THE OKLAHOMA BAR
Journal
Volume 89 — No. 31 — 11/24/2018

Court Issue

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ROCK 'N' ROLL LAW

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FEATURED TRAINER:
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This basic course is meant to give attendees an overview of music copyright law concepts, including how to establish and register a copyright for your music, what is a copyright and how to get one. You will learn the two copyrights in every song. You will also drill down to discuss the sources of revenue songs can generate as well as explore the exclusive rights of a copyright and what those basic rights mean under federal law. You will explore how the music industry as it pertains to the law has changed over the years.

Lastly, you will delve into future issues of music streaming and sampling. The course will also explore user-generated content; performing rights organizations' role in music, and the future of copyright lawsuits.

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Journal

Volume 89 – No. 31 – 11/24/2018

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PROGRAM

Marijuana Laws: Representing Individual & Corporate Clients
Office of Civil Rights Enforcement: Areas of Focus & Litigation
Tips from the Bench: What Judges Want Lawyers To Know:
Honorable Scott L. Palk, District Judge, Western District of Oklahoma
Lunch: Crabtown Buffet (included in registration)
Jury Trial Recipes for Success: Luck, Tricks or Just Plain Hard Work
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Year in Review: 2018 Federal & State Case Law Review

NOTICE: DESTRUCTION OF RECORDS

Pursuant to Court Order SCBD No. 3159, the Board of Bar Examiners will destroy the admission applications of persons admitted to practice in Oklahoma after 3 years from date of admission.

Those persons admitted to practice during **2014** who desire to obtain their original application may do so by submitting a written request and $25 processing fee. **Bar exam scores are not included.** Requests must be received by **Dec. 27, 2018**.

Please include your name, OBA number, mailing address, date of admission, and daytime phone in the written request. Enclose a check for $25, payable to Oklahoma Board of Bar Examiners.

Mail to: Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

Oklahoma Bar Association

table of contents

Nov. 24, 2018 • Vol. 89 • No. 31

page

1548 Index to Court Opinions

1549 Opinions of Supreme Court

1561 Opinions of Court of Criminal Appeals

1570 House of Delegates Actions

1571 Calendar of Events

1572 Opinions of Court of Civil Appeals

1578 Disposition of Cases Other Than by Publication

Index to Opinions of Supreme Court

2018 OK 86 In re: Amendment of Rule Seven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch.1, app 5 SCBD-6707 1549

2018 OK 87 In re: Amendment of Rule Eleven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch. 1, app. 5 SCBD-6708 1550

2018 OK 88 IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR APPROVAL OF NOT TO EXCEED $125,000,000 GILCREASE EXPRESSWAY TOLL REVENUE BONDS, SERIES 2018 (GILCREASE EXPRESSWAY WEST PROJECT: TIFIA 2018) No. 117,233 1551

2018 OK 89 STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. SHANITA DANIELLE GAINES, Respondent. SCBD 6630..... 1553

Index to Opinions of Court of Criminal Appeals

2018 OK CR 34 STATE OF OKLAHOMA, Appellant, v. SHELLEY MARIE BRADLEY, Appellee. Case No. S-2018-5; STATE OF OKLAHOMA, Appellant, v. DYLAN THOMAS BRODIE, Appellee. Case No. S-2018-6 1561

2018 OK CR 35 DAVID NEIL DUNN, Petitioner, v. THE STATE OF OKLAHOMA, Respondent. Case No. C-2017-1050..... 1566

Index to Opinions of Court of Civil Appeals

2018 OK CIV APP 67 IN THE MATTER OF E.H. AND J.H., ADJUDICATED DEPRIVED CHILDREN: AMBER HENSLEY, Appellant, vs. STATE OF OKLAHOMA, Appellee. Case No. 116,930..... 1572

2018 OK 86

In re: Amendment of Rule Seven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch.1, app 5

SCBD-6707. November 13, 2018

ORDER

This matter comes on before this Court upon an Application to Amend Rule Seven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch. 1, app 5. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective January 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 13th day of November, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Wyrick, J., dissents.

EXHIBIT A

RULE SEVEN

FEES

The following **non-refundable** fees shall be paid to the Board of Bar Examiners at the time of filing of the application:

(a) Registration:

Regular.....$125

Nunc Pro Tunc.....$500

(b) By each applicant for admission upon motion: the sum of $2,000.

(c) By each applicant for admission by examination under Rule Four, §1:

FEBRUARY BAR EXAM

Application filed on or before:

1 September.....~~$1,000~~ 1,100

1 October .....~~$1,050~~ 1,150

1 November.....~~$1,150~~ 1,250

JULY BAR EXAM

Application filed on or before:

1 February.....~~$1,000~~ 1,100

1 March .....~~$1,050~~ 1,150

1 April .....~~$1,150~~ 1,250

(d) By each applicant for a Special Temporary Permit under Rule Two, §5: the sum of $750.

(e) By each applicant for admission by a Special Temporary Permit under Rule Two, §6: the sum of $100.

(f) For each applicant for a Special Temporary Permit under Rule Two, §7, there will not be any fee charged to the applicant.

(g) By each applicant for a Temporary Permit under Rule Nine: $150.

(h) By each applicant for admission by examination other than those under subparagraph (c) hereof:

FEBRUARY BAR EXAM

Application filed on or before:

1 September..... $400

1 October.....$450

1 November.....$550

JULY BAR EXAM

Application filed on or before:

1 February $400

1 March $450

1 April $550

2018 OK 87

In re: Amendment of Rule Eleven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch. 1, app. 5

SCBD-6708. November 13, 2018

ORDER

This matter comes on before this Court upon an Application to Amend Rule Eleven of the Rules Governing Admission to the Practice of Law, 5 O.S. Supp. 2018, Ch. 1, app 5. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective January 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 13th day of November, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

RULE ELEVEN

HEARING AS TO CHARACTER AND/OR FITNESS

Section 1. If the Board of Bar Examiners decides to deny an application to take the bar examination or to deny an application for admission to practice law on any ground except failure to pass the bar examination, written Notice of Denial shall be mailed to the applicant citing the Rule upon which the denial is based. The Notice of Denial must adequately inform the applicant of the nature of the evidence upon which the denial is based. The Notice of Denial may be modified by the Board prior to any hearing on the denial as long as the applicant has sufficient notice. Subject to the foregoing, the Notice of Denial places in issue all matters that may relate, directly or indirectly, to the applicant's eligibility to practice law in the State of Oklahoma.

Section 2. The Board of Bar Examiners shall have the power to order a hearing on its own motion before making a decision on any application. Written notice of such a hearing shall be given to the applicant. The hearing procedures set forth in this Rule Eleven shall apply both to hearings ordered by the Board and to hearings requested by an applicant.

Section 3. An applicant, who receives a Notice of Denial without a prior hearing before the Board of Bar Examiners, may take issue with the denial and request a hearing before the Board. The hearing request must be written and shall be delivered to the Board within twenty (20) days after the Notice of Denial was mailed to the applicant. Delivery to the Administrative Director of the Board shall be considered delivery to the Board for purposes of this Rule Eleven.

Section 4. In any hearing conducted under this Rule Eleven, the applicant shall have the right to be represented by counsel and to present evidence. The Board of Bar Examiners may also be represented by counsel. At the request of the applicant or the Board, the Clerk of the Supreme Court of Oklahoma shall issue subpoenas for witnesses and subpoena duces tecum in connection with the hearing. At the hearing, the Board shall administer oaths and affirmations, receive the evidence, and decide on the application.

Section 5. The Board shall furnish a certified court reporter to record the proceedings at hearings under this Rule Eleven. If an applicant desires a transcript of the hearing, the applicant must order the transcript from the court reporter at the applicant's expense, and a copy must be furnished to the Board at the applicant's expense.

Section 6. ~~For h~~ Hearings held under this Rule Eleven shall be heard by at least a three-member panel ~~a quorum shall be five (5) members~~ of the Board of Bar Examiners herein referred to as the Hearing Panel. The Chairperson or his or her designee shall preside as the hearing officer. The decision on the application must be made by a majority of the Hearing Panel. ~~Board members present, excluding the Chairperson, who is not a voting member except in the case of a tie vote~~.

Section 7. The decision of the Hearing Panel of the Board of Bar Examiners following a hearing conducted under this Rule Eleven shall be reduced to written form and mailed to applicant or applicant's counsel. All denial decisions shall include findings of fact and conclusions of law.

Section 8. (a) An applicant whose application is denied by the Hearing Panel of the Board of Bar Examiners following a Rule Eleven hearing, may appeal to the Supreme Court of Oklahoma by filing twelve (12) copies of a Notice of Appeal with the Clerk of the Supreme Court and one copy of a Notice of Appeal with

the Board. The Notice of Appeal and cost bond shall be filed by the applicant with the Clerk of the Supreme Court within thirty (30) days after the Hearing Panel ~~Board~~'s written decision was mailed to the applicant or his/her counsel. The Notice of Appeal shall set forth the basis for the appeal. Any findings of fact and conclusions of law issued by the Hearing Panel ~~Board~~ in connection with the Rule Eleven hearing shall be attached to the Notice of Appeal.

(b) At the same time the Notice of Appeal is filed, the applicant shall also file a good and sufficient cost bond to be approved by the Clerk of the Supreme Court in an amount sufficient to defray the costs of the appeal, including the Rule Eleven hearing transcript.

(c) Within thirty (30) days after the court reporter has advised the applicant and the Board that the transcript of the Rule Eleven hearing is complete, the applicant must file twelve (12) copies of applicant's Brief in Chief in support of applicant's appeal with the Clerk of the Supreme Court and one copy of applicant's Brief in Chief with the Administrative Director of the Board. Within forty (40) days after receipt of the applicant's Brief in Chief the Board must file twelve (12) copies of its Answer Brief with the Clerk of the Supreme Court and send one copy to applicant or applicant's counsel. Within thirty (30) days after receipt of the Board's Answer Brief, the applicant may file twelve (12) copies of a Reply Brief with the Clerk of the Supreme Court.

(d) Once filed with the Clerk of the Supreme Court, the appeal shall be subject to the rules of the Supreme Court of the State of Oklahoma.

Section 9. The burden of establishing eligibility for admission to the Bar of this state, for registration as a law student, or to take an examination, shall rest on the applicant at all stages of the proceedings.

2018 OK 88

IN THE MATTER OF THE APPLICATION OF THE OKLAHOMA TURNPIKE AUTHORITY FOR APPROVAL OF NOT TO EXCEED $125,000,000 GILCREASE EXPRESSWAY TOLL REVENUE BONDS, SERIES 2018 (GILCREASE EXPRESSWAY WEST PROJECT: TIFIA 2018)

No. 117,233. November 14, 2018

ORIGINAL PROCEEDING TO APPROVE REVENUE BONDS

¶0 The Oklahoma Turnpike Authority (Authority) seeks to issue revenue bonds for use in the construction of the Gilcrease Expressway Turnpike Project in Tulsa, Oklahoma. Pursuant to 69 O.S. 2011 §1718, the Authority filed an application in this Court seeking approval of the proposed bonds. No objections were filed. We accept original jurisdiction to determine the bonds' validity.

ORIGINAL JURISDICTION ASSUMED; BOND PROPOSAL APPROVED.

Jered T. Davidson, Oklahoma City, Oklahoma, for Oklahoma Turnpike Authority.

