. 113,452 (Jan. 20, 2015).

3. For federal district court cases allowing a negligent entrustment claim to proceed despite an employer's stipulation of course and scope, see Warner v. Miller, No. 5:16-cv-00305-HE (W.D. Okla. Feb. 10, 2017); Snyder v. Moore, No. 5:15-cv-00865-HE (W.D. Okla. Mar. 16, 2017); Hunter v. N.Y. Marine & Gen. Ins. Co., No. 5:16-cv-01113-W (W.D. Okla. Jan. 18, 2017); Anaya v. Hutto & Jerry McClure Trucking, Inc., No. 5:16-cv-01030-HE (W.D. Okla. Dec. 5, 2016); Kennedy v. FedEx Freight E., Inc., No. 4:07-cv-00353-TCK-SAJ, 2008 WL 8947790, at *8 (N.D. Okla. Dec. 4, 2008).

For federal district court cases allowing negligent hiring, training, and retention claims to proceed despite an employer's stipulation of course and scope, see Kennedy v. FedEx Freight E., Inc., No. 4:07-cv-353-TCK-SAJ, 2008 WL 8947790, at *8 (N.D. Okla. Dec. 4, 2008); Epperson v. Braum's Inc., No. 5:06-cv-00456-L (W.D. Okla. Oct. 16, 2006); Ramiro v. J.B. Hunt Transp. Servs. Inc., 5:04-cv-01033-M (W.D. Okla. Apr. 8, 2005).

For federal district court cases precluding claims for negligent entrustment, hiring, retention, and training upon an employer's stipulation of course and scope, see Ferrell v. BGF Global, LLC, No. 5:15-cv-00404-D, 2017 WL 4898843 (W.D. Okla. Oct. 30, 2017); Davis-Pashica v. Two Buds Trucking, LLC, No. 4:16-cv-257-GKF-FHM, 2017 WL 2713332, at *2-3 (N.D. Okla. Jan. 5, 2017); Horton v. Nat'l Union Fire Ins. Co., No. 6:15-cv-00226-RAW, 2015 WL 7575909 (E.D. Okla. Nov. 25, 2015); Barnes v. W. Exp., Inc., No. 5:14-cv-00574-R, 2015 WL 2131353, at *3 (W.D. Okla. May 7, 2015); Guerrero v. Meadows, No. 5:14-cv-00537-F, 2014 WL 10962065, at *3 (W.D.Okla. Oct. 15, 2014); Fisher v. Nat'l Progressive, Inc., No. 5:12-cv-00853-C, 2014 WL 7399185, at *2 (W.D.Okla. Dec. 29, 2014); Avery v. Roadrunner Transp. Servs., Inc., No. 5:11-cv-01203-D, 2012 WL 6016899, at *2-3 (W.D. Okla. Dec. 3, 2012).

4. Petrs' Brief in Chief at 18.

5. See, e.g., Nat'l Trailer Convoy v. Saul, 1962 OK 181, 375 P.2d 922 (finding that neither respondeat superior nor negligent entrustment was "inconsistent with the other; and the jury could have consistently determined that [employer] was liable on either one of those theories, or on both — as they evidently did").

6. Braden v. Hendricks, 1985 OK 14, ¶ 18, n.24, 695 P.2d 1343, 1351.

7. Blagg v. Line, No. 4:09-cv-00703-CVE-FHM et al., 2012 WL 263034 at *4 (N.D. Okla. Jan. 30, 2012).

8. Restatement (Second) of Agency § 213. Although this Court has not formally adopted the Restatement, we have cited § 213 with approval on several occasions. Schovanec v. Archdiocese of Okla. City, 2008 OK 70, ¶ 35, 188 P.3d 158, 169-70; Mistletoe Exp. Serv., Inc. v. Culp, 1959 OK 250, ¶ 30, 353 P.2d 9, 16. Comment d to § 213 provides in relevant part:

> Liability results under the rule stated in this Section, *not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment.* The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.

Restatement (Second) of Agency § 213 cmt. d (emphasis added).

Van Eaton cites to the Restatement (Second) of Torts § 317, which provides in part that "[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if" the servant "is using a chattel of the master," and the master "knows or has reason to know that he has the ability to control his servant," and "knows or should know of the necessity and opportunity for exercising such control." Restatement (Second) of Torts § 317.

However, the first comment to § 317 specifically states that "[t]he rule stated in this Section is applicable *only when the servant is acting outside the scope of his employment*. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency." Id. (emphasis added).

9. Restatement (Second) of Agency § 213 (emphasis added). The illustration to comment h provides:

> 10. P employs A as his chauffeur. Thereafter, A periodically gets drunk, as P, in the exercise of reasonable care, should know. While using P's car on P's business, A gets drunk and runs into T with the car. P may be liable to T, aside from his liability as master.

Id.

10. Howell v. James, 1991 OK 47, ¶ 11, 818 P.2d 444, 447. In Howell, this Court discussed the viability of the election of remedies doctrine after the enactment of the Oklahoma Pleading Code in 1984. As it pertains to Van Eaton's argument, the Court in Howell, found that the Oklahoma version of Federal Rule 8(e)(2) was very similar "with one important exception." Id., ¶ 11, 818 P.2d at 447. The Court found that the Oklahoma rule, § 2008(e)(2), contained additional language that "clarifie[d] the intent of the legislature that a litigant be allowed not only to plead inconsistently, but also be allowed to rely on inconsistent theories or defenses throughout trial." Id.; see also Specialty Beverages v. Pabst Brewing Co., 537 F.3d 1165 (10th Cir. 2008) ("Oklahoma law is well settled on this point. While a party may not obtain double recovery, election of remedies is not required."). We also note that in Saul, 1962 OK 181, ¶ 11, 375 P.2d at 929, we said that the theories of negligent entrustment and respondeat superior were "cumulative, conjunctive, and consistent, rather than repugnant or inconsistent."

11. Houck v. Hold Oil Corp., 1993 OK 166, ¶ 37, 867 P.2d 451, 461; see also Kraszewski v. Baptist Med. Ctr. of Okla., Inc., 1996 OK 141, n.2, 916 P.2d 241, 243 n.2 ("Double recoveries are not permitted under the law.").

12. We recognize the tension in our case law in this regard. As one federal district court has stated: "It is difficult to discern a persuasive basis for treating a claim for negligent entrustment differently from a claim for negligent hiring" because both "presumably rely on the employer's own acts or negligence." Warner, 5:16-cv-00305-HE (Feb. 10, 2017). However, the issue is not currently before us on appeal. We do take this opportunity, however, to expressly state that, for now, the holding in Jordan is limited to its facts.

13. The plaintiff is the "'master of the complaint.'" Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386 (1987)).

2018 OK 76

IN THE MATTER OF THE REINSTATEMENT OF: JACKLYNN GRACE HOPLIGHT TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS.

SCBD No. 6596. September 17, 2018

ORDER

¶1 Petitioner, Jacklynn Grace Hoplight was stricken from the Roll of Attorneys for non-payment of dues and non-compliance with mandatory continuing legal education requirements on September 11, 2006. On November 22, 2017, Petitioner petitioned this Court for reinstatement as a member of the Oklahoma Bar Association. As required by Rule 11.3 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A, hearings were held before the Trial Panel of the Professional Responsibility Tribunal on February 9, 2018, and February 28, 2018. The Oklahoma Bar Association supported Petitioner's application for reinstatement, and the panel subsequently recommended that Petitioner be reinstated. Upon de novo review of the record, we find:

1. Petitioner has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, ch.1, app. 1-A;

2. Petitioner has established by clear and convincing evidence that she has not engaged in the unauthorized practice of law in the State of Oklahoma;

3. Petitioner has established by clear and convincing evidence that she possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association;

4. Petitioner has established by clear and convincing evidence that she possesses the good moral character which would entitle her to be reinstated to the Oklahoma Bar Association.

¶2 IT IS THEREFORE ORDERED that Jacklynn Grace Hoplight's Petition for Reinstatement be granted.

¶3 IT IS FURTHER ORDERED that Jacklynn Grace Hoplight shall pay the costs associated with this proceeding in the amount of $152.44.

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

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

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Program Planner/Moderator

-Jim Calloway, Director, Management Assistance Program, Oklahoma Bar Association

Schedule

8:30am	**Registration and Continental Breakfast**
9:00	**The Starting Line** Jim Calloway, Director, OBA Management Assistance Program
9:30	**It's All About the Clients: From Client Communication to Client Development and Marketing** Jim Calloway
11:00	**Break**
11:10	**How to Manage-Everything!** Jim Calloway
12:00pm	**Lunch provided by Oklahoma Attorneys Mutual Insurance Company**
12:20	**Malpractice Insurance and Other Risk Management Issues** Eric Janzen, Oklahoma Attorneys Mutual Insurance Company - Tulsa Phil Fraim, President, Oklahoma Attorneys Mutual Insurance Company - OKC
1:00	**Professionalism in the Practice of Law** Judge David Lewis, Presiding Judge, Oklahoma Court of Criminal Appeals
1:30	**Break**
1:40	**Trust Accounting and Legal Ethics** Gina Hendryx, OBA General Counsel
2:40	**Break**
2:50	**Some Words from the OBA General Practice Solo & Small Firm Section** Frank Urbanic, Ashley Forrester & Michael Whiting
3:00	**Equipping the Law Office** Jim Calloway
3:50	**Your Money: Accounting and Tax for Law Firms** James A. Porter, III, CPA, P.L.L.C.
4:30	**Adjourn**

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NOTICE

Oklahoma Bar Association 2019 Proposed Budget

Pursuant to Article VII, Section 1 of the Rules Creating and Controlling The Oklahoma Bar Association, Charles W. Chesnut, President-Elect and Budget Committee Chairperson, has set a Public Hearing on the 2019 Oklahoma Bar Association budget for Thursday, October 11, 2018, at 10:00 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma.

The purpose of the OBA is to engage in those activities enumerated in the Rules Creating and Controlling the Oklahoma Bar Association ("the Rules") and the OBA Bylaws ("the Bylaws"). The expenditure of funds by the OBA is limited both as set forth in the Rules and Bylaws and in *Keller v. State Bar of California*, 496 U.S. 1 (1990). If any member feels that any actual or proposed expenditure is not within such purposes of, or limitations on the OBA, then such member may object thereto and seek a refund of a pro rata portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director. Each objection must be made in writing on an OBA Dues Claim Form, addressed to the Executive Director of the OBA, P. O. Box 53036, Oklahoma City, OK 73152, and postmarked not later than Sixty (60) days after the approval of the Annual Budget by the Oklahoma Supreme Court or January 31st of each year, whichever shall first occur. Objection procedure and form are available at tinyurl.com/duesclaimform.

Upon receipt of a member's written objection, the Executive Director shall promptly review such objection together with the allocation of dues monies spent on the challenged activity and, in consultation with the President, shall have the discretion to resolve the objection, including refunding a pro rata portion of the member's dues, plus interest or schedule a hearing before the Budget Review Panel. Refund of a pro rata share of the member's dues shall be for the convenience of the OBA, and shall not be construed as an admission that the challenged activity was or would not have been within the purposes of or limitations on the OBA.

The proposed budget begins on the next page.

OKLAHOMA BAR ASSOCIATION
2019 PROPOSED BUDGET

REVENUES	2019 PROPOSED BUDGET		2018 BUDGET	
ADMINISTRATIVE:				
Dues and Penalties	$ 4,173,000		$ 4,138,716	
Investment Income	85,000		40,000	
Annual Meeting	50,000		45,000	
Commissions and Royalties	28,000		27,000	
Mailing Lists and Labels	5,000		5,800	
Council on Judicial Complaints - Rent and Services	10,000		10,000	
Board of Bar Examiners - Rent and Services	15,000		15,000	
Legal Intern Fees	6,000		6,600	
Other	10,500	$ 4,382,500	10,500	$ 4,298,616
OKLAHOMA BAR JOURNAL AND COMMUNICATIONS:				
Oklahoma Bar Journal:				
Advertising Sales	175,000		170,000	
Subscription Sales	23,000		25,000	
Other Miscellaneous	-	198,000	-	195,000
LAW RELATED EDUCATION:				
Grants	0	0	-	0
CONTINUING LEGAL EDUCATION:				
Seminars and Materials	996,500	996,500	1,023,000	1,023,000
GENERAL COUNSEL:				
Disciplinary Reinstatements	14,000		14,000	
Cerficates of Good Standing	22,000		24,000	
Out of State Attorney Registration	349,200	385,200	337,500	375,500
MANDATORY CONTINUING LEGAL EDUCATION:				
Filing Penalties	113,000		100,000	
Provider fees	88,600	201,600	83,500	183,500
PRACTICE ASSISTANCE				
Consulting Fees and Material Sales	2,500		1,000	
Diversion Program	12,500	15,000	13,000	14,000
COMMITTEES AND SPECIAL PROJECTS:				
Mock Trial Program	52,220		52,220	
Lawyers Helping Lawyers	26,744		33,750	
Insurance Committee	23,000		20,000	
Women-in -Law Conference	30,000		30,000	
Solo-Small Firm Conference	80,000		50,000	
Diversity Committee Conference	10,000		10,000	
Oklahoma Lawyers for America's Heroes Program	4,000		4,000	
YLD Kick It Forward Program	2,000		2,750	
Young Lawyers Division	3,000	230,964	3,000	205,720
TOTAL REVENUES		$ 6,409,764		$ 6,295,336

OKLAHOMA BAR ASSOCIATION
2019 PROPOSED BUDGET

EXPENDITURES	2019 PROPOSED BUDGET		2018 BUDGET	
ADMINISTRATIVE:				
Salaries and Benefits	$ 1,020,119		$ 991,326	
Annual Meeting	105,000		100,000	
Board of Governors and Officers	111,000		108,000	
Conferences and Organizational Development	18,200		18,200	
Legislative Monitoring	46,000		46,000	
General and Administrative:				
Utilities	121,000		116,000	
Insurance	46,000		50,000	
Data Processing	242,124		229,760	
Bank and Credit Card Processing Fees	85,000		85,000	
Building and Equipment Maintenance	89,000		96,000	
Postage	42,000		46,000	
Copier	42,000		44,000	
Supplies	27,060		25,700	
Grounds Maintenance	8,000		8,000	
Audit	20,000		23,000	
Miscellaneous	22,000		20,500	
Overhead Allocated to Departments	(479,549)	$ 1,564,954	(476,848)	$ 1,530,638
COMMUNICATIONS				
Salaries and Benefits	314,191		308,194	
Oklahoma Bar Journal:				
Weekly Issue Printing	45,000		75,000	
Special Issue Printing	165,000		180,000	
Other	4,000		4,000	
Public Information Projects	5,000		5,000	
Newsclip Service	3,700		3,500	
Pamphlets	5,000		5,000	
Photography	200		200	
Supplies	500		500	
Miscellaneous	10,700		10,700	
Allocated Overhead	101,275	654,566	100,688	692,782
LAW RELATED EDUCATION:				
Salaries and Benefits	0		0	
Other Grant Projects	0		0	
Training, Development and Travel	8,000		10,950	
Newsletter	0		0	
Miscellaneous	0	8,000	0	10,950
CONTINUING LEGAL EDUCATION:				
Salaries and Benefits	389,816		380,134	
Meeting Rooms and Food Service	60,000		70,000	
Seminar Materials	5,000		5,000	
Brochures and Bulk Mail	37,500		38,200	
Speakers	80,000		90,000	
Audio/Visual	3,000		3,000	
Online Provider Service Fees	168,200		193,112	
Credit Card Processing Fees	28,000		27,000	
Department Travel	5,000		5,000	
Supplies	2,000		2,000	
Miscellaneous	15,000		15,000	
Allocated Overhead	135,613	929,129	136,620	965,066

OKLAHOMA BAR ASSOCIATION
2019 PROPOSED BUDGET

EXPENDITURES	2019 PROPOSED BUDGET		2018 BUDGET	
GENERAL COUNSEL:				
Salaries and Benefits	$ 1,321,188		$ 1,271,190	
Investigation and Prosecution	63,000		62,000	
PRC Travel and Meetings	3,500		4,500	
PRT Travel and Meetings	10,000		9,000	
Department Travel	9,250		9,250	
Library	6,000		6,000	
Supplies	10,000		9,000	
Miscellaneous	8,300		8,300	
Allocated Overhead	128,363	$ 1,559,601	127,612	$ 1,506,852
MANDATORY CONTINUING LEGAL EDUCATION:				
Salaries and Benefits	241,100		233,213	
Printing & Compliance Reporting	3,000		3,000	
Supplies	200		200	
Commission Travel	1,000		1,000	
Miscellaneous	10,500		10,000	
Allocated Overhead	57,149	312,949	55,964	303,377
PRACTICE ASSISTANCE				
Salaries and Benefits	398,047		383,422	
OBA-NET Expense	0		500	
Dues & Subscriptions	1,900		1,800	
Library	1,300		1,000	
Computer Software	1,850		1,800	
Supplies	1,000		1,000	
Diversion Programs	2,200		2,000	
Travel and Conferences	20,000		19,775	
Miscellaneous	7,700		5,500	
Allocated Overhead	57,149	491,146	55,964	472,761
COMMITTEES AND SPECIAL PROJECTS:				
Law Day	60,000		60,000	
Women-in -Law Conference	30,000		30,000	
Solo-Small Firm Conference	80,000		50,000	
Mock Trial Program	54,620		53,000	
FastCase Legal Research	91,000		93,000	
Leadership Institute	9,000		8,000	
General Committees	49,688		49,688	
Lawyers Helping Lawyers Program	61,800		61,800	
Oklahoma Lawyers for America's Heroes Program	22,000		22,000	
Public Education Initiative	2,000		2,000	
President's Service Program	5,000		5,000	
YLD Kick It Forward Program	2,750		2,750	
Young Lawyers Division	75,700	543,558	72,300	509,538
OTHER EXPENDITURES				
Client Security Fund Contribution	175,000		175,000	
Bar Center Renovations	50,000		10,000	
Furniture and Equipment	32,000		45,955	
Computer Hardware and Software	99,585	356,585	58,800	289,755
TOTAL EXPENDITURES		$ 6,420,488		$ 6,281,720
TOTAL REVENUES OVER (UNDER) EXPENDITURES		$ (10,724)		$ 13,616

LEGAL AID SERVICES OF OKLAHOMA PRESENTS

CELEBRATE PRO BONO

www.celebrateprobono.org

OKLAHOMA BAR ASSOCIATION CENTER
OKLAHOMA CITY

OCTOBER 16, 2018
8:30AM-5:00PM

LUNCH PROVIDED

TOPICS TO INCLUDE:

BANKRUPTCY CHAPTER 7 AND ADV CIRCUMSTANCES

PRIMER ON GUARDIANSHIPS

IMMIGRATION VAWA AND U VISAS PLUS EMERGING TOPICS

SENIORS AND THE LAW

CURRENT LEGAL AID PRIVATE ATTORNEY VOLUNTEERS AND NEW ATTORNEY VOLUNTEERS WELCOME

REGISTER AT PROBONO.NET/OK/CLE

CLE IS 6 CREDIT HOURS, WHICH INCLUDES 1 ETHICS CREDIT

2019 OBA Board of Governors Vacancies

Nominating Petition deadline was 5 p.m. Friday, Sept. 7, 2018

OFFICERS

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

Vice President
Current: Richard Stevens, Norman
(One-year term: 2019)
Nominee: **Lane R. Neal, Oklahoma City**

BOARD OF GOVERNORS

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

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

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

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
Nominees:
Josh D. Lee, Vinita
Miles T. Pringle, Oklahoma City

NOTICE

Pursuant to Rule 3 Section 3 of the Oklahoma Bar Association Bylaws, the nominees for uncontested positions have been deemed elected due to no other person filing for the position.

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

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

Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS
President-Elect
Susan B. Shields, Oklahoma City

Nominating Petitions have been filed nominating Susan B. Shields for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 573 signatures appear on the petitions.

Vice President
Lane R. Neal, Oklahoma City

Nominating Petitions have been filed nominating Lane R. Neal for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 126 signatures appear on the petitions.

BOARD OF GOVERNORS

Supreme Court
Judicial District No. 3
David T. McKenzie,
Oklahoma City

Nominating Petitions have been filed nominating David T. McKenzie for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 57 signatures appear on the petitions.

Supreme Court
Judicial District No. 4
Timothy E. DeClerck, Enid

Nominating Petitions have been filed nominating Timothy E. DeClerck for election of Supreme Court Judicial District No. 4 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Twenty-five of the names thereon are set forth below:

Kaleb Hennigh, Julia C. Rieman, Glenn A. Devoll, Robert P. Anderson, David Trojan, Gary L. Brown III, Kyle Domnick, Marcus Jungman, Kyle Hadwiger, Brandon Harvey, Clark McKeever, Norman L. Grey, Francis McGee, Andrew Ewbank, Russell N. Singleton, Timothy R. Beebe, James R. Cox, Robert Faulk, Jonathan F. Benham, Josh Davis, Benjamin J. Barker, Randy Wagner, John L. Scott, Justin Lamunyon and P. John Hodgden

A total of 46 signatures appear on the petitions.

A Nominating Resolution has been received from the following county: Garfield County

Supreme Court
Judicial District No. 5
Andrew E. Hutter, Norman

Nominating Petitions have been filed nominating Andrew E. Hutter for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Twenty-five of the names thereon are set forth below:

Alissa Preble Hutter, Drew Nichols, Greg Dixon, Charles Douglas, Jana Ford, Sam Talley, Josh Turner, Brian Hall, Eugena Bertman, Jeanne Snider, Rick Knighton, Kathryn Walker, Kristina Bell, Cindy Allen, Todd Kernal, Nicholas Lee, Myong Chung, Rebekah Taylor, Margaret Walker, Chad Pate, Amelia Pepper, Jason Hicks, Heather Strohmeyer, Jeff Bryant and Amanda Everett

A total of 31 signatures appear on the petitions.

Member at Large
Josh D. Lee, Vinita

Nominating Petitions have been filed nominating Josh D. Lee, Vinita for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 66 signatures appear on the petitions.

Miles T. Pringle, Oklahoma City

Nominating Petitions have been filed nominating Miles T. Pringle, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 105 signatures appear on the petitions.

2018 OK CIV APP 55

LINDA SMITH, Plaintiff/Appellant, vs. ANGEL CARLSON, Defendant/Appellee.