KAUGER, J:

¶1 The cause before us is an original proceeding brought pursuant to the provisions of 69 O.S. 2011 §1718,[1] which authorizes the Oklahoma Turnpike Authority (Authority) to file an application with this Court seeking approval of bonds to be issued for the construction and operation of turnpike projects. With no Protestants filing objections, we approve the bonds.

BACKGROUND

¶2 Since the 1950's, this Court has approved several bonds requested by the Authority. In 2017, the Oklahoma Legislature passed the Oklahoma Local Public and Private Facilities and Infrastructure Act (the Act), 74 O.S. Supp. 2017 §§5151 et. seq.[2] The purpose of the Act is to facilitate public-private partnerships to improve public services.[3]

¶3 Even though the Authority is exempted from the Act, the Act does provide that the Authority may utilize the general provisions and processes of the Act to develop public-private partnership agreements.[4] The purpose of the agreements is to facilitate the construction and operation of various turnpike projects throughout the state. One such project is the proposal at issue here. The Gilcrease Expressway, the project presented here, is part of an original more than 50 year-old master plan for Tulsa, Oklahoma. The project will be four lanes, approximately 5 miles in length, serving west and north Tulsa. It will connect Interstate 44 and U.S. Highway 412, operating as an all-electronic toll collection system.

¶4 Financing for the project will come from the issuance of revenue bonds or a TIFIA loan, secured by and payable from revenues generated by the project. Additional financial commitments are also made by the Authority, the

Oklahoma Department of Transportation, and the City of Tulsa utilizing a combination of: 1) long term debt, payable from project revenues in the form of a loan from the United States Department of Transportation (USDOT) under the Transportation Infrastructure Finance and Innovation Act (TIFIA)[5]; 2) $71,123,068 of bond proceeds from the "Grant Anticipation Notes (GARVEEs) issued and payable by ODOT; and 3) a contribution from the Authority's general fund. This project is described as a component of the "Driving Forward" program announced by the Governor in 2015. It is generally designed to expand and modernize the Authority's Turnpike Projects and improve safety throughout the state.[6]

DISCUSSION/CONCLUSION

¶5 There are no Protestants to this cause. Consequently, no one presents any legal authority showing that this project is a violation of the Oklahoma Constitution or any statutes. Nor does it appear that the Authority exceeded its authority as authorized by law, or that the Bonds appear to facially violate the law. Pursuant to In the Matter of Application of the Oklahoma Turnpike Authority, 2016 OK 124, ¶15, 389 P.3d 31 we need not engage in further research.[7] The applicant explains that the bond financing procurement in this proposal cannot create an unlawful partnership interest in contravention to the Okla. Const. art. 10, §15[8] because at no time will the Authority enter into a joint venture or acquire a partnership or other ownership interest in a private entity.

¶6 Rather, the Authority will oversee construction and provide inspection. Upon completion it will be the owner of the project, and solely responsible for operating and maintaining the new turnpike. It will also establish the applicable rates and charges for use by the public.

CONCLUSION

¶7 The proposed bond issue was properly authorized as an essential governmental function.[9] Valid notice of this application was given.[10] No Protestants have come forward, therefore, there is no legally or factually supportable reasons to disapprove the application. Accordingly, the Authority's application is granted. Rehearing, if any, shall follow Okla. Sup. Ct. Rule 1.13.[11]

ORIGINAL JURISDICTION ASSUMED; BOND PROPOSAL APPROVED.

COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON, REIF, and DARBY, JJ., concur.

COLBERT and WYRICK, JJ., dissent

WYRICK, J., with whom COLBERT, J., joins, dissenting:

The Court lacks jurisdiction to render this advisory opinion.

KAUGER, J:

1. Title 69 O.S. 2011 §1718 provides:
The Authority is authorized in its discretion to file an application with the Supreme Court of Oklahoma for the approval of any bonds to be issued hereunder, and exclusive original jurisdiction is hereby conferred upon the Supreme Court to hear and determine each such application. It shall be the duty of the Court to give such applications precedence over the other business of the Court and to consider and pass upon the applications and any protests which may be filed thereto as speedily as possible. Notice of the hearing on each application shall be given by a notice published in a newspaper of general circulation in the state that on a day named the Authority will ask the Court to hear its application and approve the bonds. Such notice shall inform all persons interested that they may file protests against the issuance of the bonds and be present at the hearing and contest the legality thereof. Such notice shall be published one time not less than ten (10) days prior to the date named for the hearing and the hearing may be adjourned from time to time in the discretion of the Court. If the Court shall be satisfied that the bonds have been properly authorized in accordance with this article and that when issued, they will constitute valid obligations in accordance with their terms, the Court shall render its written opinion approving the bonds and shall fix the time within which a petition for rehearing may be filed. The decision of the Court shall be a judicial determination of the validity of the bonds, shall be conclusive as to the Authority, its officers and agents, and thereafter the bonds so approved and the revenues pledged to their payment shall be incontestable in any court in the State of Oklahoma.
2. Title 74 O.S. Supp. 2017 §§5151 et seq. Section 5151 provides:
This act shall be known and may be cited as the "Oklahoma Local Public and Private Facilities and Infrastructure Act".
3. Title 74 O.S. Supp. 2017 §5154.1 provides:
Authority and Purpose of this Act
A responsible governmental entity may take any action and execute any Public-Private Partnership contract, authorized under this act, for the provision of a public purpose in order to more efficiently and effectively provide public services, including by generating additional resources in support of the public project.
4. Title 74 O.S. Supp. 2017 §5152.1 provides in pertinent part:
. . .B. The Oklahoma Department of Transportation and the Oklahoma Turnpike Authority shall be exempt from this act. However, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority may utilize the general provisions and process described herein to develop a public-private partnership contract for a transportation improvement in consultation with the Director of the Office of Management and Enterprise Services (OMES) and subject to the approval of the Oklahoma Transportation Commission or the Oklahoma Turnpike Authority Board as applicable.
5. 23 U.S. C. §§601-609.
6. See, In the Matter of Application of the Oklahoma Turnpike Authority, 2016 OK 124, ¶6, 389 P.3d 318.
7. In the Matter of Application of the Oklahoma Turnpike Authority, 2016 OK 124, ¶15, 389 P.3d 318 [We need not consider propositions unsupported by convincing argument or authority in an original action unless it is apparent without further research that they are well taken. S.W. v. Duincan, 2001 OK 39, ¶31, 24 P.3d 846.].
8. The Okla. Const. art. 10, §15 provides:
15. Pledge or loan of credit - Donation - Exceptions.

A. Except as provided by this section, the credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.

B. Pursuant to authority of and subject to requirements of law and according to professional norms established nationally in similar activities, the Oklahoma Center for the Advancement of Science and Technology or its successor may be authorized to use public funds not exceeding one percent (1%) of total state appropriations for the current fiscal year to promote economic development through grants or loans to individuals, companies, corporations or associations. Pursuant to authority of and subject to requirements of law and according to professional norms established nationally in similar activities, the Oklahoma Center for the Advancement of Science and Technology or its successor may be authorized to use public funds in order to promote economic development by purchase or ownership of stock or to make other investments in private enterprises and to receive income from such investments which are involved with research or patents from projects involving Oklahoma colleges or universities. The Oklahoma Center for the Advancement of Science and Technology or its successor may only use public funds for the purposes authorized in this subsection if a statute specifically authorizing such use is approved by an affirmative vote of at least two-thirds (2/3) of the members elected to the Senate and to the House of Representatives upon final passage of such measure in each of the respective houses and with the approval of the Governor.

C. The Legislature shall only authorize use of public funds by the Oklahoma Center for the Advancement of Science and Technology or its successor as permitted by this section for promotion of economic development by creation of new employment, enhancement of existing employment or by the addition of economic value to goods, services or resources within the State authorized by subsection B herein.

D. The Legislature shall establish procedures to review and evaluate the extent to which the purposes of any statute authorizing use of public funds by the Oklahoma Center for the Advancement of Science and Technology are achieved.

E. Bonds issued by the board of education of any school district or public institutions of higher education may be guaranteed by the corpus of the permanent school fund, provided:

1. As to bonds issued by the board of education such bonds must be approved by election of the school district upon the question of issuing such bonds;

2. As to bonds issued by an institution within The Oklahoma State System of Higher Education such bonds are issued in accordance with all applicable provisions of law; and

3. Provisions shall be made by the Legislature to guarantee prompt reimbursement to the corpus of the permanent school fund for any payment from the fund on behalf of a school district or on behalf of an institution within The Oklahoma State System of Higher Education. The reimbursement shall include a reasonable rate of interest. The provisions of this paragraph regarding use of the permanent school fund for guarantee of bonds issued by an institution within The Oklahoma State System of Higher Education shall not be self-executing and the Legislature shall provide by law the procedure pursuant to which such obligations may be guaranteed and the procedures for repayments, if any, required to be made to the permanent school fund.

F. Subject to requirements imposed by law, the governing boards of institutions within The Oklahoma State System of Higher Education and employees of those institutions may have an ownership interest in a technology, whether or not the technology is protected pursuant to federal or state law governing intellectual property, and may have an ownership interest in a business enterprise or private business entity, if the ownership interest is acquired as a result of research or development of a technology involving the authorized use of facilities, equipment, or services of such institutions.

9. The Enabling Act, 69 O.S. 2011 §1701 establishes the Authority to construct, maintain, repair, and operate turnpike projects and to issue turnpike revenue bonds payable solely from revenues to pay the cost of such projects. the term "project" includes highways and related infrastructure necessary for turnpike operation. The Authority is an instrumentality of the state and its purpose of construction, operating and maintaining turnpikes is an essential governmental function.

10. Pursuant to 69 O.S. 2011 §1718, see note 1, supra, on July 25, 2018, this Court issued an order setting the dates for protests to be filed and oral presentation on the matter in accordance with the statute. The Authority on August 14, 2018, filed an "Affidavit of Proof of Publication" attaching proof of compliance with the above notice requirements. No protests against the issuance of the bonds were filed nor did any interested persons or Protestants appear at the hearing before the referee.

11. Title 20 O.S. 2011 §14.1 provides that this Court shall fix the time for rehearing. It states:

> Any department, institution, board, bureau, division, commission, agency, trusteeship, or authority of state government authorized to issue bonds, notes, or other evidences of indebtedness may, upon advice of bond counsel or upon governing board approval, file an application with the Supreme Court of Oklahoma for the approval of any obligations to be issued by it. Exclusive original jurisdiction shall be conferred upon the Supreme Court to hear and determine each such application pursuant to rules and procedures designated by the Court. The Court may give such applications precedence over the other business of the Court and to consider and pass upon the applications and any protests which may be filed against the application as expeditiously as possible.
>
> Notice of the hearing on each application shall be given by a notice in a newspaper of general circulation in the state that on a day named, the applicant will ask the Court to hear its application and approve the obligations. Notice shall inform all persons interested that they may file protests against the issuance of the obligations and be present at the hearing and contest its legality. The notice shall be published one time not less than ten (10) days prior to the date named for the hearing and the hearing may be adjourned from time to time in the discretion of the Court.
>
> If the Court is satisfied that the obligations have been properly authorized in accordance with the law and that when issued, they will constitute valid obligations in accordance with their terms, the Court shall render its written opinion approving the obligations and shall fix the time within which a petition for rehearing may be filed. The decision of the Court shall be a judicial determination of the validity of the obligations, shall be conclusive as to the applicant, its officers and agents, and thereafter the obligations so approved and the revenues pledged to their payment shall be incontestable in any court in this state.

Rule 1.13 of the Okla. Sup. Ct. Rules. 12 O.S. 2011 App. 1, provides in pertinent part:

> (a) Petition.
>
> Applications for a rehearing and a brief in support thereof, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk within twenty (20) days from the date on which the opinion in the cause is filed. The mailbox rule, extended to various papers by the terms of Rule 1.4 (c) and 1.4(e), applies to rehearing petitions to the Supreme Court. No oral argument on a petition for rehearing shall be allowed except upon order of the Court. No petition for rehearing shall be filed or considered without proof of service. . . .

2018 OK 89

STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. SHANITA DANIELLE GAINES, Respondent.

SCBD 6630. November 20, 2018

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE

¶0 The Complainant, the Oklahoma Bar Association, brought a disciplinary proceeding pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2014, ch. 1, app. 1-A, following the Respondent's disbarment from the practice of law in the State of Texas for misconduct arising from a personal injury case. The Respondent testified in a

hearing before the Professional Responsibility Tribunal. After the hearing, the Complainant filed a brief recommending the Respondent be disbarred for her misconduct. The Respondent did not file a response brief. We hold Respondent's professional misconduct warrants disbarment and she is hereby disbarred from the practice of law and her name stricken from the roll of attorneys upon the date this opinion is filed.

RESPONDENT DISBARRED AND NAME STRICKEN FROM ROLL OF ATTORNEYS UPON THE DATE THIS OPINION IS FILED

Loraine Dillinder Farabow, First Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Shanita Danielle Gaines, Respondent/*Pro Se*

COMBS, C.J.:

¶1 This is a reciprocal disciplinary proceeding initiated pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings ("RGDP"), 5 O.S. Supp. 2014, ch. 1, app. 1-A, which provides for discipline in Oklahoma that is based upon a disciplinary action occurring in another jurisdiction. The present matter concerns a Judgment of Disbarment issued February 5, 2018, by the Evidentiary Panel 14-2 of the Grievance Committee for the State Bar of Texas, District 14, in *Commission For Lawyer Discipline v. Shanita Danielle Gaines*, Case No. 201604423. Currently, the Respondent, Shanita Danielle Gaines, is suspended from practicing law in Oklahoma. *State ex rel. Okla. Bar Ass'n v. Gaines,* 2016 OK 80, 378 P.3d 1212 (Gaines I); *In the Matter of the Suspension of Members of the Okla. Bar Ass'n,* 2018 OK 44. In addition, just a few weeks prior to our decision in *Gaines I*, she was suspended for failure to comply with continuing legal education requirements. *In the Matter of the Suspension of Members of the Okla. Bar Ass'n*, 2016 OK 64. The Respondent was granted a hearing before the Professional Responsibility Tribunal ("PRT") on June 20, 2018. Thereafter, the PRT issued a report wherein it recommended Respondent be disbarred effective September 28, 2016 (the alleged date her suspension became final in *Gaines I*).[1]

I. PROCEDURAL HISTORY

A. *Gaines I*

¶2 The Respondent was licensed to practice law in the State of Texas in 2004 and was admitted to the Oklahoma Bar in 2011. In 2009, the Respondent moved to Oklahoma and continued to practice law in Texas, having not yet been licensed in Oklahoma.[2] During that period she hired a Texas resident Jeffrey Gipson as a paralegal. The Respondent met Gipson while the two were studying for the Texas Bar Exam.[3] Mr. Gipson had failed to pass the exam and had been performing paralegal work.[4] The Respondent's law office was essentially Gipson's home in Texas and she maintained a P.O. Box in which both she and Gipson had access.[5] In 2012, the Respondent had difficulty communicating with Gipson. In November 2012, while making a trip to the office, she noticed many boxes with her name on them and legal matters initiated by Gipson without her knowledge.[6] She took the boxes and files with her to Oklahoma and spent the next few months reviewing them.[7] By March 2013, she contacted Gipson and terminated their working relationship.[8] The boxes contained many matters where she was representing persons without her knowledge.[9] Some of these unknown clients filed grievances against her.[10] Three of these grievances were the subject of *Gaines I*.

¶3 In March 2016, the Respondent appeared before Evidentiary Panel 6-4 of the Grievance Committee for the State Bar of Texas, District 6, concerning Case Nos. 201306034, 201306048, and 201306128. The Evidentiary Panel made Findings of Fact and Conclusions of Law concerning the Respondent's professional conduct in the three disciplinary cases. The panel held the Respondent violated Texas Disciplinary Rules of Professional Conduct, Rules 1.01 (b) (1) (competent and diligent representation), 1.03 (a) (communication), 1.14 (b) (safekeeping property), 5.03 (a) (responsibilities regarding nonlawyer assistants), and 5.04 (a) (Professional Independence of a Lawyer).[11] The panel imposed upon the Respondent a fully probated suspension of two years. A probated suspension allows the lawyer to practice during the probation as long as they comply with the terms of the probation.[12] There were ten terms of probation which included payment of restitution to one of her clients in the amount of $1,566.66 as well as payment of costs to the Texas State Bar in the amount of $1,962.50. The Judgment of Fully Probated Suspension also allowed the Chief Disciplinary Counsel to file a motion to revoke the probation upon information the Respondent violated a term of the judgment. Nothing in the present record indicates such a motion was ever filed.

¶4 At the time of her probated suspension, the Respondent was licensed to practice law in Oklahoma and the Oklahoma Bar Association instigated a reciprocal disciplinary proceeding pursuant to Rule 7.7 RGDP. In April 2016, this Court issued an order directing the Respondent to show cause in writing why a final order of discipline should not be imposed or to request a hearing. *State ex rel. Okla. Bar Ass'n v. Gaines*, 2016 OK 80, ¶7, 378 P.3d 212. The Respondent did not file a response, enter an appearance or request a hearing. *Gaines*, 2016 OK 80 at ¶7. This Court held "respondent committed an act of commingling and conversion, neglected legal matters, failed to communicate with clients, failed to supervise an employee that resulted in the unauthorized practice of law, and failed to notify the General Counsel of her disciplinary proceeding." *Id.* at ¶15. We also noted there was no indication the Respondent had been complying with the terms of her probation by making monthly restitution payments. *Id.* at ¶12. An opinion was issued by this Court on June 28, 2016, and Respondent was suspended from the practice of law in Oklahoma for two years and one day. *Id.* This Court denied her petition for rehearing on September 12, 2016, and the case was closed the same day.

B. *Gaines II* (the present matter before this Court)

¶5 On July 28, 2016, one month after this Court issued its opinion in *Gaines I*, Veronica Gallegos filed a grievance with the State Bar of Texas against the Respondent. This grievance was based upon the Respondent's professional misconduct incurred while representing Veronica and her sister Nancy in an automobile accident case.

¶6 On January 26, 2018, the Evidentiary Panel 14-2 of the Grievance Committee for the State Bar of Texas, District 14, held a hearing. The evidence at the hearing revealed in 2010 Jeffrey Gipson approached the Gallegos sisters in a chiropractic office and offered the Respondent's services.[13] The Respondent testified she had no knowledge that Gipson had been soliciting her services at that time.[14] Thereafter, the sisters hired the Respondent to represent them.[15] After her first contact with Gipson, Veronica Gallegos claimed her communications between 2010 and 2013 were always with the Respondent and not Gipson.[16] Veronica testified she signed a contract with the Respondent for representation but she did not have a copy of the contract; Nancy testified she did not sign a contract.[17] The Respondent claimed this type of case would normally have been a contingency fee case but she was unsure because she believed Gipson handled the contract.[18] She did not have a copy of the contract due to a "server" crash.[19]

¶7 After the Respondent terminated her employment of Gipson, she notified Allstate, the insurer in the Gallegos case, that all communications should be made to her and not Gipson.[20] This occurred on March 29, 2013. Thereafter, all communications with Allstate were made by the Respondent.[21] On April 1, 2013, Allstate wrote two letters to its insured stating it had made offers to settle bodily injury claims for Veronica and Nancy Gallegos.[22] On June 7, 2013, the Respondent wrote Allstate to inform the insurer that Veronica had agreed to a settlement.[23] On the same day, Allstate wrote the Respondent confirming the acceptance of the offer of settlement for Veronica Gallegos.[24] The letter requested a copy of the hospital lien agreement and upon receipt Allstate would issue two checks to the Respondent. On June 14, 2013, the Respondent sent Veronica an email stating she forwarded Veronica's acceptance of the settlement to Allstate and she would need a copy of the creditor's letter regarding a hospital bill.[25] Veronica testified that after receiving this email she tried to contact the Respondent but that is when the Respondent "really became M.I.A."[26] Two other letters written by Allstate to its insured, dated June 20, 2013, and August 30, 2013, informed the insured that both Veronica and Nancy's claims for bodily injury had been settled.[27]

¶8 On July 19, 2013, Allstate issued a check to Veronica Gallegos, Shanita Gaines and American Chiropractic Clinic as lienholder.[28] The amount was for $8,119.00 and the back of the check was endorsed with the signatures of the Respondent, Shanita Gaines, and the signature of Veronica Gallegos. Another check was issued by Allstate on September 11, 2013, to Nancy Gallegos and Shanita Gaines for the amount of $6,826.00.[29] The back of this check was endorsed with the signatures of the Respondent, Shanita Gaines, and the signature of Nancy Gallegos. At the evidentiary hearing, Veronica and Nancy testified they did not endorse either check.[30] The Respondent could not recall who endorsed the checks for Veronica or Nancy but admitted she had endorsed both checks with her own name.[31] The Respondent testified she believed

the money may have been deposited into her operating account rather than her trust account but she could not recall how the money was used.[32] She stipulated that she and not Gipson conducted the settlement with Allstate and neither Veronica nor Nancy ever received any money from the settlement.[33] She further testified she had no explanation why she did not pay the sisters anything from the settlement funds.[34] Veronica and Nancy both testified they never knew what happened to their case after they agreed to settle.[35] Evidence at the hearing showed Veronica continued attempting to contact the Respondent for almost three years after the settlement to get information on her case.[36] After Veronica filed her grievance, the Respondent sent an email to Veronica on November 14, 2016, expressing her desire to pay Veronica monthly "restitution" payments of one hundred dollars ($100.00).[37] In the alternative, she suggested Veronica should contact the Texas Bar to see if she could be paid from its Client Security Fund.[38] There is no evidence in the record to support the Respondent made any "restitution" payments.

¶9 The Evidentiary Panel 14-2 issued its Judgment of Disbarment on February 5, 2018. In its Findings of Fact it determined: Veronica Gallegos hired the Respondent in 2010, the Respondent failed to promptly comply with reasonable requests for information, failed to deposit settlement funds in a separate trust account, failed to provide a written statement describing the outcome of the personal injury matter as well as remittances to any medical providers, failed to notify medical providers of the settlement, failed to surrender to Gallegos the paper and property she was entitled upon termination of representation, failed to make reasonable efforts to ensure Gipson's conduct was compatible with the professional obligations of the Respondent, and the Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. These actions constituted violations of the following Texas Disciplinary Rules of Professional Conduct: 1.03 (a)[39] (Communication), 1.04 (d)[40] (Fees), 1.14 (a)[41] (Holding Funds in a Separate Account), 1.14 (b)[42] (Notification of Client Upon Receipt of Funds), 1.15 (d)[43] (Duties Upon Termination of Representation), 5.03 (a)[44] (Supervision Over Non-Lawyers), and 8.04 (a) (3)[45] (Dishonesty, Fraud, Deceit or Misrepresentation). The Panel's judgment disbarred the Respondent effective January 26, 2018.