Case No. 115,907. August 8, 2018

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY, OKLAHOMA

HONORABLE RUSSELL VACLAW, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Trey Abraham, LOUIS ABRAHAM III P.C., Tulsa, Oklahoma, for Plaintiff/Appellant

Steve E. Chlouber, FULLER, CHLOUBER & FRIZZELL, L.L.P., Tulsa, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Linda Smith appeals from the trial court's order denying her motion for new trial in response to the court's order granting Angel Carson's motion to disqualify Smith's counsel for conflict of interest and ordering her counsel to withdraw. We reverse the order denying Smith's motion for new trial and remand with instructions to vacate the order disqualifying her counsel.

BACKGROUND

¶2 The underlying lawsuit, filed in June 2014, arose out of the sale of a particular piece of property in 2009 (the 2009 deed) by Smith to Carlson. Smith alleged numerous theories of recovery including breach of contract, fraud in the inducement, and unjust enrichment and sought damages, punitive damages and "such other and further relief, at law or in equity, to which she may show herself justly entitled." Though not among the instruments in the record on appeal, an answer was apparently filed by Carlson. In May 2015, Smith filed a motion for partial summary judgment in which she asked for cancellation of the 2009 deed, immediate possession of the property, and a reasonable attorney's fee and costs. Thereafter, Smith filed an application to have her motion deemed confessed because, she alleged, while Carlson's then attorney acknowledged at a hearing held in May 2015 that she had received service of the motion, no response or brief had yet been filed by Carlson. On June 18, 2015, the court issued its order granting Smith's motion and ordered the 2009 deed canceled, ordered immediate possession to Smith, and ordered the execution and delivery of any conveyances or deeds by Carlson to Smith "to establish and maintain marketable title to the property in [Smith]."

¶3 On June 26, 2015, Carlson filed a motion to vacate the partial summary judgment order alleging, among other reasons, that Carlson's former counsel failed to adequately represent her by not responding to Smith's motion. She further alleged various issues of fact remained regarding Smith's claims, and alleged those claims were barred by the statute of limitations. On July 14, 2015, Smith responded and objected to the motion to vacate and alleged, among other things, that after the court's summary judgment order and in "contravention" of that order, "Carlson removed fixtures, furnishings and equipment from the property," and failed to sign and deliver a deed to Smith though Carlson's former attorney had been requested to do so by Smith. Smith also alleged Carlson's former attorney had not withdrawn as counsel of record from the case.[1]

¶4 On September 30, 2015, Carlson filed a response to Smith's previous motion for summary judgment and filed a cross-motion for summary judgment. Carlson set forth various arguments why she, not Smith, was entitled to summary judgment including exhibits and transcripts from a different lawsuit involving different parties, one of whom was represented by Smith's attorney, in support of Carlson's arguments in defense against Smith's claims. On October 6, 2015, the trial court granted Carlson's motion to vacate the June 18, 2015 partial summary judgment.[2]

¶5 The trial court thereafter set the matter for pretrial on February 16, 2017, and for jury trial on March 6, 2017.

¶6 On January 18, 2017, Carlson filed a motion to disqualify Smith's attorney asserting she "recently has learned" that on July 14,

2015, the same day Smith filed her response to Carlson's motion to vacate the June 2015 partial summary judgment, Smith deeded to her attorney an undivided one-third interest in the property at issue in this lawsuit.[3] Carlson, referencing Rules 1.8(i)[4] of the Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A, asserted her "counsel recently learned of this conflict and must bring it to the Court's attention."[5] Carlson asserted Smith's attorney was required to withdraw from representing her pursuant to Rule 1.16(a)(1).[6]

¶7 Smith asserted Carlson and her counsel were aware of the 2015 quitclaim deed from at least June 2016 and attached a copy of an excerpt from a June 2016 deposition of Smith during which Carlson's attorney allegedly asked her about the 2015 quitclaim deed. She also asserted, among other matters, that the June 2015 order granting her partial summary judgment canceled the 2009 deed and that order "was valid and subsisting" "[d]uring all the time in question." She also claimed the quitclaim deed "comports completely with the written fee agreement between" herself and her attorney arguing that while Rule 1.8(i) prohibits an attorney from acquiring a proprietary interest in the subject matter of the client's litigation, the Rule states an attorney may "acquire a . . . contract to secure the lawyer's fee" and "contract with a client for a reasonable contingent fee in a civil case." Smith offered to make the contingent fee contract available for the court's in camera review.

¶8 The hearing on the disqualification motion was held February 2, 2017. Apart from the court's prior orders and the briefs and exhibits appended to them, no other evidence was introduced at the hearing. The majority of the hearing consisted of the arguments of counsel and the trial court's inquiries.

¶9 Carlson argued there was a conflict because Smith's attorney obtained a proprietary interest in the property, the property is the subject of the litigation, and her attorney acquired the interest after the June 18, 2015 partial summary judgment order, but on the same date she responded to Carlson's motion to vacate that judgment. Carlson's attorney also argued the court's June 18, 2015 order that canceled the 2009 deed (relief she asserted and had asserted in previous hearings was not requested in Smith's petition), and the court's subsequent order that vacated the June 18, 2015 order but kept Smith in possession of the subject property, put a cloud on Carlson's title. That cloud, Carlson argued, caused problems for her in a foreclosure action pending against her in a different court and in which Smith's attorney has now been made a party because of his one-third interest.

¶10 Smith argued Carlson's arguments about the relief she sought in this action — return of the property — had been raised numerous times by her in this litigation and had not succeeded. Whether she should remain in possession of the property, Smith argued, is one that the jury was to decide in March 2015. The court agreed that the issue of Smith's possession of the property was not an issue as to the motion to disqualify. Smith also argued Carlson and her counsel were aware of the quitclaim deed for about seven months prior to the motion to disqualify but did not raise the issue until two months before the jury trial was scheduled. She also argued the written contingent fee agreement set out how her attorney was to be paid for his legal services.

¶11 The court stated it did not need to see the contingent fee agreement because "I don't think [the contract] is any objection by [Carlson's attorney], per se, to what I understand. The timing on it to me is what I am concerned about." The court was concerned with why Smith's attorney would accept the one-third interest before the litigation ended — including appeal. Smith argued that as of June 18, 2015, regardless of what may happen at some later point, she was the owner of the property and could do with it what she chose. Her attorney also offered to deed the property back to Smith, to which the court replied, "I don't know if that ship has sailed," and asked Carlson's attorney if that course of action would "resolve [the] issue." Carlson's attorney said it would not but did so arguing about the relief issue in the current litigation the court already stated had no bearing on disqualification and argued about matters in other lawsuits involving these and other, related litigants in which Smith's attorney and Carlson's attorney were representing various parties.

¶12 The trial judge reiterated its concern "that [Smith's attorney] took the [June 18, 2015] order, [was] served notice of a . . . motion to vacate, and then carried out the conveyance of that property to himself knowing that the order could have been vacated. That is problematic to me." Smith's counsel urged the court to consider Smith's situation, the harm that would

occur to her at this stage of the litigation if he were disqualified, and the likelihood that she could not find another lawyer because "this case has mushroomed[.]" He again requested that he be permitted to convey the property to Smith to avoid disqualification. The court replied:

> I sympathize with [Smith's] situation as you have described it, because that is very difficult and the approach that this Court could take could be heavy-handed to her, with all due respect, I also have to lay that at your feet with the conveyance to yourself after the motion to vacate had been filed, that makes it very difficult for me to look past that, and I — regretfully, I think I have to sustain their motion and I will."

¶13 On February 9, 2017, Smith's attorney conveyed his interest in the subject property to Smith by quitclaim deed that was recorded the same day. Also on that date, Smith filed a motion for new trial. On March 2, 2017, the trial court issued its order disqualifying Smith's attorney and ordering him to withdraw from the case. The court struck the pretrial conference and jury trial from the record and set the case for status hearing on that day, March 2, 2017. The court heard counsel's arguments and, with respect to the February 9, 2017 deed, stated:

> I am not going to comment on it other than to say I am going to deny the request for new trial and your record is preserved for appeal. You may present that to the appellate court if you wish on whether or not your removal by filing a quit claim deed changes anything. For me the issue still comes down to — I understand you had a contingency fee agreement; however, the taking of the property in your name on the same day that you had responded to the motion to vacate led me to believe that there was knowledge that the case wasn't over. It had not been concluded yet and yet you took that interest and then it proceeded" [until] I ruled on this . . . , so for quite a long time that interest remained and I think it creates the conflict [Carlson's attorney] has presented to the Court[.]

Thereafter, on March 10, 2017, the trial court entered its order denying Smith's motion for new trial. She appeals.

STANDARD OF REVIEW

¶14 "In considering the correctness of the trial court's order overruling [a motion for new trial], we first note that such motions are directed to the sound discretion of the trial court, and will not be disturbed on appeal in the absence of an abuse of that discretion." *Nu-Pro, Inc. v. G.L. Bartlett & Co., Inc.*, 1977 OK 226, ¶ 5, 575 P.2d 620 (footnote omitted). To reverse a trial court on the ground of an abuse of discretion, it must be found that the trial court made a clearly erroneous conclusion and judgment, against reason and evidence. "[A] clear abuse of discretion standard includes appellate review of both fact and law issues." *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling." *Fent v. Okla. Natural Gas Co.*, 2001 OK 35, ¶ 12, 27 P.3d 477 (citation omitted). On this appeal that determination requires examination of the underlying ruling on the motion to disqualify. In reviewing an order on a motion to disqualify an attorney, "we review the trial court's findings of fact for clear error and carefully examine *de novo* the trial court's application of ethical standards." *Ark. Valley State Bank v. Phillips*, 2007 OK 78, ¶ 8, 171 P.3d 899 (footnote omitted).

ANALYSIS

¶15 Smith raises several propositions of error on appeal including the validity of the contingent fee contract under which he was to receive a percentage of the subject property. She argues, among other things, the trial court abused its discretion in determining the interest her attorney received pursuant to that contract was, thus, a violation of Rule 1.8(i). She further argues Carlson is a stranger to her attorney-client relationship and the disqualification order was a denial of her due process right to be represented by counsel of her choice. For these reasons, she asserts, the trial court abused its discretion in denying her motion for new trial.

¶16 As to the validity of a contingent fee contract in which an attorney and client agree that the attorney will receive as a fee a percentage of property that is the subject of the litigation, the Oklahoma Supreme Court has determined, in a circumstance wherein

> [a]n attorney agreed to conduct litigation for quieting title to his client's real estate, and the client agreed as compensation "to

> make, execute, and deliver to said second party (attorney) a good and sufficient warranty deed conveying an undivided one-half interest in and to said lands above described." Held, that the agreement constituted an equitable, conditional assignment to the attorney of an interest in the subject of litigation.

. . . . Such contract was not illegal or against public policy.

Lashley v. Moore, 1925 OK 397, ¶ 0, 240 P. 704 (Syllabus by the Court) (emphasis added). *See Emery v. Goff*, 1947 OK 93, ¶ 0, 180 P.2d 175 (Syllabus by the Court) ("Where the guardian of a minor enters into a contingent fee contract with an attorney to handle litigation for the recovery of lands for the ward's estate whereby said attorney is to receive a specified undivided interest in said lands, and the contract is duly approved by the county court as necessary for the proper protection of the ward's estate, such contract is valid and binding upon the ward, and constitutes an equitable conditional conveyance of the interest to the attorney, to take effect on successful completion of the legal services."). *See also In re Guardianship of Stanfield*, 2012 OK 8, ¶ 14 n.18, 276 P.3d 989 (favorably discussing *Emery* wherein a "deed was executed for payment of legal services previously rendered pursuant to a contractually created contingent fee agreement"). Consequently, as argued by Smith, her contingent fee contract with her attorney gave him the expectancy of a percentage of the subject property in payment for legal services he performed with respect to that property. Because such contracts are not illegal or against public policy, Smith argues, they come within the exceptions to Rule 1.8(i) and, therefore, do not violate the Rules of Professional Conduct.[7]

¶17 We note nothing in the record or, more significantly, presented at the hearing on the motion to disqualify, supports a conclusion that Smith's contingent fee agreement was invalid or failed to give her attorney an interest in the subject property as a fee for his legal services. In fact, the trial court appeared to assume the contingent fee contract was valid and provided for payment of that fee by a percentage of Smith's property. The problematic issue for the trial court was that the fee was paid — the property interest was conveyed — at a time prior to the conclusion of the litigation.

¶18 While Smith argues, in effect, that the services he rendered were concluded at the time of the June 18, 2015 partial summary judgment order that gave Smith title to the subject property and canceled the 2009 deed, the trial court certainly had a legal and factual basis for determining that the litigation was not concluded, Smith's attorney knew it was not concluded, and yet the attorney took the interest while the litigation continued. It is the attorney's receipt of this property prior to the completion of the legal services that takes the current matter outside the facts of decisional authority such as *Lashley* and *Emery.* Yet, the question remains whether an attorney should be disqualified when the client opposes such disqualification and the interest is returned to the client.

¶19 The Oklahoma Supreme Court has explained that

> a party litigant in a civil proceeding still has a fundamental right to employ and be heard by counsel of his or her own choosing. The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the personal agent of the client and not the state. It is also grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk. An individual's decision to employ a particular attorney can have profound effects on the ultimate outcome of litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered.

Ark. Valley State Bank v. Phillips, 2007 OK 78, ¶ 12, 171 P.3d 899 (emphasis omitted) (footnotes omitted). The Supreme Court further explained,

> Nevertheless, the right to select one's own counsel is not absolute. A litigant's choice of counsel may be set aside under limited circumstances, where honoring the litigant's choice would threaten the integrity of the judicial process. This most often arises where an attorney's compliance with ethical standards of professional responsibility are challenged. It is this Court's non-

> delegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law, and in doing so, to preserve public confidence in the bar and the judicial process. However, motions to disqualify counsel for failure to comply with the Rules of Professional Conduct are not to be used as procedural weapons. Disqualification is such a drastic measure that it should be invoked if, and only if, the Court is satisfied that real harm is likely to result.

Id. ¶ 13 (footnotes omitted) (emphasis added). Referencing the holding in *Towne v. Hubbard*, 2000 OK 30, 3 P.3d 154, concerning a different conflict of interest issue, the Supreme Court stated:

> There, [we] held that the proper test for granting a motion to disqualify counsel is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. The burden rests with the moving party to establish the likelihood of such harm by a preponderance of the evidence.

Arkansas Valley, ¶ 23 (footnotes omitted). The Court thus concluded:

> A party litigant's right to employ the counsel of his or her choice is fundamental. A disqualification order is a drastic measure. The standard for granting a motion to disqualify counsel is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified.

Id. ¶ 25 (emphasis added).

¶20 In the present case, the trial court made no determination about whether "real harm is likely to result," *id.* ¶ 13, or "any real harm to the integrity of the judicial process is likely to result," *id*. ¶ 25, if Smith's attorney is not disqualified. The trial court seemed to believe it could not consider that issue, and whether whatever conflict may have been present could be cured by the conveyance of the interest in the subject property to Smith. In this regard, we conclude the trial court was in error.

¶21 First, no evidence of harm to Carlson by Smith's attorney's receipt of the property interest was presented at the hearing. Carlson made some argument about a foreclosure proceeding to which she was a party that was complicated in some way by the attorney's ownership interest in Smith's property. However, no evidence about this cloud of title issue was presented, and no evidence was presented or argument made that Carlson was adversely affected in the present litigation by the transfer of interest and no finding of such harm was made by the trial court. Second, no evidence was presented that Smith — the person whose interest is protected by Rule 1.8(i) — was harmed by the transfer. For instance, no evidence or argument was presented that the actual transfer of the interest to Smith's attorney during the litigation gave him any greater interest in the litigation than he had by virtue of his contingent fee agreement, and no evidence or argument was presented that Smith was dissatisfied with his representation or otherwise wished to discharge him but could not because of the interest he had in the subject property.

¶22 Third, and significantly, Smith is harmed by the disqualification of her attorney, a harm the trial court specifically noted but evidently believed it could not consider. The contentious litigation in this lawsuit had "mushroomed" since its inception in 2014 and was a month from jury trial at the time of the hearing. Smith is elderly, disabled, and unemployed. She lives alone and has no vehicle. Her sole income is $700 per month in Social Security benefits. At the time of the March 2, 2017 hearing on her motion for new trial, Smith had still been unable to secure new counsel. The court was informed that not even legal aid was able to help her. Thus, despite "her best efforts," she had been unable to secure new counsel.

¶23 Whether the actions of Smith's attorney would subject him to disciplinary proceedings is not the question we are answering and we offer no opinion about that matter.[8] The question before us is whether the standard that must be met for disqualification was met. "The burden rests with the moving party to establish the likelihood of [harm to the integrity of the judicial process] by a preponderance of the evidence." *Arkansas Valley*, ¶ 23 (footnote omitted). We conclude under the facts here presented, including the attorney's relinquishment of the property interest, that Carlson had not satisfied the standard of whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. We, therefore, conclude the trial court abused its discretion in denying Smith's motion for new trial.

CONCLUSION

¶24 We conclude the trial court abused its discretion in denying Smith's motion of new trial; consequently, we reverse the order and remand the cause with instructions to vacate the order disqualifying Smith's counsel.

¶25 **REVERSED AND REMANDED WITH INSTRUCTIONS.**

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Smith also argued that for over a year Carlson failed to present her defenses, failed to comply with the court's scheduling order, failed to address responsibilities incident to pretrial, and failed to respond to the motion for summary judgment. Smith argued Carlson had been present for most of the hearings and was fully apprised of key elements of the case and was represented by two attorneys during the course of the litigation; consequently, Smith argued, the motion to vacate should be denied. Smith also filed a first supplement in response to the motion to vacate concerning deposition testimony by Carlson that Smith gifted the property to her; Smith denied any such gift.

2. Smith had also filed a motion for summary judgment in May 2015. The court ordered Carlson to reply to that motion by September 30, 2015, and set the matter for hearing on November 12, 2015. The court's disposition docket shows that on November 12, 2015, the trial court denied both parties' competing motions for summary judgment.

3. The quitclaim deed was filed on July 14, 2017.

4. Rule 1.8(i) provides, in part, as follows: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . . ."

5. Carlson also asserted Rule 1.8(a) regarding business transactions between a lawyer and a current client was an applicable basis for disqualification in this case. However, that basis for disqualification was not pursued at the hearing, no evidence was presented showing the Rule's requirements were not met by Smith's attorney, the court's disqualification order was not based on Rule 1.8(a), and no argument regarding that Rule as a basis for disqualification is offered by Carlson on appeal.

6. Rule 1.16(a)(1) provides, in part, as follows: "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law[.]"

7. Though not mandatory authority, the comments to the rules are persuasive authority, *see Miami Bus. Servs., LLC v. Davis*, 2013 OK 20, ¶ 23, 299 P.3d 477; Comment 16, titled "Acquiring Proprietary Interest in Litigation," states, in part, as follows:

> Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule, has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. . . . In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees.

8. As stated by the Oklahoma Supreme Court in *Towne v. Hubbard*, 2000 OK 30, 3 P.3d 154, "it is principally a lawyer's responsibility when undertaking a representation to settle questions regarding possible conflicts of interest"; however, "a court may also consider the question, when it is appropriately raised by the motion of one of the parties, by acting in the exercise of its power to regulate the conduct of those involved in a judicial proceeding before it[.]" *Id.* ¶ 15 (footnote omitted). However, the Oklahoma Supreme Court has repeatedly stated:

> This Court is vested with exclusive and original jurisdiction over attorney disciplinary proceedings. 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. 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. Okla. Bar Ass'n v. Knight, 2018 OK 52, ¶ 6, 421 P.3d 299 (emphasis added) (citations omitted).

2018 OK CIV APP 56

ABERCROMBIE & FITCH STORES, INC., Plaintiff/Appellee, vs. PENN SQUARE MALL LIMITED PARTNERSHIP, Defendant/Appellant, and JOHN DOES 1-10, Defendants.

Case No. 116,008. August 10, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS, TRIAL JUDGE

AFFIRMED

Mark T. Steele, Scott F. Lehman, LATHAM, WAGNER, STEELE & LEHMAN, P.C., Tulsa, Oklahoma, for Plaintiff/Appellee

Thomas G. Wolfe, Catherine L. Campbell, Clayton D. Ketter, PHILLIPS MURRAH P.C., Oklahoma City, Oklahoma, for Defendant/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This case arises from a water leak in a roof drain line running above the ceiling of leased premises in a shopping mall. Abercrombie & Fitch Stores, Inc., the occupant of the leased premises, filed suit against Penn Square Mall Limited Partnership alleging Penn Square "had a contractual duty to maintain the mall's plumbing lines in good order, condition, and repair," and that Penn Square breached this duty. Abercrombie asserted theories of breach of contract and negligence against Penn Square, asserted that as a result of the water leak it "incurred substantial damages in cleanup, repair, lost merchandise, lost profits, and interruption to its business," and sought damages in excess of $300,000.[1]

¶2 Following a jury trial, the jury found in Abercrombie's favor, though it also found Abercrombie to be contributorily negligent. The trial court's order memorializing the decision of the jury states:

> After hearing the evidence and due deliberation, the jury returned with a unanimous verdict as follows:
>
> 1. Contribution negligence as to [Abercrombie] 40% and [Penn Square] 60%.

> Damages set in the sum of $243,000. The Court [therefore reduces] the damages by 40% of [Abercrombie's] contributory negligence and [finds] [Abercrombie's] damages to be $145,800.
>
> 2. Breach of contract in favor of [Abercrombie]. Damages set in the sum of $0.00.

The order concludes by stating that "judgment in all respects is awarded and entered in favor of [Abercrombie] as to its claim for negligence in the amount of $145,800, [and] its claim for breach of contract in the amount of $0.00[.]"

¶3 Penn Square appeals. In particular, Penn Square challenges the trial court's denial of its motion for directed verdict, and Penn Square also asserts on appeal that the trial court erred in its approval of certain jury instructions.

STANDARD OF REVIEW

¶4 In determining whether a trial court erred in denying a motion for directed verdict, "[w]e 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"; such a motion "should not be granted unless there is an entire absence of proof on a material issue." *First Nat. Bank in Durant v. Honey Creek Entm't Corp.*, 2002 OK 11, ¶ 8, 54 P.3d 100 (citation omitted).

¶5 "When reviewing jury instructions, we look at whether the probability arose that the jurors were misled and reached a different conclusion due to an error in the instruction given." *CNA Ins. Co. v. Krueger, Inc., of Tulsa,* 1997 OK 142, ¶ 14, 949 P.2d 676 (citation omitted).

> In reviewing the propriety of given instructions, the instructions are to be viewed in whole rather than separately. And, where it appears that instructions taken as a whole do not establish that the jury was misled or that complaining parties' rights were prejudiced, the verdict will not be set aside. Instructions are sufficient when, considered as a whole, they present the law that is applicable to the issues.