¶10 On March 13, 2018, this Court received the Complainant's Notice of Judgment of Disbarment with the attached certified copy of the judgment. The notice also informed this Court that the Respondent is currently suspended from practicing law in Oklahoma. On April 4, 2018, the Respondent filed a Brief to Mitigate the Severity of Disciplinary Action in which she requested a hearing and asked that no final order of discipline be imposed based upon the Texas Judgment of Disbarment.

¶11 A hearing was held before the Professional Responsibility Tribunal on June 20, 2018. In the PRT's report they found the evidence presented before the Texas Evidentiary Panel established the Respondent settled a personal injury case on behalf of Veronica Gallegos, she received settlement funds but failed to deposit those funds into a separate trust account and never distributed those funds to her clients. The PRT also found that the Respondent did not dispute these facts at the June 20, 2018, hearing. Her testimony as well as her witness's testimony was compelling to support she was remorseful for her misconduct. Former Oklahoma County District Judge Kenneth Watson testified on her behalf. The Respondent worked for Watson for several years performing legal research and writing. Mr. Watson was impressed with her work and had no concern about the Respondent being readmitted to the practice of law in Oklahoma. His testimony also supported the Respondent's remorse for her misconduct. The Complainant's witness, OBA Investigator Krystal Willis, also testified that the Respondent was very cooperative during the investigation and complied with recommendations on how she should conduct her affairs. However, the PRT found the Respondent had no satisfactory explanation regarding the settlement funds she received and she could not dispute that she appeared to have benefited from and used those funds. Her misconduct in this case was found to be the same as in her earlier case where this Court determined "respondent committed an act of commingling and conversion, neglected legal matters, failed to communicate with clients, failed to supervise an employee that resulted in the unauthorized practice of law, . . ." *State ex rel. Oklahoma Bar Ass'n v. Gaines*, 2016 OK 80, ¶15, 378 P.3d 1212. The PRT recommended the Respondent be disbarred effective September 28, 2016, the date it alleged *Gaines I* became final.

¶12 On August 21, 2018, this Court issued an order setting a briefing schedule. The Complainant timely filed a brief on September 11, 2018, and the Respondent did not file a brief.

II. STANDARD OF REVIEW

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

III. ANALYSIS

¶14 Rule 7.7, RGDP allows a lawyer in a reciprocal disciplinary matter to file documentation to support a defense that the discipline imposed by another jurisdiction was not supported by the evidence or that the findings therein did not furnish sufficient grounds for discipline in Oklahoma. The Respondent was served and filed a pre-hearing brief to mitigate the severity of discipline. She made no allegations that the Judgment of Disbarment was not supported by the evidence, nor did she allege the findings therein do not support discipline in Oklahoma. Her pre-hearing brief in support of mitigation only asserts she has not taken any action warranting discipline in Oklahoma since her June 28, 2016, suspension by this Court and she has not engaged in any activity in Oklahoma that would endanger the interest of the public or erode the public confidence in the legal profession. She did not file a response to Complainant's post-hearing brief in support of discipline.

¶15 We have conducted a *de novo* review of the record and find clear and convincing evidence that establishes the Respondent engaged in professional misconduct. Unlike *Gaines I*, it is clear here the Respondent conducted the settlement of the Gallegos sisters' personal injury matter and she received the settlement funds. Initially, she failed to properly supervise her non-lawyer staff person, Gipson, and failed to provide her clients a copy of a written and signed contingency fee agreement. She endorsed the settlement checks herself and cannot recall who endorsed the names of the Gallegos sisters, but she does not dispute the sisters' testimony that they did not endorse the checks nor authorize anyone else to endorse the checks. The funds were deposited into the Respondent's operating account and not her trust account. No funds were delivered to the Gallegos sisters, nor were necessary payments made to all third parties. She settled the Gallegos case and failed to notify her clients and provide them a settlement statement describing the outcome of the case. Over several years the Respondent failed to satisfy the sisters' requests for a status report. At the conclusion of the case she also failed to surrender any papers and property to her clients to which they were entitled. The Complainant's brief alleges the evidence conclusively establishes the Respondent misappropriated her clients' and third parties settlement proceeds. We agree. The Respondent's conduct violated the Oklahoma Rules of Professional Conduct, Rules 1.4 (a) (3) and (4)[46] (failure to keep client reasonably informed and promptly comply with reasonable requests for information), 1.5 (c)[47] (failure to provide client with a copy of a written and signed contingency fee agreement), 1.15 (a)[48] (failure to safekeep and hold separately client funds), 1.15 (d)[49] (failure to promptly notify and deliver funds to client and interested third parties upon receipt), 1.16 (d)[50] (failure to promptly surrender client files and other property upon termination of representation), 5.3 (b)[51] (failure to properly supervise non-lawyer assistants), and 8.4 (c)[52] (engaging in conduct involving dishonesty, fraud, or deceit), 5 O.S. 2011, ch. 1, app. 3-A.

¶16 In determining appropriate discipline it is proper to compare the matter at hand with

previous disciplinary matters. *State ex rel. Okla. Bar Ass'n v. Doris*, 1999 OK 94, ¶38, 991 P.2d 1015. The extent of discipline must, however, be decided on a case-by-case basis because each situation will usually involve different transgressions and different mitigating circumstances. *Doris,* 1999 OK 94 at ¶38.

¶17 This Court has defined three levels of culpability when evaluating the mishandling of client funds: 1) commingling; 2) simple conversion; and 3) misappropriation, i.e., theft by conversion or otherwise. *State ex rel. Oklahoma Bar Ass'n v. Meek,* 1994 OK 118, ¶8, 895 P.2d 692. Misappropriation occurs when an attorney purposefully deprives a client of money by way of deceit and fraud. *Meek*, 1994 OK 118 at ¶8. A finding that a lawyer committed such an act requires imposition of the harshest discipline. *Id.; State ex rel. Okla. Bar Ass'n v. Arnold,* 2003 OK 31, ¶21, 72 P.3d 10. At the time *Meek* and *Arnold* were decided, Rule 1.4 (c), Rules Governing Disciplinary Proceedings, 5 O.S. 2001, ch. 1, app. 1-A, required disbarment for theft by conversion or otherwise of the funds of a client.[53] In 2007, that requirement was removed from the rule effective January 1, 2008. *In re: Application of the OBA to Amend the Rules of Professional Conduct,* 2007 OK 22, 171 P.3d 780. However, subsequent decisions of this Court still acknowledge disbarment as an appropriate discipline for conversion/misappropriation of a client's funds. *State of Okla. ex rel. Okla. Bar Ass'n v. Kleinsmith*, 2018 OK 5, ¶¶11-12, 411 P.3d 365; *State ex rel. Okla. Bar Ass'n v. Rymer*, 2008 OK 50, ¶5, 187 P.3d 725.

¶18 The Complainant submitted *State ex rel. Oklahoma Bar Ass'n v. Perkins*, 1988 OK 65, 757 P.2d 825, in support of its recommendation for disbarment. In *Perkins* a lawyer failed to maintain a trust account, commingled clients' funds, converted clients' funds to his personal use, and failed to use the funds for their intended purpose. Perkins repaid some of his clients' funds but not all were paid in full. *Perkins*, 1988 OK 65, ¶¶ 8, 10, 12. This Court determined the imposition of severe discipline is required in misappropriation cases. *Id.* at ¶34. We stated the following:

> A practicing lawyer should not need this Court to tell him he can't take a client's money, given to him to be held in trust, and use it for personal expenses or to pay personal loans.

Id. at ¶33.

Perkins was disbarred and his name was stricken from the roll of attorneys. *Id.* at ¶35.

¶19 The record reflects the Respondent misappropriated her clients' settlement proceeds. The Complainant has acknowledged mitigating factors including the Respondent's lack of experience, stress of being a solo practitioner, and her remorse for the harm she has caused her clients and to the reputation of the legal profession. Nonetheless, the Complainant recommends the Respondent be disbarred retroactively from the effective date of her suspension in *Gaines I*. Misappropriation of a client's funds warrants the harshest discipline and disbarment is appropriate here. The Respondent is hereby disbarred and her name shall be stricken from the roll of attorneys upon the date this opinion is filed.

¶20 The Complainant filed an Application to Assess Costs against the Respondent in the amount of $1,805.42. Our review of the application indicates it should be granted. The costs of the transcript, investigation, and proceeding shall be borne by the Respondent. The amount of $1,805.42 is to be paid within 30 days upon the date this opinion is filed.

RESPONDENT DISBARRED AND NAME STRICKEN FROM ROLL OF ATTORNEYS UPON THE DATE THIS OPINION IS FILED

¶21 ALL JUSTICES CONCUR

COMBS, C.J.:

1. The actual date when *Gaines I* was closed was September 12, 2016.
2. Tr. at 56-57, *State of Oklahoma ex rel., The Oklahoma Bar Association v. Shanita Danielle Gaines* (SCBD #6630; June 20, 2018).
3. *Id.* at 57.
4. *Id.* at 55-56.
5. *Id.* at 75-76.
6. *Id.* at 57-58.
7. *Id.*
8. *Id.*
9. *Id.* at 58-59.
10. *Id.* at 59.
11. For detailed information on these particular rules *see State ex rel. Okla. Bar Ass'n v. Gaines*, 2016 OK 80, ¶ 4 nn. 1-5, 378 P.3d 1212, 1214-15 nn. 1-5.
12. State Bar of Texas, *Punishment for Professional Misconduct,* https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/MisconductPunishment.htm (last visited October 11, 2018).
13. Complainant's Ex. 9, Tr. at 16 & 33, Commission for Lawyer Discipline v. Shanita Gaines (201604423; January 26, 2018).
14. *Id.* Ex. 9, Tr. at 47.
15. *Id.* Ex. 9, Tr. at 16-17.
16. *Id.* Ex. 9, Tr. at 29-30.
17. *Id.* Ex. 9, Tr. at 17, 39.
18. *Id.* Ex. 9, Tr. at 70.
19. *Id.* Ex. 9, Tr. at 71.
20. *Id.* Ex. 9, Tr. at 54 & Ex. 1B attached to the transcript.
21. *Id.*
22. Complainant's Ex. 1, at CEX 611 &612.
23. Complainant's Ex. 9, Ex. 1C attached to the transcript.
24. Complainant's Ex. 1, at CEX 615.

25. Complainant's Ex. 9, Ex. 4 attached to the transcript.

26. Complainant's Ex. 9, Tr. at 22, *Commission for Lawyer Discipline v. Shanita Gaines* (201604423; January 26, 2018).

27. Complainant's Ex. 1, at CEX 613 & 614.

28. Complainant's Ex. 9, Ex. 6 attached to the transcript.

29. *Id*.

30. Complainant's Ex. 9, Tr. at 24-26, 36, *Commission for Lawyer Discipline v. Shanita Gaines* (201604423; January 26, 2018).