Id. ¶ 15 (citation omitted).

ANALYSIS

I. A duty derived from a contractual relationship may properly form the basis of a negligence theory.

¶6 Penn Square asserts that the elements of duty and breach of duty in a negligence action[2] cannot be founded upon a duty derived from a contractual relationship. For example, Penn Square asserts that "to maintain a claim for negligence, a claimant must establish the breach of a duty that exists at common law" and that is "independent of the breach of contract." Penn Square asserts that if the duty in question would not exist apart from a contract or contractual relationship, then the only available theory is breach of contract. In this regard, Penn Square states that "Abercrombie utterly failed to introduce any evidence that Penn Square breached a duty independent of the breach of contract," and further states that

> Abercrombie repeatedly makes reference [in its Answer Brief] to the contractual duty to keep plumbing lines in good order, condition, and repair — a duty that arises solely out of the Lease. If Penn Square failed to keep the lines in good order and repair, Abercrombie's only remedy would be under a breach of contract action.

Penn Square summarizes its argument as follows: "While Abercrombie's assertion that Penn Square failed to comply with the contractual obligation to keep the [water] lines in good order and repair may give rise to a claim for breach of contract, the breach of that contractual duty does not give rise to a tort claim."

¶7 However, the Oklahoma Supreme Court has explained that "[a]ccompanying every contract is a common-law duty to perform it with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract." *Keel v. Titan Const. Corp.*, 1981 OK 148, ¶ 14, 639 P.2d 1228 (emphasis added) (footnote omitted). In *Finnell v. Seismic*, 2003 OK 35, 67 P.3d 339, the Oklahoma Supreme Court similarly explained:

> Oklahoma law has long recognized that an action for breach of contract and an action in tort may arise from the same set of facts. . . . [I]nherent in every contract [is] a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness. A person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach-of-contract or tort theory, or both[.][3]

Id. ¶ 13 (emphasis added) (footnotes omitted). *See also Gaasch v. St. Paul Fire & Marine Ins. Co.*,

2018 OK 12, ¶ 18, 412 P.3d 1151 ("An action for breach of contract and an action in tort may arise from the same set of facts and a person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach of contract or tort theory, or both." (citing, *inter alia*, *Finnell*)).[4] Pursuant to the reasoning in *Finnell* and *Keel*, we reject Penn Square's argument that the duty derived from the parties' contractual relationship could not form the basis of Abercrombie's negligence theory.[5]

¶8 Moreover, the parties' contract expressly provides that claims for negligence are not waived. The contract provides that the parties "shall not be liable for, and the other party waives, all claims for damage to person and property sustained by the other party … resulting from any accident or occurrence in or upon the demised premises or any part of the Shopping Center, except for the willful acts, negligence or default under this lease of a party or its agents and employees, and except for a party's failure to make repairs …." (Emphasis added.)

¶9 Consequently, we conclude the trial court did not err in denying this portion of Penn Square's motion for directed verdict, and we conclude the trial court did not err in providing the jury with a negligence instruction.

II. The provision in the parties' contract excluding certain damages does not apply to damages ex delicto and, even if it did, no error occurred.

¶10 Penn Square points out that the parties' contract contains the following language: "In no event shall either party be liable for indirect or consequential damages." *Cf. Black's Law Dictionary* (10th ed. 2014) (Defining consequential damages as "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act. — Also termed indirect damages."). Penn Square asserts that all of the damages claimed by Abercrombie were consequential damages and that only the costs required "to stop the leak are considered direct damages[.]" Penn Square asserts Abercrombie should therefore not have been awarded any damages.

¶11 Indeed, it appears Penn Square may have been successful in this regard because the jury awarded zero damages to Abercrombie for breach of contract. However, the jury did award damages for negligence, and we disagree with Penn Square to the extent it is arguing the limitation on damages contained in the parties' contract applies to the award of damages for negligence.

> A breach of contract is a material failure of performance of a duty arising under or imposed by agreement. Although torts may be committed by parties to a contract, a tort is a violation of a duty imposed by law independent of contract. If the contract is merely the inducement which creates the occasion for the tort, the tort, not the contract, is the basis of the action. A common law duty to perform with care, skill, reasonable expediency, and faithfulness accompanies every contract. Negligent failure to observe any of these conditions will give rise to an action *ex delicto* as well as an action *ex contractu.*

Lewis v. Farmers Ins. Co., 1983 OK 100, ¶ 5, 681 P.2d 67 (citing *Okla. Nat. Gas Co. v. Pack*, 1939 OK 475, 97 P.2d 768).[6] As in the present case, "there may be a duty imposed by law, by reason of the relation of the parties," and "although the relation was created by contract," there remains "a broad distinction between causes of action arising *ex contractu* and *ex delicto*[.]" *Pack*, ¶ 11 (citation omitted). With regard to the latter, "damages may be recovered for all injuries of which the breach was the proximate cause." *Id.* ¶ 17 (citations omitted).

¶12 Nevertheless, contractual provisions may, under certain circumstances, restrict tort recovery. Indeed, in Oklahoma, parties may contract to avoid any and all liability for ordinary negligence. *See Combs v. W. Siloam Speedway Corp.*, 2017 OK CIV APP 64, ¶ 7, 406 P.3d 1064 ("The Oklahoma Supreme Court has long recognized that exculpatory contracts, i.e., a contract to avoid liability for damages . . . , may be valid and enforceable." (citation omitted)). However, in the context of exculpatory contracts, the "language must evidence a clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages[.]" *Combs*, ¶ 8 (quoting *Schmidt v. United States*, 1996 OK 29, 912 P.2d 871). Similarly, agreements to indemnify a party against its own negligence are enforceable in Oklahoma, but the intent to do so must be expressed "in unequivocally clear language." *See Am. Energy-Permian Basin, LLC v. ETS Oilfield Servs., LP,* 2018 OK CIV APP 44, ¶ 18, 417 P.3d 1282.

¶13 In confronting circumstances similar to those presented here, where a contract contains a provision prohibiting certain kinds of damages and the issue raised is whether that limitation applies to tort recovery, other jurisdictions have similarly concluded that such language may be applicable to tort recovery, but only if the provision in question unambiguously and clearly signals the parties' intent to restrict tort recovery. *See, e.g., Kaste v. Land O'Lakes Purina Feed, LLC*, 392 P.3d 805, 811 (Or. Ct. App. 2017). We find this approach to be consistent with Oklahoma law.

¶14 Turning to the provision itself,

> [a]s other courts have recognized, the phrase "consequential damages" ordinarily refers to contract damages, not tort damages. *Berwind Corp. v. Litton Industries, Inc.*, 532 F.2d 1, 7 (7th Cir. 1976) ("[T]he use of the words 'consequential damages' refers to contract rather than tort damages."); *Starr v. Dow Agrosciences LLC,* 339 F. SupP.2d 1097, 1101 (D. Or. 2004) (concluding that contractual limitations on recovery of consequential damages did not bar recovery on negligence claims).

Kaste, 392 P.3d at 811. *See also Macal v. Stinson*, 468 N.W.2d 34, 35-36 (Iowa 1991) ("Two types of damages may be awarded in breach of contract actions, general damages and special or consequential damages."). By contrast, in tort actions, "[w]hen there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed," Restatement (Second) of Torts § 903 cmt. a (1979), and, in tort actions, "[t]he recovery of damages for pecuniary harm is restricted by the rules as to causation," *id.* at § 906 cmt. a. *See also Black's Law Dictionary* (10th ed. 2014) (Defining compensatory damages as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered."). In the present case, the limitation in the parties' contract refers to contract damages, not tort damages, and the language in question does not unambiguously and clearly signal an intent to restrict tort recovery. Consequently, we conclude the language does not apply.

¶15 Finally, even assuming, arguendo, the "indirect or consequential damages" limitation applies to the negligence claim, here the jury was instructed to award only those damages which were "directly caused" by the negligence. For example, the jury was instructed that "when a lessor/Landlord fails to keep in good order, condition or repair the plumbing the lessor is then liable for injuries directly caused by its failure to maintain." (Emphasis added.) The jury was also provided with an instruction on direct damages, and the jury was not instructed to award indirect or consequential damages. Thus, no error occurred in this regard.[7]

III. The statute of repose is inapplicable to the issues.

¶16 Finally, Penn Square argues that any claim for negligence based on the construction of the drain line is barred by the statute of repose. Penn Square bases this argument on 12 O.S. 2011 § 109, which bars tort actions "for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property" brought more than ten years after the completion of the construction, as well as on the fact that Abercrombie appears to have alleged in its petition, filed more than ten years after construction of the drain line, that Penn Square was negligent in, among other things, the construction and installation of the plumbing line.

¶17 However, in the pretrial conference order, Abercrombie merely asserted that Penn Square breached its duty to maintain the mall's plumbing lines, and no mention is made in the pretrial conference order, or in the subsequent jury instructions, that Penn Square was negligent in the construction or installation of the drain line. *See* Okla. Dist. Ct. R. 5(I), 12 O.S. Supp. 2013, ch. 2, app. (The pretrial conference order "shall control subsequent course of the action unless modified by a subsequent order," and "[t]he contents of the pretrial order shall supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the Court to prevent manifest injustice." (emphasis added)); *Corman v. H-30 Drilling, Inc.,* 2001 OK 92, ¶ 13, 40 P.3d 1051 ("Under Rule 5(I) any issue not identified in the pretrial order will not be considered unless it is permitted to prevent 'manifest injustice.'" (emphasis added)).

¶18 Indeed, it is undisputed that the drain line was installed in 1995, and that the leak did not occur until approximately eighteen years later in 2013. As Abercrombie asserts its claims

concern Penn Square's failure to maintain and inspect its plumbing lines, not the construction or installation of the drain lines, and the statute of repose is inapplicable. *See also CNA Ins. Co.*, 1997 OK 142, ¶ 15 ("Instructions are sufficient when, considered as a whole, they present the law that is applicable to the issues.").

¶19 We are not persuaded that the statute of repose is applicable. Consequently, we conclude the trial court did not err in failing to grant Penn Square's motion for directed verdict on the basis of the statute of repose, or in failing to provide the jury with a statute of repose instruction.

CONCLUSION

¶20 We conclude the trial court did not err in denying Penn Square's motion for directed verdict, and we also conclude the trial court adequately instructed the jury. Consequently, we affirm.

¶21 **AFFIRMED**.

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. In the jury instructions it is stated:
> The parties agree that on October 20, 2006, Abercrombie entered into a lease with Penn Square to occupy retail space within Penn Square Mall. The parties further agree that on the morning of June 5, 2013, an overhead pipe leaked into the Abercrombie store causing damage to the store and merchandise.
>
> Abercrombie alleges that . . . Penn Square breached its contractual duty to maintain the pipe. Abercrombie also alleges that Penn Square negligently maintained its premises, specifically the pipe in question. . . .

2. To establish a *prima facie* case of negligence, a plaintiff must show: "1) a duty owed by the defendant to protect the plaintiff from injury; 2) a failure to perform that duty; and 3) injuries to the plaintiff which are proximately caused by the defendant's failure to exercise the duty of care." *Smith v. City of Stillwater,* 2014 OK 42, ¶ 22, 328 P.3d 1192 (citations omitted). Thus, "[a]mong the traditional elements of the tort of negligence are that there must be (1) a duty owed by one person to another, and (2) a breach of that duty. The threshold question in any suit based on negligence is whether defendant had a duty to the particular plaintiff alleged to have been harmed." *Wofford v. E. State Hosp.*, 1990 OK 77, ¶ 8, 795 P.2d 516 (internal quotation marks omitted) (citations omitted).

3. The *Finnell* Court further explained that if both theories are pursued — as occurred in the present case — and "if the evidence supports both," then "the claimant can achieve but a single recovery." *Id.* ¶ 13 (footnote omitted). However, it does not appear, and Penn Square does not assert, that Abercrombie achieved anything other than a single recovery in this case.

4. We note that Penn Square relies on an Oklahoma Court of Civil Appeals decision — *Chase v. Paul Holt Drilling, Inc.*, 1975 OK CIV APP 9, 538 P.2d 217 — which predates both *Keel* and *Finnell*. In *Chase*, a separate division of this Court did conclude that the trial court erred in providing the jury with a negligence instruction where the alleged breach of duty was "founded on the breach of a rotary drilling contract[.]" *Chase*, ¶ 1. However, as far back as at least 1939, the Oklahoma Supreme Court has relied on the same reasoning found in *Keel* and *Finnell*. *See, e.g., Okla. Nat. Gas Co. v. Pack,* 1939 OK 475, ¶¶ 9-14, 97 P.2d 768 (The *Pack* Court concluded that although "there was a contractual relationship between the plaintiffs and defendant," "the contention that plaintiffs are limited to an action for breach of a contract is incorrect."); *but see Gaasch*, 2018 OK 12, ¶ 17 (Citing a 1915 Oklahoma Supreme Court case, the *Gaasch* Court explained that, "[h]istorically, when an action is a claim which seeks to recover for unliquidated damages for a personal injury caused by negligence, although the negligence complained of amounts to a breach of contract on the part of the defendant, the action is one *ex delicto* and the law of torts governs that claim."). In addition, the reasoning in *Chase* is unpersuasive. The *Chase* Court stated that "[i]n the context used the word 'negligent' is really a superfluous adjective describing the reason for defendant's alleged failure to fulfill its contractual obligations. We say superfluous because if indeed defendant breached the contract, it is immaterial whether it did so negligently or otherwise." 1975 OK CIV APP 9, ¶ 20. While it is true that a plaintiff can achieve but a single recovery, see n.3, *supra*, we disagree that an allegation of breach of contract renders a negligence theory arising from the same facts superfluous such that a jury cannot be instructed regarding both theories. Applying the logic in *Chase*, the opposite could just as easily be said. However, rather than having the trial court arbitrarily determine which of the two theories it deems to be "superfluous" prior to submission of the instructions to the jury, the Oklahoma Supreme Court has determined, as quoted above, that "[a] person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach-of-contract or tort theory, or both[.]" *Finnell*, ¶ 13. We are bound by the decisions of the Oklahoma Supreme Court. *See, e.g., Sweeten v. Lawson*, 2017 OK CIV APP 51, ¶ 24 n.11, 404 P.3d 885 ("It is axiomatic the Court of Civil Appeals cannot overrule an opinion of the Oklahoma Supreme Court and we are thus bound by its previous decisions." (citation omitted)).

Finally, it should also be noted that *Chase* was decided prior to important changes to the Oklahoma Pleading Code. The Chase Court appears to have based its conclusion, at least in part, on a close reading of the language used in the plaintiff's petition in that case, which failed to "contain any allegation relating to the breach of a common law duty by defendant." Chase, ¶ 20 This portion of the reasoning in Chase (which was decided in 1975) is at odds with "[t]he Oklahoma Pleading Code, 12 O.S. 2001 §§ 2001 *et seq*. . . . adopted in 1984 to replace form pleading requirements." *Wilson v. Webb*, 2009 OK 56, ¶ 9, 221 P.3d 730 (footnote omitted). Under the Oklahoma Pleading Code,

> pleadings should give fair notice of the claim and be subject to liberal amendment, should be liberally construed so as to do substantial justice, and that decisions should be made on the merits rather than on technical niceties. The Pleading Code rejects the approach that pleading is a game of skill in which one misstep is decisive to the outcome, but instead accepts the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. (footnotes omitted). *See also Estate of Hicks ex rel. Summers v. Urban E., Inc.*, 2004 OK 36, ¶ 15, 92 P.3d 88 ("In *Finnell* we said that the court will craft the available relief that is justified by the facts. We stated that notice pleading requires of the petition only that it give fair notice of the plaintiff's claim and the grounds upon which it rests. This regime abolishes any requirement that a litigant correctly identify a theory of recovery or describe the remedy affordable for vindication of asserted rights.").

5. The Oklahoma Supreme Court has noted that "in ordinary commercial contracts, a breach of good faith and fair dealing generally merely results in damages for breach of contract, not independent tort liability." *James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 16 n.16, 292 P.3d 10 (citation omitted). We interpret this statement to mean that, as acknowledged by the Supreme Court in a separate case cited by Penn Square, "[c]onduct that is merely a breach of contract is, of course, not a tort." *Hall Jones Oil Corp. v. Claro*, 1969 OK 113, ¶ 9, 459 P.2d 858. In other words, even where all the elements of a breach of a contract theory have been met in a case, the elements of a negligence theory may not be met, and vice versa. *Cf. Digital Design Grp., Inc. v. Info. Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834 (The elements of a breach of contract theory are: "1) formation of a contract; 2) breach of the contract; and 3) damages as a direct result of the breach." (footnote omitted)), and *Robinson v. Okla. Nephrology Assocs., Inc.*, 2007 OK 2, ¶ 9, 154 P.3d 1250 (The elements of a negligence theory are: "(a) a duty owed by the defendant to protect the plaintiff from injury, (b) a failure to properly exercise or perform that duty and (c) plaintiff's injuries proximately caused by the defendant's failure to exercise his duty of care." (citation omitted)). The present case appears to be one in which the breach of contract and negligence theories dovetailed with regard to the creation of a duty because Penn Square agreed, under the Lease, "to maintain all common areas . . . of the Shopping Center in good order, condition and repair and in a safe, clean, sightly and sanitary condition in accordance with good, current from time to time and generally accepted shopping center management practices." But this does not mean, as Penn Square suggests, that Abercrombie was limited to a breach of contract theory.

6. In line with the Oklahoma decisional law discussed herein, the Supreme Court of Texas explained long ago that a tort

> is generally described as a wrong independent[] of a contract, though it is conceded that a tort may grow out of, make a part of, or be coincident with, a contract. So the same state of facts, between the same parties, may admit of an action *ex contractu* or *ex delicto*. In such cases the tort is dependent upon, while at the same time independent of, the contract.

Shirley v. Waco Tap R.R. Co., 10 S.W. 543, 549 (Tex. 1889) (internal quotation marks omitted) (citations omitted).

7. We note that the jury was instructed as to lost profits as follows: "Lost profits that are found to have occurred directly or proximately . . . are direct damages and may be recoverable. If you find that the lost profits were not directly or proximately caused from a breach of contract or negligence you may not award them." Penn Square summarily argues that "[a]s a matter of law, lost profits constitute consequential damages." However, it cites to only two cases of the United States Court of Appeals for the Tenth Circuit in support of this argument. In response, Abercrombie cites to two Oklahoma Supreme Court cases and to one Tenth Circuit case applying Oklahoma law in support of its position that "Oklahoma has a long history of acknowledging that lost profits are" — or, at least, can be — "direct damages[.]" In its Reply Brief, Penn Square cites to a case from another jurisdiction stating, "In essence, consequential damages are economic losses, such as lost profits." However, Penn Square has not cited to any Oklahoma authority in support of this argument and, in Oklahoma, lost profits may constitute direct damages. *See Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶ 26, 933 P.2d 282 (Lost profits are recoverable in a breach of contract case, among other things, "if the loss flows directly or proximately from the breach," and "loss of profits . . . is generally considered a common measure of damages for breach of contract, it frequently represents fulfillment of the non-breaching party's expectation interest, and it often closely approximates the goal of placing the innocent party in the same position as if the contract had been fully performed." (citations omitted)). Moreover, here, the limiting phrase in the parties' contract is "indirect or consequential damages," not just "consequential damages," and this language follows language in the contract, quoted at greater length above, providing, among other things, that Penn Square agrees not to waive liability for damages sustained by Abercrombie resulting from Pen Square's negligence. Thus, even assuming the "indirect or consequential damages" limitation applies to Abercrombie's negligence claim, we conclude the trial court did not err in instructing the jury to award lost profits that "have occurred directly or proximately" as a result of the negligence. More fundamentally, however, we conclude, as set forth above, that the language in question does not unambiguously and clearly signal an intent to restrict tort recovery and, thus, we conclude it does not apply to the jury's award of damages for negligence.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JAMES ROBERT JOHNSON, SCBD #6679 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if James Robert Johnson should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, Nov. 8, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

OKLAHOMA SUMMIT ON ACCESS TO JUSTICE

OCTOBER 11, 2018

9 A.M. - 3:30 P.M.

Oklahoma Bar Center

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9:00 a.m.	**Welcome -** OBA President Kimberly Hays
9:05 a.m.	**The Justice Gap -** James J. Sandman, President of the Legal Services Corporation
10:00 a.m.	**The Oklahoma Access to Justice Commission: A Report Card** The Honorable Douglas Combs, Chief Justice Oklahoma Supreme Court Associate District Judge Rick Bozarth Michael Figgins, Commission Chair Anna Carpenter, Commission Vice-Chair M. David Riggs, Commission Past-Chair
10:35 a.m.	**Keynote address** The Honorable Jonathan Lippman Chief Judge, New York Court of Appeals
11:15 a.m.	**There is Too Much Law for Those Who Can Afford It, AND FAR TOO LITTLE FOR THOSE WHO CAN'T!** Michael C. Turpen, Riggs, Abney, Neal, Orbison & Lewis
11:40 a.m.	**Networking Lunch**
12:20 p.m.	**Why Civil Justice Reform Matters for Oklahoma** Katherine Alteneder, Executive Director, Self-Represented Litigation Network
1:10 p.m.	**What the Data Tell Us About Civil Access to Justice** Ryan Gentzler, Director, Open Justice Oklahoma Anna Carpenter, Associate Professor, University of Tulsa College of Law, Director of the Lobeck Taylor Community Advocacy Clinic
1:55 p.m.	**The New Reality of Eviction and Homelessness** Michael Figgins, Executive Director, Legal Aid Services of Oklahoma William Hoch, Crowe & Dunlevy; Richard M. Klinge, Oklahoma City University School of Law; Eric Hallett, Legal Aid Services of Oklahoma
2:25 p.m.	**Oklahoma Free Legal Answers and the Work of the OBA Access to Justice Committee** Rodney Ring, OBA Access to Justice Committee Chair
2:35 p.m.	**Delivering Limited Scope Services Safely and Effectively** Jim Calloway, MAP Director, Oklahoma Bar Association
3:30 p.m.	**Adjourn**

Calendar of Events

September

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

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

OBA Financial Institutions and Commercial Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle, 405-848-4810

27 **OBA General Practice/Solo and Small Firm Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Ashley B. Forrester 405-974-1625

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

OBA Environmental Law Section meeting; 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Teena G. Gunter 405-522-4576