31. *Id*. Ex. 9, Tr. at 57, 66.

32. *Id*. Ex. 9, Tr. at 66-67, 69, 72.

33. *Id*. Ex. 9, Tr. at 60, 64, 76.

34. *Id*. Ex. 9, Tr. at 70.

35. *Id*. Ex. 9, Tr. at 20-22, 34-35.

36. *Id*. Ex. 9, Tr. at 22-23 & Ex. 5 attached to the transcript.

37. Complainant's Ex. 8; Tr. at 65, *State of Oklahoma ex rel., The Oklahoma Bar Association v. Shanita Danielle Gaines* (SCBD #6630; June 20, 2018).

38. *Id*.

39. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 1.03 (a):

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

40. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 1.04 (d):

> (d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

41. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 1.14 (a):

> (a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

42. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 1.14 (b):

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

43. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 1.15 (d):

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

44. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 5.03 (a):

> (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

45. V. T. C. A., Govt. Code T. 2, Subt. G App. A, Art. 10, § 9 Rule 8.04 (a) (3):

> (a) A lawyer shall not:
>
> . . . .
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

46. Rule 1.4 (a) (3) and (4), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

> (a) A lawyer shall:
>
> . . . .
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and

47. Rule 1.5 (c), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of determination.

48. Rule 1.15 (a), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

49. Rule 1.15 (d), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

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

50. Rule 1.16 (d), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

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

51. Rule 5.3 (b), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> . . . .
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

52. Rule 8.4(c), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

53. 1.4 (c), Rules Governing Disciplinary Proceedings, 5 O.S. 2001, ch. 1, app. 1-A provided:

> (c) Theft by conversion or otherwise of the funds of a client shall, if proved, result in disbarment.

2018 OK CR 34

STATE OF OKLAHOMA, Appellant, v. SHELLEY MARIE BRADLEY, Appellee.

Case No. S-2018-5[1]. November 15, 2018

STATE OF OKLAHOMA, Appellant, v. DYLAN THOMAS BRODIE, Appellee.

Case No. S-2018-6. November 15, 2018

SUMMARY OPINION

ROWLAND, JUDGE:

¶1 The State of Oklahoma, Appellant, appeals to this Court from an order entered by the reviewing judge, the Honorable Mark L. Dobbins, Associate District Judge, affirming a ruling by the magistrate, the Honorable Dennis N. Shook, Associate District Judge, which sustained the defendants' demurrers to the evidence on Counts 1 and 2; and denied the State's request to amend the Informations, in Case Nos. CF-2017-445 and CF-2017-446 in the District Court of Wagoner County. *See* 22 O.S.2011, §§ 1089.1 – 1089.7.

STATEMENT OF THE CASE

¶2 In Case Nos. CF-2017-445 and CF-2017-446, the Appellees, Shelley Marie Bradley ("Appellee Bradley") and Dylan Thomas Brodie ("Appellee Brodie"), were each charged with Count 1: Intimidation of a Witness, in violation of 21 O.S.Supp.2013, § 455 ("Section 455") and Count 2: Conspiracy to Commit a Felony, either Intimidation of a Witness or in the alternative Subornation of Perjury, in violation of 21 O.S.2011, § 421. At the preliminary hearing, Judge Shook sustained the Appellees' demurrers to the evidence as to both counts. Judge Shook also sustained demurrers to the State's request to amend the Informations to include a charge of False Preparation of Exhibits as Evidence, in violation of 21 O.S.2011, § 453. The State announced its intent to appeal from the adverse rulings of Judge Shook. The matter was assigned to Judge Dobbins, as reviewing judge pursuant to 22 O.S.2011, § 1089.2(C), who affirmed Judge Shook's ruling. The State appealed.

¶3 Pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument on August 9, 2018, pursuant to Rule 11.2(E). At the conclusion of oral argument, this Court reversed the ruling of the reviewing judge and announced that this written opinion would follow.

SUMMARY OF FACTS

¶4 Appellees Bradley and Brodie are the mother and brother of Jacob Ode ("Ode"), who was charged in Wagoner County District Court Case No. CF-2017-413 with Count 1 – Endangering Others While Attempting to Elude Police Officer; Count 2 – Running a Roadblock; and Count 3 – Reckless Driving. Makenzie Janelle Hawkins ("Hawkins") is the niece of Appellee Bradley; a cousin of Appellee Brodie; and a cousin of Ode.

¶5 On June 1, 2017, Hawkins was a passenger in Ode's vehicle during the police pursuit that resulted in the charges filed against Ode in Case No. CF-2017-413. At the end of the pursuit, Ode and a male passenger fled the vehicle and eluded officers, but Hawkins stayed inside. Hawkins was detained, questioned by police, and gave a written statement concerning the pursuit. Hawkins' written statement said that Ode was the driver of the vehicle being pursued by the police. A copy of Hawkins' written statement was introduced as State's Exhibit No. 1 during the preliminary hearing in this case.

¶6 Hawkins testified that on June 18, 2017, Appellee Brodie called and asked Hawkins to come to Hawkins' grandmother's house, where Appellees Bradley and Brodie both lived. Hawkins testified Appellee Brodie came to Hawkins' house, picked her up, and drove her to the grandmother's house. Hawkins testified she had not had any contact with Appellees Bradley and Brodie since the police pursuit and was "sort of glad" when Appellee Brodie called her and asked her to go to the grandmother's house on June 18, 2017, because it meant the family was talking to her.

¶7 While at the grandmother's house, Appellee Brodie asked if she would change her statement about the police pursuit and Hawkins

testified that "I said yes." Hawkins testified that Appellee Brodie and Appellee Bradley both asked her to change her statement because Ode's bond was going to be revoked if she didn't.

Hawkins testified that Appellees Bradley and Brodie walked her through what to write and, after Appellees tore up her first attempt at writing the changed statement, got her to write a statement saying that Ode was not in the vehicle on the night of the police pursuit. That statement written by Hawkins was admitted at the preliminary hearing as State's Exhibit No. 2. During the preliminary hearing, the State twice asked Hawkins whether Appellees or anybody else told her they wanted her to testify in court in accordance with her written statement in State's Exhibit No. 2, and both times Hawkins replied "No." During her preliminary hearing testimony, Hawkins was given use and transactional immunity by the State.

¶8 The State's second witness at the preliminary hearing was Major Dustin Dorr ("Dorr"), with the Wagoner County Sheriff's Office. Dorr testified that on June 19, 2017, Appellee Bradley gave Hawkins written statement, State's Exhibit No. 2, to him and asked him to consider it in the investigation of pending and anticipated charges against her son, Ode. The State's final witness was Deputy Danny Elliott ("Elliott"), with the Wagoner County Sheriff's Office. Elliott said he was asked to investigate who was actually driving the vehicle involved in the police pursuit on June 1, 2017. Elliott interviewed Hawkins on June 21, 2017, and she told him that her statement to police on June 1, 2017, was the truth, that Ode was driving the vehicle during the police pursuit. Elliott also testified that he listened to phone conversations Ode made from jail, which indicated the stories had been fabricated that he was not driving the vehicle being pursued. After Elliott's testimony, the State rested.

¶9 Appellees Bradley and Brodie demurred to the evidence. First, Appellees argued that as to the intimidation of a witness and conspiracy charges the State presented no evidence either that they actually threatened or procured physical or mental harm through force or fear against Hawkins, or that they had prevented or attempted to prevent Hawkins from giving testimony. Second, as to perjury and subornation of perjury and conspiracy charges, Appellees argued Hawkins never made and was never forced to make any false statements under oath or affirmation. In response, the State first asked that the Informations be amended to add a count of falsely preparing exhibits as evidence, pursuant to 21 O.S.2011, § 453. The State argued their evidence satisfied the elements of threatening a witness, but even if it didn't Section 455 is satisfied if a person prevents or attempts to prevent a person from testifying.

¶10 Judge Shook sustained the Appellees' demurrer as to the charge of intimidation of a witness and conspiracy, by finding there was insufficient evidence Hawkins was threatened or placed in fear of giving testimony. Judge Shook sustained the Appellees' demurrer as to the charge of conspiracy to commit subornation of perjury, by finding Hawkins' statement was not made under oath. Judge Shook sustained the demurrer as to False Preparation of Exhibits as Evidence without making any findings or conclusions. On appeal, Judge Dobbins affirmed Judge Shook's decision without findings or conclusions.

¶11 The State filed this appeal asserting the same four propositions of error in both appeals:

I. THE STATE OF OKLAHOMA PRESENTED SUFFICIENT EVIDENCE TO SHOW PROBABLE CAUSE THAT THE DEFENDANT COMMITTED THE CRIME OF PREVENTING WITNESS FROM GIVING TESTIMONY – THREATENING WITNESS WHO HAS GIVEN TESTIMONY (21 O.S. § 455), AS DEFINED BY OKLAHOMA LAW;

II. THE STATE OF OKLAHOMA PRESENTED SUFFICIENT EVIDENCE TO SHOW PROBABLE CAUSE THAT THE DEFENDANT COMMITTED THE CRIME OF CONSPIRACY (21 O.S. § 421), AS DEFINED BY OKLAHOMA LAW;

III. SHOULD THIS COURT FIND THAT THE STATE HAS NOT MET ITS BURDEN IN SHOWING THAT THE DEFENDANT COMMITTED THE CRIME OF PREVENTING WITNESS FROM GIVING TESTIMONY – THREATENING WITNESS WHO HAS GIVEN TESTIMONY AND THE CRIME OF CONSPIRACY TO COMMIT THE CRIME OF SUBORNATION OF PERJURY [SIC]; and

IV. THE STATE OF OKLAHOMA PRESENTED SUFFICIENT EVIDENCE OF OTHER CRIMES TO SHOW PROBABLE

CAUSE THAT THE DEFENDANT COMMITTED THE ADDITIONAL CRIME OF PREPARING FALSE EVIDENCE (21 O.S. § 453), AS DEFINED BY OKLAHOMA LAW TITLE 22 SECTION 264.

ANALYSIS

¶12 "The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime." 22 O.S.2011, § 258(8); *see also State v. Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d 1127, 1129. The standard of review to be used by the reviewing District Court Judge in a State appeal from an adverse ruling of the preliminary hearing magistrate is "whether the evidence, taken in the light most favorable to the state, is sufficient to find that a felony crime has been committed and that the defendant probably committed said crime." 22 O.S.2011, § 1089.5; *see also Vincent, supra*. As we noted in *Berry*:

> When considering whether or not a crime has been committed, the State is required to prove each of the elements of the crime. . . . The magistrate must consider the proof established by the State in light of the statutory elements of the given offense. If the elements of the crime are not proven, then the fact of the commission of a crime cannot be said to have been established. A defendant cannot be held to answer for actions which do not amount to a crime as defined by our statutes.

State v. Berry, 1990 OK CR 73, ¶ 9, 799 P.2d 1131, 1133. Absent an abuse of discretion in reaching that determination, the magistrate's ruling will remain undisturbed. *Vincent, supra* (citation omitted). An abuse of discretion has been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶13 In Proposition I, the State argues that sufficient evidence was presented to show probable cause that the Appellees committed the crime charged in Count 1: Intimidation of Witness, pursuant to 21 O.S.Supp.2013, § 455(A). We begin by rejecting Appellees' claim that the definition of testimony in *Pinkley* provides the fatal flaw to the State's argument under this proposition. *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756. Appellees note that *Pinkley* defines testimony as evidence given by a competent witness under oath or affirmation. *Pinkley*, 2002 OK CR 26 at ¶ 8, 49 P.3d at 759. Appellees argue that neither of Hawkins' written statements were made under oath or affirmation and are thus not testimony as contemplated by Section 455(A) and by *Pinkley*. Appellees fail to consider the determination in *Pinkley* that Section 455 encompasses not only the completed crime of witness intimidation, but also attempts to intimidate a witness intending to prevent testimony, which necessarily would occur prior to the witness giving testimony under oath or affirmation. *Pinkley*, 2002 OK CR 26 at ¶ 10, 49 P.3d at 759-60 (citing *Mehdipour v. State*, 1998 OK CR 23, 956 P.2d 911). *Pinkley*'s definition of testimony is thus not dispositive of this proposition because a witness can be intimidated under the terms of Section 455 before testimony is ever given.

¶14 Despite rejecting Appellees' arguments, we cannot find that the refusal by Judge Shook and Judge Dobbins to bind Appellees over for trial on the State's charges under Section 455 rises to the level of error or abuse of discretion as argued by the State. Section 455(A) provides:

> A. Every person who willfully prevents or attempts to prevent any person from giving testimony or producing any record, document or other object, who has been duly summoned or subpoenaed or endorsed on the criminal information or juvenile petition as a witness, or who makes a report of abuse or neglect pursuant to Section 1-2-101 of Title 10A of the Oklahoma Statutes or Section 10-104 of Title 43A of the Oklahoma Statutes, or who is a witness to any reported crime, or threatens or procures physical or mental harm through force or fear with the intent to prevent any witness from appearing in court to give his or her testimony or produce any record, document or other object, or to alter his or her testimony is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than ten (10) years in the custody of the Department of Corrections.

21 O.S.Supp.2013, § 455(A). Subsection A of Section 455 is very poorly written. As shown by the Oklahoma Jury Instructions – Criminal and published authority of this Court, the subsection contains two separate parts. OUJI-CR 3-39; 21 O.S.Supp.2013, § 455(A). The first part criminalizes the preventing or attempting to prevent a summoned or subpoenaed person from testifying (or producing documents, etc.). OUJI-CR 3-39; 21 O.S.Supp.2013, § 455(A); *see*

also Mehdipour, 1998 OK CR 23 at ¶ 7, 956 P.2d at 914 (the plain language of Section 455, now Section 455(A), "refers to two separate actions a defendant may take [the first being] willfully preventing testimony"). The second part criminalizes the threatening or procuring of harm through force/fear to a person with the intent to make the person alter his or her testimony.[2] OUJI-CR 3-39; 21 O.S.Supp.2013, § 455(A); *see also Mehdipour*, 1998 OK CR 23 at ¶ 7, 956 P.2d at 914 (the second separate action "a defendant may take [is] threats of physical or mental harm through force or fear with the intent to prevent a witness from testifying at all, or to cause a witness to alter his testimony").

¶15 As applied to this case, and to the State's arguments, there is no evidence in this appeal record showing that either of the Appellees prevented or attempted to prevent Hawkins from testifying, from giving testimony, or from appearing in court. Therefore, the decision of both Judge Shook and Judge Dobbins, that the Appellees should not be bound over for trial as to the first part of subsection A of Section 455, cannot be considered a clearly erroneous conclusion and judgment that is clearly against the logic and effect of the facts presented. 21 O.S.Supp.2013, § 455(A); *Vincent, supra; Neloms, supra.*

¶16 With regard to the second part of subsection A of Section 455, the State contends it presented sufficient evidence of Appellees' threats or procurement of mental or physical harm through force or fear concerning Appellees' intent to cause Hawkins to alter her testimony. The State argues Hawkins felt mental harm from her extended family because they had ceased to have a relationship with her, resulting in her feeling alienated. The State also uses a statement written by Hawkins, which was ruled to be hearsay and not admitted into evidence, where Hawkins stated she felt pressure to change her statement as directed by Appellees because the family had not talked to her since her original statement. We find that the evidence in this appeal record is weak at best relating to threats or the procurement of physical or mental harm through force or fear. Hawkins' feelings of being alienated by her family, and feeling pressure because they were not talking to her, even if considered as properly admitted evidence, do not rise to the level of Section 455(A) requirements to constitute intimidation of a witness. Judge Shook found that there was no evidence that Hawkins was threatened or placed in fear when she wrote the second statement at the direction of Appellees. To the contrary, Judge Shook found that Hawkins indicated she was glad to be there. Again, the decision of the District Court judges, that the Appellees should not be bound over for trial as to the second part of subsection A of Section 455, cannot be considered a clearly erroneous conclusion and judgment that is clearly against the logic and effect of the facts presented. 21 O.S.Supp.2013, § 455(A); *Vincent, supra; Neloms, supra.* The State's Proposition I is denied.

¶17 In Proposition II, the State argues that it presented sufficient evidence to show probable cause that the Appellees committed the crime of conspiracy to commit the crime of intimidation of a witness. As addressed in Proposition I above, there was insufficient evidence to show that Appellees prevented or attempted to prevent Hawkins from testifying, from giving testimony, or from appearing in court. We find there is also insufficient evidence to show that Appellees engaged in any conspiracy to prevent or attempt to prevent Hawkins from testifying, from giving testimony, or from appearing in court. Also as addressed in Proposition I above, there was insufficient evidence to show that Appellees threatened or procured physical or mental harm through force or fear with the intent to cause Hawkins to alter her testimony. We find there is also insufficient evidence to show that Appellees engaged in any conspiracy to threaten Hawkins or to procure physical or mental harm through force or fear against her with the intent to cause her testimony to be altered. Judges Shook and Dobbins did not err or abuse their discretion by refusing to bind Appellees over for trial on the crime of conspiracy to commit the crime of intimidation of a witness. 21 O.S.2011, § 421; 21 O.S.Supp.2013, § 455(A); *Vincent, supra; Neloms, supra*. The State's proposition II, concerning proof of conspiracy to commit the crime of intimidation of a witness, is denied.

¶18 In Proposition III, the State contends that it presented sufficient evidence to show probable cause that the Appellees committed the crime of conspiracy to commit the crime of subornation of perjury. The record contains evidence that Appellees both told Hawkins that the purpose of the written statement was for it to be taken to court and used to fight or defend the revocation of Ode's bond.

¶19 Perjury by Subornation - Attempted Perjury by Subornation is defined as:

> Whoever procures another to commit perjury is guilty of perjury by subornation. Perjury by subornation is a felony, punishable as provided in Section 505 of this title. Whoever does any act with the specific intent to commit perjury by subornation but fails to complete that offense is guilty of attempted perjury by subornation.

21 O.S.2011, § 504.

¶20 Hawkins was the key eyewitness against their family member, and had given a statement to police implicating him in a felony crime. The natural first act of one seeking to cause Hawkins to change her projected trial testimony would be to have her first change her official statement to police. Thus, the act of making or causing her to write a contrary statement and provide it to police could easily be viewed by a jury as "any act with the specific intent to commit perjury by subornation but [which] fails to complete that offense." *Id.* As the preliminary hearing magistrate is required to view the evidence in the light most favorable to the State, Judges Shook and Dobbins abused their discretion in finding that because no actual sworn statement had yet been sought or given, no conspiracy to suborn or attempt to suborn perjury could be proved. We find that relief under Proposition III should be granted and the matter remanded to the District Court with instructions to bind the Appellees over for trial on the charge of Count 2: Conspiracy to Commit the felony crime of Perjury by Subornation.

¶21 We find that the State's arguments under Proposition IV also require relief. The State argues that the evidence presented at the preliminary hearing in this case shows that the Appellees committed the crime of conspiracy to commit false preparation of exhibits as evidence, pursuant to 21 O.S.2011, § 453; and thus Judge Shook erred by failing to endorse that crime on the Informations in this case, pursuant to 22 O.S.2011, § 264. Section 453 provides that "[a]ny person guilty of falsely preparing any book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced as genuine upon any trial, proceeding or inquiry whatever, authorized by law, shall be guilty of a felony." 21 O.S.2011, § 453. Section 264 provides that when it appears from the evidence presented at a preliminary hearing that any public offense has been committed, the magistrate must order that the offense be endorsed on the Information. 22 O.S.2011, § 264.

¶22 After the evidence was presented at the preliminary hearing in this case, the State specifically asked Judge Shook to amend the charges to conform to the evidence presented under Section 264. The State also specifically asked Judge Shook to add an additional count of False Preparation of Exhibits as Evidence under Section 453. Judge Shook summarily sustained a demurrer to False Preparation of Exhibits as Evidence without making any findings of fact or conclusions of law to support his finding. Judge Dobbins also summarily affirmed Judge Shook's decision without comment.

¶23 The State is correct that the evidence presented at Appellees' preliminary hearing showed that Hawkins' written statement, State's Exhibit No. 2, is a "paper" or "instrument in writing" "falsely prepar[ed]" by Hawkins under the direction of both Appellees "with the intent to produce it, or allow it to be produced as genuine upon" the "proceeding[s]" and "inquiry" prior to or during Ode's criminal case and/or at Ode's "trial." 21 O.S.2011, § 453.

¶24 On the other hand, Appellees' arguments are not correct. First, Appellees' argument the State was required to proffer an explanation or argument for amendment of the Informations is contrary to the plain language of Section 264. 22 O.S.2011, § 264. Second, Appellees incorrectly argue Section 453 applies to tampering with or altering evidence, because Section 453 expressly applies to the "preparing" of evidence. 21 O.S. 2011, § 453. Third, Appellees argument that there was insufficient evidence to show that Hawkins' written statement was ever intended to be introduced at a legal proceeding is clearly wrong because evidence showed Appellee Bradley introduced the statement into the Sheriff's "inquiry" into Ode's crimes and both Appellees clearly intended for the statement to be produced at Ode's bond hearing. Finally, Appellees' argument that the State did not sufficiently ask to amend the Informations is contrary to the record in this case and to the plain language of Section 264.

¶25 Neither Judge Shook nor Judge Dobbins gave any explanation why the evidence was insufficient to endorse the crime of False Preparation of Exhibits as Evidence on the Informations. The evidence presented at the preliminary

hearing in this case clearly showed that Appellees conspired with Hawkins to commit the crime of false preparation of exhibits. We find the decision of Judges Shook and Dobbins that the Informations should not be amended to include a charge of False Preparation of Exhibits as Evidence is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. 21 O.S.2011, § 453; 22 O.S.2011, § 264; *Vincent, supra; Neloms, supra*. We find that this matter should be remanded to the District Court of Wagoner County with instructions to endorse on the Informations the offense of False Preparation of Exhibits as Evidence, pursuant to 21 O.S.2011, § 453.