October

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

4 **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

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

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

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

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

17 **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

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

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

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

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, September 6, 2018

F-2017-972 — Appellant Chris Martin Peterson appeals his Judgment and Sentence from the District Court of Jefferson County, Case No. CF-2017-29, for Failure to Register as a Sex Offender, After Former Conviction of a Felony (Count 1) and Sex Offender Living Within 2000 Feet of Licensed Daycare, After Former Conviction of a Felony (Count 2). The Honorable Dennis L. Gay, Associate District Judge, presided over Peterson's non-jury trial, found him guilty on each count, sentenced him to ten years imprisonment and a $1,000.00 fine on each count, and ordered the sentences to be served consecutively. From these judgments and sentences Chris Martin Peterson has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

RE-2017-0775 — Deondrea Deshawn Thompson, Appellant, entered a plea of guilty on November 10, 2010, to Robbery With A Dangerous Weapon. He was sentenced to twenty years, seven years to serve and thirteen years suspended, with rules and conditions of probation for the suspended portion of the sentence. Appellant was given credit for time served. The State filed an application to revoke Appellant's suspended sentence on November 8, 2016. Following a revocation hearing held on July 17, 2017, the Honorable Timothy R. Henderson, District Judge, revoked Appellant's suspended sentence in full, thirteen years. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Lewis, V.P.J.: Lumpkin, P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur

C-2018-111 — Clorinda Alexis Archuleta, Petitioner, entered a blind plea of guilty to Counts 3 and 4, child neglect, and Count 6, permitting child abuse by injury, in the District Court of Tulsa County, Case No. CF-2014-323. The Honorable James M. Caputo, District Judge, accepted the plea and sentenced Petitioner to life imprisonment and a $500.00 fine on each count, with credit for time served, to be served concurrently. The court also imposed various fees and costs. Petitioner filed a motion to withdraw the plea, which the district court denied after evidentiary hearing. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

RE-2017-149 — In the District Court of Pottawatomie County, Appellant, Teddy Lynn Fontenot, while represented by counsel, entered pleas of guilty to Escape from Arrest and Knowingly Concealing Stolen Property, in Case No. CF-2014-80, and to Domestic Assault and Battery Against a Pregnant Woman, a Second Offense, in Case No. CF-2014-503. Each of those offenses were after former conviction of two or more felonies. On March 30, 2016, in accordance with a plea agreement, the Honorable John G. Canavan, Jr., District Judge, sentenced Appellant to a term of ten (10) years imprisonment for each offense, to be served concurrently with one another, all suspended under written rules of probation. On February 1, 2017, Judge Canavan found Appellant violated his probation and revoked the suspension orders in full. Appellant appeals the final order of revocation. AFFIRMED WITH INSTRUCTIONS TO AMEND THE WRITTEN ORDERS OF REVOCATION. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

F-2017-569 — Appellant Charlie Joe Hicks, III, was tried by jury and convicted of First Degree Murder in the District Court of Oklahoma County, Case No. CF-2015-3941. The jury recommended a sentence of life in prison and the trial court sentenced accordingly. From this judgment and sentence Charlie Joe Hicks III has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur in Results; Rowland, J., Recuse.

F-2017- 69 — Adam Clayton Zilm, Appellant, was tried by jury for the crime of Sexual Abuse of a Child Under 12 in Case No. CF-2012-3037 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at thirty-six years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Adam Clayton Zilm has perfected his appeal. AFFIRMED. Motion to Supplement the Record on Appeal and for Evidentiary Hearing is DENIED. 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. 2)
Wednesday, September 5, 2018

115,391 — In re the marriage of: Pamela Marie Utley, Petitioner/Appellee, vs. Robert Dempsey Utley, Respondent/Appellant. Appeal from Order of the District Court of Tulsa County, Hon. Tammy L. Bruce, Trial Judge. Appellant Robert Utley appeals those portions of the Decree of Dissolution of Marriage regarding division of property and finding him guilty of contempt. He further appeals the district court's denial of his motion to reconsider and its order granting appeal-related attorney fees to Pamela Utley. Robert failed to meet his evidentiary burden to rebut the presumption that property acquired during the marriage is marital property. Additionally, we find that the record supports the district court's valuation of Robert's business and we find no abuse of discretion in the district court's award of appellate attorney fees to Pamela. We further find that the indirect contempt citation against Robert was coercive in nature and, therefore, his right to a jury trial was statutory and not subject to federal constitutional safeguards. As such, he failed to preserve the jury trial issue for appellate review because he did not object during the trial. For these reasons, we affirm the orders of the district court. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Thursday, September 6, 2018

115,652 — Karessa James, now Virden, Plaintiff/Appellant, vs. William Edwards, Defendant/Appellee. Proceeding to review a judgment of the District Court of Washington County, The Hon. Russell C. Vaclaw, Trial Judge. Plaintiff Karessa James appeals the verdict of the district court after the bench trial of an automobile accident case. Plaintiff argues that, as a result of "ex parte communication," Defendant decided to withdraw his tendered payment of the jury fee, subjecting Plaintiff to a bench trial when Plaintiff wanted a jury trial. Plaintiff also argues that the verdict in the bench trial was tainted by bias, and damages were inadequate. We find that Plaintiff was not denied a jury trial as the result of any "ex parte communication," but because Plaintiff did not tender the jury fee as ordered. We find no other evidence of "bias" sufficient to vacate the verdict. It is inherent to the nature of either a bench trial or a jury trial that damage awards may vary considerably from the mean for a given case or scenario. Unless the award is so unusual that it is clearly unreasonable, or without any support in the record, the appellate courts defer to the judgment of the jury or judge in such matters. We find the damages awarded are within the acceptable range pursuant to this established standard. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer J., concur.

Friday, September 7, 2018

116,600 — Amanda Cole, Plaintiff/Appellant, vs. Samantha Josey, Defendant/Appellee. Appeal from an order of the District Court of McClain County, Hon. Leah Edwards, Trial Judge, granting Defendant Samantha Josey's motion to dismiss. Plaintiff filed her first lawsuit in Cleveland County alleging negligence against Defendant as a result of an automobile accident. Defendant filed a special appearance and motion to dismiss for failing to serve process within 180 days. The trial court dismissed the case without prejudice. Plaintiff refiled this negligence case against Defendant but this time in McClain County. Defendant filed a special appearance and motion to dismiss arguing that Plaintiff failed to timely refile her negligence suit within one year from the date of dismissal of the first lawsuit as required by 12 O.S.2011 § 100 (the savings statute). Plaintiff asserts the trial court erred in its interpretation of the savings statute, and then in its application of that interpretation to the refiled claim. Because Plaintiff failed to present any good cause for failing to timely serve Defendant, we conclude, as did the trial court, that Plaintiff's Cleveland County petition was deemed dismissed as a matter of law on the 181st day after its filing, which was October 27, 2015. Plaintiff had one year from that date to refile her case pursuant to the savings statute. As a result,

Plaintiff's McClain County petition filed on January 3, 2017, is untimely and the trial court properly dismissed it. The trial court's order of dismissal is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

116,013 — The Falls at Garrett Creek HOA, Inc., Plaintiff/Appellee, vs. Iberia Whitfield, Defendant/Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Millie Otey, Trial Judge, granting judgment in favor of The Falls at Garrett Creek HOA, Inc., in a small claims action seeking past-due homeowner assessments against Defendant, Iberia Whitfield. The two main issues in this case are: (1) Did the trial court err in finding Defendant was subject to the HOA for dues and assessments? and (2) Did the trial court err in awarding the HOA attorneys' fees and costs? We determine that the moment Defendant accepted the deed to her lot, she also accepted membership in the HOA, which included paying assessments. The evidence supports the trial court's calculation and award to the HOA of damages, and the judgment is affirmed. We also conclude that the trial court acted within its authority to award attorneys' fees and costs to the HOA, and based on case law and the record before us, the amount of that the award is not unreasonable. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Friday, August 31, 2018

116,654 — Tinker Federal Credit Union, Plaintiff/Appellant, vs. Brandon Meeks, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Trial Judge. Plaintiff Tinker Federal Credit Union (Appellant) appeals an order for dismissal without prejudice of its lawsuit against Defendant Brandon Meeks (Appellee) for failure to obtain service within 180 days since the filing of the petition. *See* 12 O.S. §2004 (I). Appellant's authority, *Klein v. Department of Corrections*, 2012 OK CIV APP 79, 283 P.3d 901, supports its argument that it was entitled to a show cause hearing before dismissal of its petition. As in *Klein*, the record in this case confirms Appellant was given no opportunity to show good cause, by hearing or otherwise, before the trial court's dismissal of its petition. The record also includes the process server's affidavit attesting her skip trace on June 7, 2016 found Defendant's "current residence" was in Kentucky. This evidence triggered §2004(I)'s exception to the trial court's authority for dismissal when a defendant "has been outside of this state for one hundred eighty (180) days following the filing of the petition." We conclude the trial court's violations of §2004(I) re-quires reversal of the Order of Dismissal and remand of the case for further proceedings. REVERSED AND REMANDED. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

116,020 — In Re the Marriage of Dinan: C. Dinan, Petitioner/Appellant, vs. L. Dinan, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Owen Evans, Judge. Petitioner/Appellant C. Dinan (Father) appeals from a trial court order modifying child support and entering a judgment against him for the child support arrearage. After reviewing the record, we hold the trial court abused its discretion by awarding child support in an amount greater than the child's monthly expenses. We modify the order by reducing the child support award for one child from $2,400 per month to $1,637.67 per month and reduce the judgment against Father for the child support arrearage from $39,217.38 to $11,776.18. The order is affirmed in all other respects. AFFIRMED AS MODIFIED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,138 — Tetra Energy, LLC, an Arkansas limited liability company; Northstar Minerals, LLC, an Oklahoma limited liability company; Riverfront Exploration, LLC, an Arkansas limited liability company; Sand Ridge, LLC, an Arkansas limited liability company; GWP Investments, LLC, an Arkansas limited liability company; Blue Teton, LLC, an Arkansas limited liability company; Davis Holdings, L.P., a Texas limited partnership, Plaintiffs/Appellees, vs. Sundance Energy, Inc., a Delaware corporation, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. Defendant/Appellant Sundance Energy, Inc. (Sundance) appeals from a journal entry of judgment entered in favor of Plaintiffs/Appellees Tetra Energy, LLC; Northstar Minerals, LLC; Riverfront Exploration, LLC; Sand Ridge, LLC; GWP Investment, LLC; Blue Teton, LLC; and Davis Holdings, L.P. (collectively, Tetra). After a non-jury trial, the court found Sundance's attempt to terminate the parties' contract was legally ineffective due to Sundance's

failure to comply with other contractual provisions. Accordingly, Sundance breached the contract by refusing to close the transaction. Tetra was awarded Sundance's $600,000 escrow deposit plus interest pursuant to the terms of the contract. Because we find no reversible errors of law and the trial court's journal entry of judgment sets forth extensive findings of fact and conclusions of law adequately explaining its decision, we affirm under Oklahoma Supreme Court Rule 1.202(d), 12 O.S. 2011, Ch. 15, App. 1. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

Friday, September 7, 2018

116,327 — In Re the Marriage of Phillips: Teresa Renee Phillips, Petitioner/Appellant, vs. John T. Phillips, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. Petitioner/Appellant Teresa Renee Phillips (Wife) appeals the court's order to spread mandate, which awarded Wife $26,140.50 for her portions of Respondent/Appellee John T. Phillips' (Husband) stock benefits and 401(k). We find the trial court erred as a matter of law by allowing new evidence on remand regarding the value of Husband's "phantom stock options." The valuation date was affirmed in the first appeal of this case and thus, any litigation concerning the value of the stock after that date was barred by the settled law of the case doctrine. We REVERSE and REMAND for the trial court to re-calculate the value of the stock benefits, as of the settled valuation date, January 18, 2013, and to make an equitable distribution of the marital property. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Wednesday, August 29, 2018