DECISION

¶26 The order of the District Court of Wagoner County sustaining the magistrate's ruling adverse to the State in Case Nos. CF-2017-445 and CF-2017-446 is **REVERSED**, and the cases are **REMANDED** to the District Court with instructions to bind the Appellees over for trial on the charge of Count 2: Conspiracy to Commit the felony crime of Perjury by Subornation, and to amend the Informations and bind the Appellees over for trial on the charge of False Preparation of Exhibits as Evidence, pursuant to 21 O.S.2011, § 453. Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF WAGONER COUNTY
THE HONORABLE MARK L. DOBBINS,
ASSOCIATE DISTRICT JUDGE

APPEARANCES IN THE DISTRICT COURT

Douglas G. Dry, Assistant District Attorney, Wagoner County, 307 E. Cherokee, Wagoner, OK 74467, Counsel for the State

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Clinton C. Hastings, Attorney at Law, 1634 S. Denver Ave., Tulsa, OK 74119, Counsel for Defendant Brodie

APPEARANCES ON APPEAL

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

1. On our own motion, we consolidate these cases for disposition together for reasons of judicial economy. Rule 3.3(D), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2018).

2. The second part of subsection A of Section 455 also contains a clause criminalizing threats of harm through force/fear to a person with the intent to prevent the person from appearing in court to testify (or produce documents, etc.). OUJI-CR 3-39; 21 O.S.Supp.2013, § 455(A). That clause is wholly superfluous/unnecessary because the first part of subsection A of Section 455 criminalizes willfully preventing testimony regardless of whether there are threats of harm through force/fear. *Mehdipour,* 1998 OK CR 23 at ¶ 7, 956 P.2d at 914. Such poor writing adds significantly to the difficulty in interpreting and applying subsection A of Section 455.

2018 OK CR 35

DAVID NEIL DUNN, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.

Case No. C-2017-1050. November 8, 2018

SUMMARY OPINION GRANTING *CERTIORARI* AND REMANDING FOR EVIDENTIARY HEARING

LUMPKIN, PRESIDING JUDGE:

¶1 Petitioner, David Neil Dunn, was charged by Information in the District Court of Muskogee County Case No. CF-2015-1155 with Robbery in the First Degree (Count 1) (21 O.S.2011, § 798), First Degree Burglary (Count 2) (21 O.S. 2011, § 1431), Kidnapping (Count 3) (21 O.S. Supp.2012, § 741), Larceny of an Automobile (Count 4) (21 O.S.2011, § 1720), and Possession of a Firearm After Former Felony Conviction (Count 5) (21 O.S.2011, § 1283(A)). The State further alleged that Appellant had committed these offenses After Two or More Felony Convictions.

¶2 On June 5, 2017, Petitioner entered a blind plea of no contest to the charges with the assistance and advice of his appointed counsel. The Honorable Michael Norman, District Judge, accepted Petitioner's plea and set the matter for sentencing pending receipt of the pre-sentence investigation report. On September 8, 2017, the District Court sentenced Petitioner to imprisonment for life in Counts 1 and 2, twenty (20) years in Count 3, ten (10) years in Count 4,

and five (5) years in Count 5. The District Court imposed various fines, fees, and costs and further ordered the sentences to run consecutively.[1]

¶3 On September 15, 2017, Petitioner filed his Motion to Withdraw Plea. On October 8, 2017, the District Court held an evidentiary hearing on Petitioner's request. Petitioner had been transported to the Department of Corrections and was not present at the hearing. The District Court denied Petitioner's motion. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his application to withdraw plea.

¶4 Petitioner raises the following propositions of error in support of his appeal.

I. Petitioner was denied his due process right to be present and assist in presenting to the Court his Motion to Withdraw Plea.

II. Petitioner was deprived of his right to effective assistance of counsel.

¶5 After thorough consideration of these propositions and the entire record before us on appeal, we find the case must be remanded to the District Court for a proper hearing on the motion to withdraw.

¶6 In Proposition One, Petitioner contends that he was denied due process when the District Court proceeded to hear his motion to withdraw in his absence. He argues this violated his right to be present and assist in his case.

¶7 The United States Supreme Court has held that under the Due Process Clause of the Fourteenth Amendment "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987). Thus, we have recognized that "a defendant has a due process right to be present where his presence 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend.'" *Lockett v. State*, 2002 OK CR 30, ¶ 9, 53 P.3d 418, 423, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106, S.Ct. 330, 332, 78 L.Ed. 674 (1934). "'[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Ryder v. State*, 2004 OK CR 2, ¶ 29, 83 P.3d 856, 864 (quoting *Snyder*, 291 U.S. at 107-08, 54 S.Ct. at 333). However, "[t]he defendant's presence is not required where such 'presence would be useless, or the benefit but a shadow.'" *Ryder,* 2004 OK CR 2, ¶ 29, 83 P.3d at 864 (quoting *Snyder,* 291 U.S. at 106-07, 54 S.Ct. at 332).

¶8 Although this Court has recognized that the evidentiary hearing held on a motion to withdraw plea is a "critical stage" for the purposes of the Sixth Amendment right to the assistance of counsel, *Randall v. State*, 1993 OK CR 47, ¶ 6, 861 P.2d 314, 315, we have not recognized that a criminal defendant has the right to be present at such an evidentiary hearing. We now explicitly recognize this right.

¶9 Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Tate v. State,* 2013 OK CR 18, ¶ 40, 313 P.3d 274, 285, (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). These issues focus on the defendant's knowledge and volition. Often, it is the defendant who offers crucial testimony on these matters. Thus, his or her absence from the evidentiary hearing held on the motion to withdraw plea would tend to thwart a fair and just determination of these issues. Even when the defendant does not testify, his or her familiarity with the circumstances would greatly benefit defense counsel and, therefore, his or her presence is likely critical to the fairness of the proceedings. Accordingly, we find that a defendant has a due process right to be present at the evidentiary hearing held on his or her motion to withdraw plea.

¶10 Turning to the present case, we find that Petitioner was denied the right to be present at the hearing held on his motion. When the matter came on for hearing, the District Court announced on the record that Petitioner did not appear because he had already been transported to the Department of Corrections. The District Court inquired and defense counsel affirmed that he had spoken with Petitioner and "fe[lt] comfortable proceeding without him." Counsel then renounced Petitioner's request to withdraw his plea and, instead, reargued for the merger of three of the counts.

¶11 The right of a defendant to be present is not an absolute right; it may be waived. *Watson v. State*, 2010 OK CR 9, ¶ 12, 234 P.3d 111, 114. However, this Court will not presume the waiver of a defendant's right to be present from a silent record. *Id.; Van White v. State,* 1999 OK CR

10, ¶ 31, 990 P.2d 253, 265. This Court has upheld a defendant's waiver of his or her right to be present at trial where a knowing and voluntary waiver was found in the record, *i.e.*, "a verbal waiver after the defendant was advised of his/her rights, a voluntary absence, or disruptive conduct after an advice of rights." *Watson*, 2010 OK CR 9, ¶ 12, 234 P.3d at 114.

¶12 Defense counsel's announcement of his feelings in the present case did not operate to waive Petitioner's constitutional and statutory rights. As nothing in the record establishes that Petitioner knowingly and voluntarily waived his right to be present at the evidentiary hearing, we find that he was denied due process.

¶13 Citing Petitioner's failure to argue on appeal that his plea was not knowingly or voluntarily entered, the State argues that this error was harmless. The denial of the constitutional and statutory right to be present is subject to harmless error review. *Watson*, 2010 OK CR 9, ¶ 16, 234 P.3d at 115; *Van White*, 1999 OK CR 10, ¶ 32, 990 P.2d at 265. In order for a constitutional error to be deemed harmless the Court must find beyond a reasonable doubt, that it did not contribute to the verdict. *Watson*, 2010 OK CR 9, ¶ 16, 234 P.3d at 115 (citing *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). "The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt." *Id.*, (citing *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991)).

¶14 We cannot agree with the State's assertion. Petitioner entered a no contest blind plea on the morning of his jury trial. Petitioner's Motion to Withdraw Plea alleged all of the counts should have merged pursuant to 21 O.S.2011, § 11 and that the plea was not knowingly and voluntarily entered. Petitioner did not withdraw either claim prior to the evidentiary hearing. Because Petitioner was the only person who could fully explain why the plea was not knowingly or voluntarily entered, his testimony was essential to the outcome of the hearing. As Petitioner was not present at the hearing, he was unavailable to provide testimony in support of this claim and defense counsel withdrew that portion of the motion challenging the validity of the plea. On appeal, Petitioner could not properly raise this issue because there was no evidence presented at the evidentiary hearing. *See Anderson v. State,* 2018 OK CR 13, ¶ 4, 422 P.3d 765, 767 ("If a matter is not presented to the trial court, there is nothing for this Court to review."). The effect of Petitioner's absence was to deny him the record required for this Court's review of the voluntariness of his no contest plea. *Id.*, 2018 OK CR 13, ¶ 4, 422 P.3d 765, 767. Therefore, we conclude the State has not shown that this error was harmless beyond a reasonable doubt. We find the case must be remanded to the District Court for a proper hearing on Petitioner's motion to withdraw.

¶15 In Proposition Two, Petitioner challenges the effectiveness of counsel throughout the proceedings. In light of the error which occurred and the relief granted in Proposition One, we find that this issue is moot.

DECISION

¶16 The Petition for a Writ of *Certiorari* is **GRANTED**. The case is **REMANDED TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON THE MOTION TO WITHDRAW PLEA CONSISTENT WITH PETITIONER'S RIGHT TO BE PRESENT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF MUSKOGEE COUNTY
THE HONORABLE MICHAEL NORMAN,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Dan Medlock, Attorney at Law, 620 W. Broadway, Muskogee, OK 74401, Counsel for Defendant

Nalani Ching, Asst. District Attorney, 220 State St., Muskogee, OK 74401, Counsel for the State

APPEARANCES ON APPEAL

Ricki J. Walterscheid, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Petitioner

Mike Hunter, Attorney General of Oklahoma, Jennifer B. Welch, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur in Part Dissent in Part
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur

1. Petitioner is required to serve 85% of his sentences for First Degree Robbery and First Degree Burglary prior to becoming eligible for consideration for parole. 21 O.S.Supp.2014, § 13.1.

LEWIS, VICE PRESIDING JUDGE, CONCURS IN PART AND DISSENTS IN PART:

¶1 I agree in principle with the majority that the hearing on a motion to withdraw the plea is a critical stage of a criminal prosecution, and that due process protects the right to be present when necessary to a full and fair hearing. We need not explicitly "recognize" this right or enhance it with new procedural requirements, because it already exists. I respectfully disagree that the Petitioner here was denied the right to be present at this hearing, or that he has shown any constitutional harm as a result.

¶2 Petitioner's technical challenge to counsel's waiver of his presence rather cleverly avoids any material substance about *how* his presence might have contributed to, or possibly altered, the outcome. Trial counsel appeared at the hearing and informed the court that he and the Petitioner had discussed the motion, and that counsel was prepared to proceed on Petitioner's behalf. Counsel then specifically renounced the prior written claim that the plea was involuntary, and argued for sentencing relief based on a theory of merger.

¶3 The lawyer is an officer of the court as well as an agent of the client, and is generally presumed to possess the authority to act for a client in the matter under representation until the contrary is shown. *North Side State Bank v. County Commissioners*, 1994 OK 34, ¶ 25, 894 P. 2d 1046, 1055. Petitioner has not rebutted this presumption, and thus has not shown that his presence was "denied" in any meaningful sense. Counsel was not simply stating his "feelings" about Petitioner being present. A fair reading of counsel's comments was that Petitioner's presence was unnecessary to a fair presentation of his *actual* claims. Indeed, if the record before us is "silent" in some important respect, it is deafeningly so as to any facts that would draw into question the Petitioner's waiver of his right to a jury trial, and his consent to being found guilty and sentenced by the court.