116,768 — In the Matter of: A.M. and M.H., Brandon Marshall, Appellant, v. State of Oklahoma, ex rel. Department of Human Services, Appellee. Appeal from an Order of the District Court of Comanche County, Hon. Lisa Shaw, Trial Judge. Brandon Marshall (Marshall), father of A.M. and M.H. (Children), appeals the judgment entered on a jury verdict terminating his parental rights. Marshall's parental rights were terminated for failure to correct conditions leading to the deprived adjudication. However, the evidence shows that Marshall did not receive the ISP until after the petition for termination was filed and more than one year after the ISP was adopted by the trial court. Marshall did not have an attorney appointed until after the termination petition was filed. Marshall is incarcerated and that fact was known to all parties. The DHS caseworker has a duty to contact and work with a parent. That duty is reinforced by DHS regulations. The Record reflects a rather haphazard effort on the part of the DHS caseworker to contact Marshall. The caseworker did not bring the matter of her inability to make contact due to DOC's lack of cooperation to the attention of the trial court, the District Attorney's office, or any supervisor. The caseworker has a duty to work closely with the court. This Court is confident that the trial court would have appointed an attorney had the caseworker informed the trial court, as the caseworker is required to do, and other officials about the failure to contact Marshall. The result is that Marshall has been denied Due Process of Law and his guaranteed access to courts in a timely manner so that he could defend himself. The judgment terminating Marshall's parental rights based upon failure to correct conditions is reversed. Marshall's parental rights were also terminated for failure to support Children. Submission to the jury of two distinct failures to support grounds was error. The Record lacks clear and convincing evidence that Marshall willfully failed to abide by court ordered child support. The verdict form did not distinguish between failure to support based on a court order versus failure to support to best of ability. Therefore, it is not possible to determine whether the jury's verdict is based upon the erroneously submitted ground. There is a probability that the jurors were misled by its intermingling of the two failures to support grounds. The judgment terminating Marshall's parental rights is reversed. However, the judgment adjudicating Children as deprived is not disturbed. Therefore, the cause is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Friday, September 7, 2018

116,144 — Noble Investments, Inc., an Oklahoma corporation; the Jean B. McGill Exemption Trust, Plaintiffs, and James C. McGill, an individual, Plaintiff/Appellant, v. Susie McRight and Mike McRight, Defendants/Appellees. Appeal from the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. James C. McGill (McGill) appeals from the trial court's order awarding attorney fees to Susie and Mike McRight (the McRights). The trial court awarded the McRights attorney fees under 12 O.S. 2011 § 936, which, among other

things, allows prevailing party attorney fees "[i]n any civil action to recover for labor or services rendered[.]" Consistent with a ruling of the Oklahoma Supreme Court in a prior appeal in this case, we conclude the "labor or services" provision of § 936 is inapplicable. The McRights also sought attorney fees below on the basis of 18 O.S. Supp. 2014 § 1126(c). However, § 1126(c) is inapplicable, nor do the McRights assert on appeal that the trial court's order should be affirmed on the basis of § 1126(c). The McRights do assert on appeal that the trial court's order should be affirmed on the basis of either 12 O.S. Supp. 2014 § 2011.1 or "based on the Court's inherent power to sanction onerous and frivolous litigation conduct[.]" However, we conclude the trial court did not err in failing to award attorney fees under its inherent equitable power. As to § 2011.1, it is inapplicable because it only applies in actions not arising out of contract. For these reasons, we conclude the trial court abused its discretion in awarding attorney fees to the McRights. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Monday, September 10, 2018

117,105 — Kimberly Willis, Plaintiff/Appellant, v. Douglas G. Woodson, D.D.S. d/b/a Douglas G. Woodson, PLLC, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge. The trial court plaintiff, Kimberly Willis (Willis) appeals an Order granting summary judgment to the defendants, Douglas G. Woodson, D.D.S. d/b/a Douglas G. Woodson, PLLC (Woodson). Willis sued Woodson and claimed injury as a consequence of dental malpractice. Willis has no expert witness. She has not shown that any recognized exception applies to having an expert witness in a medical malpractice case. Therefore, the trial court did not err in granting summary judgment. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

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ESTABLISHED, DOWNTOWN TULSA, AV-RATED LAW FIRM SEEKS ASSOCIATE ATTORNEY with 3 - 6 years' commercial litigation experience, as well as transactional experience. Solid deposition and trial experience a must. Our firm offers a competitive salary and benefits with bonus opportunity. Send replies to "Box J," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

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

OIL & GAS LITIGATION ASSOCIATE. McAfee & Taft's large and sophisticated oil and gas practice is looking for an associate attorney with one to three years of hands-on oil and gas litigation experience. Top academic performance, strong writing and analytical skills, interpersonal skills and the ability to work in a team environment are required. Candidates with prior industry experience (land department, engineering and/or operations) are specifically encouraged to apply for this position. Excellent salary and benefits. Please submit resume, law school transcript and a short writing sample to Brandon Long at brandon.long@mcafeetaft.com and Todd Woolery at todd.woolery@mcafeetaft.com. All inquiries will be treated confidentially.

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

ATTORNEY POSITION AVAILABLE FOR COMANCHE COUNTY. Must have criminal law experience. Please email resume to Teressa.H.Williams@gmail.com.

MUGG WINSTON IS SEEKING AN ATTORNEY with 1-3 years of experience to practice in the area of estate planning. Probate, adoption, civil litigation or oil and gas experience preferred. Please complete an application at www.muggwinston.law/careers.

NASH COHENOUR KELLEY & GIESSMANN PC, an AV rated firm in Oklahoma City, seeks an associate attorney. The practice involves commercial, business, estate planning, probates, legal research and briefing. The associate would work very closely with two established attorneys. Please email your resume and salary requirements to either Rollin Nash at rnash@nashfirm.com or Jay Scott at jscott@nashfirm.com. All replies held in strict confidence.

POSITIONS AVAILABLE

AV RATED DOWNTOWN OKC insurance defense/civil litigation firm is accepting resumes for an associate attorney with 5+ years civil litigation experience. Candidate should be self-motivated, detail oriented and have strong research and writing skills. Partner track position for the right candidate. Excellent salary and benefits. Send replies to "Box W," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

NATIONWIDE LAW FIRM SEEKS JUNIOR ASSOCIATE WITH 0-3 YEARS EXPERIENCE. Candidates must be self-motivated and detail oriented. Excellent communication skills and ability to multitask required. Competitive compensation package. Please send resume and cover letter to Jim Klepper Law Firm, attn: Pam, P.O. Box 271320, OKC, OK 73137.

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

ARE YOU SEEKING A MORE DESIRABLE WORK/LIFE BALANCE? Do you enjoy and excel at legal research and writing? Perhaps this is the job you have been searching for. Our offices are located in mid-town Tulsa. Legal experience preferred, but not required. Resume and writing sample may be emailed to tclavin@hmkoklaw.com.

POSITION AVAILABLE. New or young attorney, associate or partner. Working with older attorney. General practice. Primarily bankruptcy. Oklahoma City. Plan to take over practice. Be your own boss. Own your law practice. 949-5544.

DISTRICT 15 (MUSKOGEE COUNTY) IS SEEKING AN ASSISTANT DISTRICT ATTORNEY with 0 to 5 years of prosecutorial experience. Send resumes or inquiries thru October 19, 2018, to orvil.loge@dac.state.ok.us or Orvil Loge, District Attorney, Muskogee County District Attorney's Office, 220 State Street, Muskogee, OK 74464.

FOR SALE

SENTENCING REFORMS COMING NOV. 1, 2018. Be ready with the new 3rd edition of Sentencing in Oklahoma (2018-19) by Bryan Dupler. $30 + tax & shipping. Email orders to oksentencinglaw@gmail.com.

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OCTOBER IS DOMESTIC VIOLENCE AWARENESS MONTH

OCT. 11 MCLE CREDIT 3/1
OCT. 12 MCLE CREDIT 7/2

DOMESTIC VIOLENCE TRAINING FOR GUARDIAN AD LITEMS

OCTOBER 11 1:30 - 3:40 P.M.

University of Tulsa College of Law Moot Courtroom, 3120 East 4th Place, Tulsa

DOMESTIC VIOLENCE AT WORK AWARENESS, PLANNING & PREVENTION

Cosponsored by the Community Learning Council

OCTOBER 12 8:30 A.M. - 3 P.M.

University of Tulsa College of Law Moot Courtroom, 3120 East 4th Place, Tulsa

FOR DETAILS AND TO REGISTER, GO TO WWW.OKBAR.ORG/CLE

Stay up-to-date and follow us on

OCTOBER 11:

Program Planner/Moderator/Presenter:
G. Gail Stricklin, *Attorney, Oklahoma City*

TOPICS COVERED:

- **Domestic Violence and Trauma**
  - Megan Martin, *VP of Legal Services*
  - Lori Gonzalez, *Domestic Violence Intervention Services of Tulsa*
- **GAL Law and Best Practices**
- **Case Study (to Include 1 Hr Ethics)**

$75 for registration. Lawyers providing pro bono services through Legal Aid, Lawyers for Children, public defender GALs or court-appointed pro bono GALs may pre-register for $25 by contacting Renee at 405.416.7029 or ReneeM@okbar.org. NO OTHER DISCOUNTS. This program will not be webcast.

OCTOBER 12:

Program Planner/Moderator:
Ginger Decoteau, *Founder, Executive Director, Community Learning Council, Inc.*

During this program, participants will review case studies that detail incidents of domestic violence-related incidents and injuries. This program was designed to help professionals identify warning signs, strengthen policies, implement safety measures and develop an action plan to create a safer and supportive work environment for all employees.

$150 for early registration (before Oct. 4). Late Fees Apply. Lawyers providing pro bono services through Legal Aid, Lawyers for Children, public defender GALs or court-appointed pro bono GALs may pre-register for $25 by contacting Renee at 405.416.7029 or ReneeM@okbar.org.

NO OTHER DISCOUNTS. This program will not be webcast.

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MCLE CREDIT 3/1

TRUST ACCOUNTING ESSENTIALS

OCTOBER 16, 2018

1:30 - 4:10 P.M.

Oklahoma Bar Center

OTHER AVAILABLE DATE: DECEMBER 18, 2018

FOR DETAILS AND TO REGISTER, GO TO WWW.OKBAR.ORG/CLE

Stay up-to-date and follow us on

PROGRAM MODERATORS:

Gina Hendryx, OBA General Counsel
Jim Calloway, OBA MAP Director

The need to handle with scrupulous care funds entrusted to a lawyer by a client or third person should be self-evident. Nonetheless, cases continue to arise where practicing lawyers, either inadvertently or intentionally, mishandle trust funds, subjecting clients and third persons to the risk of economic hardship and undermining public confidence in the legal profession.

The purpose of this is course is threefold: (1) to describe the rules for handling trust funds and property; (2) to discuss relatively recent changes to the handling of fees and trust transactions; and (3) to provide practical guidance on how to use both print and electronic tools to produce client and general ledgers and to perform proper three-way reconciliation of trust funds accounts.

$75 for early registrations with payment received by October 8, 2018; $100 for registrations October 10-15, 2018. Walk-ins $125. Register online at www.okbar.org/cle. No discounts apply. This program will not be webcast.