¶4 We have never held that a personal waiver of the right to be present on the record is necessary for every important hearing in a criminal prosecution, especially when counsel is present to protect the defendant's interests. Such a rule would effectively demand the defendant's presence at all times, if only to consent not to be present. Nor does the Fourteenth Amendment guarantee this right "'when presence would be useless, or the benefit but a shadow.'" *Jones v. State*, 2006 OK CR 5, ¶ 70, 128 P. 3d 521, 544 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-107, 54 S.Ct 330, 332, 78 L.Ed. 674 (1934)).

¶5 The procedural right to be present is not a license to trifle with the court, or for appellate counsel to revoke every ostensibly disadvantageous act or declaration made by trial counsel in the defendant's absence. Petitioner pled no contest, knowing that he would be found guilty and sentenced by the court within the statutory ranges, which he was. He was understandably disappointed with those sentences, but he has offered no credible, factual reason, either in the trial court or in this appeal, to doubt the knowing and voluntary nature of his pleas.

¶6 There are cases where the denial of a Petitioner's right to be present at the hearing on a motion to withdraw plea "would tend to thwart a fair and just determination of the issues," and violate due process of law. This is not one of those cases, and no relief is warranted.

House of Delegates Actions

The following resolution and title examination standards report were submitted to the House of Delegates at the 114th Oklahoma Bar Association Annual Meeting at 10:30 a.m. Friday, Nov. 9, 2018, at the Hyatt Regency in Tulsa. Actions are as follows:

RESOLUTION NO. ONE: AMENDMENT TO OKLAHOMA RULES OF PROFESSIONAL CONDUCT ADDING A LIMITED EXCEPTION FOR LAWYERS PROVIDING COUNSEL TO CLIENTS REGARDING MARIJUANA-RELATED LAWS OF THE STATE OF OKLAHOMA

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association amend Rule 1.2 of the Rules of Professional Conduct (5 O.S. ch. 1, app. 3A), as published in The Oklahoma Bar Journal and posted on the OBA website at www.okbar.org to add a new paragraph (e) providing a limited exception for lawyers who counsel clients regarding marijuana state laws. *(Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the Rules of Professional Conduct Committee) Adoption not recommended by the OBA Board of Governors.*

ADOPTED

TITLE EXAMINATION STANDARDS

Action: The Oklahoma Title Examinations Standards revisions and additions published in OBJ 89 1395 (Oct. 13, 2018) were approved in the proposed form. The revisions and additions are effective immediately.

ADOPTED

2019 OBA OFFICERS AND NEW BOARD MEMBERS

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Calendar of Events

November

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

28 **OBA Bar Center Facilities Committee meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Bryon J. Will 405-308-4272

December

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

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

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

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

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

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

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

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

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

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

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

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

20 **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

24-25 **OBA Closed** – Christmas

January

1 **OBA Closed** – New Year's Day

Opinions of Court of Civil Appeals

2018 OK CIV APP 67

IN THE MATTER OF E.H. AND J.H., ADJUDICATED DEPRIVED CHILDREN: AMBER HENSLEY, Appellant, vs. STATE OF OKLAHOMA, Appellee.

Case No. 116,930. October 19, 2018

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY

HONORABLE ROBIN ADAIR, SPECIAL JUDGE

AFFIRMED

Dan Medlock, DAN MEDLOCK, PLLC, Muskogee, Oklahoma, for Appellant,

Morgan Muzljakovich, Assistant District Attorney, Muskogee, Oklahoma, for Appellee.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

¶1 The State filed its petition to adjudicate children deprived and to immediately seek termination of mother's parental rights due to mother's failure to protect her children from heinous and shocking sexual abuse by the father. The record on appeal contains clear and convincing evidence that the mother failed to take reasonable action to prevent the abuse, including agreeing to withdraw the protective order and to the father's unsupervised visitation of the children. Further, the jury trial held two years after the removal of the children in violation of 10A O.S. § 1-4-601 did not violate the due process clauses of the United States or Oklahoma Constitutions because the mother had a meaningful and fair opportunity to defend, and the risk of erroneous deprivation posed by the procedure employed by the trial court is outweighed by the risk of substantial harm to the children.

I. FACTS AND PROCEDURAL BACKGROUND

¶2 Amber Hensley (Mother) appeals the trial court order adjudicating her children, E.H. and J.H., deprived and terminating her parental rights pursuant to 10A O.S. §1-4-904(B)(9). We affirm the trial court's order.

¶3 In August 2015, E.H. disclosed to Mother that her father was sexually abusing her. After the disclosure, Mother sought the assistance of medical personnel, police, DHS and other social service organizations for counseling and parenting classes. At the time of the initial disclosure, E.H. did not have a medical exam. In September 2015, Mother filed for an emergency protective order from the father. Later that month, DHS ruled out the threat of harm due to Mother's securing a protective order. In November 2015, the father filed a paternity petition. In December 2015, Mother and father appeared for the hearing on the protective order and paternity petition. At the hearing, the judge directed the parties to speak with one another. While discussing whether the parties could reach an agreement in a separate room from the courtroom, Mother allowed her children to be around the father and allowed them to sit on his lap. After this discussion, the parties reached an agreement and the court entered its order dissolving the protective order, providing unsupervised visitation for the father, and setting an amount for child support. Around Christmas time 2015, after Mother withdrew the protective order, the father had visitation with the children.

¶4 In March 2016, DHS received a new referral regarding abuse of E.H. and J.H. from a disciplinary/spanking incident by Mother. The DHS worker conducted an investigation and interviewed E.H. and Mother. E.H. disclosed to the DHS worker that Mother hit her with a belt and hanger, and that father sexually abused her and her sister. Mother disclosed to the DHS worker several things, including that the children had seen the father the day before, that E.H. had disclosed sexual abuse, that the children were acting out in a sexual manner, and that E.H. could describe father's sexual anatomy. On March 7, 2016, a forensic interviewer spoke with E.H. At the interview, E.H. made disclosures regarding the sexual abuse by the father as to both E.H. and J.H. When asked if E.H. told Mother, E.H. replied that Mother told her "[d]addies just do that sometimes. All daddies put their fingers in there." On March 8, 2016, a nurse conducted a sexual assault examination of E.H. and J.H. The nurse found E.H. had injuries consistent with sexual abuse. The nurse examined J.H. but found no physical

findings. That same day, E.H. and J.H. were removed by DHS by way of a Temporary Emergency Custody Order. A show cause hearing was held on March 9, 2016.

¶5 On March 23, 2016, the State of Oklahoma (State) filed a petition alleging E.H. and J.H. to be deprived children as to their mother and sought immediate termination of Mother's parental rights to both children due to shocking and heinous neglect or abuse. The State alleged the natural father sexually abused the children, Mother knew the children were sexually abused by the father and others, and Mother permitted the father to have unsupervised visitation in exchange for monthly support.

II. STANDARD OF REVIEW

¶6 On review Mother raises two propositions of error. First, the State failed to meet its burden of proof that she failed to protect her children from abuse or neglect. Second, the trial court's failure to set an adjudication hearing within the time limits prescribed by 10A O.S. § 1-4-601 violated mother's due process of law.

¶7 Before a state may sever the rights of parents to their natural child, the State must support its allegations at trial by clear and convincing evidence. *In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082 citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). On review, we apply the same standard used in the district court. *Id.* ¶ 7. Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established. *In re K.C.*, 2002 OK CIV APP 58, ¶ 5, 46 P.3d 1289. This standard balances the fundamental rights of parents with the State's duty to protect children within its borders. *Id.* In the absence of sufficient evidence that the State met its burden clearly and convincingly, an order terminating parental rights will be reversed on appeal. *Id.*

¶8 In determining whether there was a constitutional deprivation of due process, we review the timing of the trial court's adjudication hearing *de novo. See In re A.M.*, 2000 OK 82, ¶ 6, 13 P.3d 484, 486-87 (claims that a procedure used in a parental rights termination proceeding violated due process are reviewed *de novo*). *De novo* review requires an independent, nondeferential re-examination of another tribunal's legal rulings. *Id.*

III. ANALYSIS

¶9 First, Mother argues the jury's determination that she failed to protect E.H. and J.H. from heinous and shocking abuse is not supported by clear and convincing evidence. Mother actually argues the evidence at trial demonstrated she took reasonable action after E.H. disclosed the abuse. Mother also asserts that there was no evidence introduced at trial that the father sexually abused the children after the court ordered him visitation.

¶10 In regard to this case, a trial court may not terminate parental rights of a parent to a child unless the child has been adjudicated deprived, termination of parental rights is in the best interest of the child, and a "finding that the parent . . . failed to protect the child or a sibling of the child from abuse or neglect that is heinous or shocking." 10A O.S. § 1-4-904(B)(9) "'Failure to protect' means failure to take reasonable action to . . . prevent child abuse or neglect, and includes the conduct of a nonabusing parent . . . who knows the identity of the abuser. . . , but . . . fails . . . to take reasonable action to end the abuse or neglect." 10A O.S. § 1-1-105(26).

¶11 While Mother did initially take action by seeking the help of medical professionals, police and DHS, she failed to protect her children when she agreed to withdraw the protective order and give the father unsupervised visitation in exchange for monthly child support. Further, there was evidence introduced at trial that the father had sexually abused the children after visitation was granted. Mother testified she wrote social media posts stating she "granted him every other weekend with his kids unsupervised" and that she was "giv[ing] [the father] one last chance to be a part of their life."

¶12 Rebecca Williamson, a sexual assault nurse, testified she performed an examination of E.H. and J.H. Williamson testified E.H. had injuries consistent with sexual assault. E.H. told the nurse that "Mommy said don't talk about this stuff or Daddy will go to jail." E.H. said they had seen their daddy a couple days before the physical examination.

¶13 Lyndsey Stephens, a DHS permanency planning worker, testified that while the children were in their foster home placement, she visited them at least once a month and that they are doing very well. At the beginning of the placement, the children exhibited behav-

ioral issues, but those have since subsided. Stephens testified that she kept in touch with Mother during this time and that she was aware Mother was taking classes, but was still concerned when Mother could not verbalize how to protect the girls at home should she get into another relationship. Stephens testified that the children last referred to their biological mother in November 2016 and referred to her as "fake Mom." They refer to their foster parents as "Mommy" and "Daddy." Stephens testified the girls are treated as if they were the foster parents' biological children; they are well cared for and do not want to leave their foster home.

¶14 In parental rights termination proceedings, the State has the burden of proof. This summary of the evidence indicates the State met its burden of proving by clear and convincing evidence Mother failed to protect her children from heinous and shocking sexual abuse and that termination of Mother's parental rights was in the best interests of the children.

¶15 Mother's next assignment of error is that the two-year delay in the adjudication hearing violated her due process rights guaranteed by the U.S. and Oklahoma Constitutions. Mother argues the trial court erred in not holding an adjudication hearing within the time limits mandated by statute.

¶16 10A O.S. § 1-4-601 provides in pertinent part:

> A. The court shall hold an adjudication hearing following the filing of a petition alleging that a child is deprived. The hearing shall be held not more than ninety (90) calendar days following the filing of the petition. The child and the child's parents, guardian, or other legal custodian shall be entitled to not less than twenty (20) days' prior notice of the hearing.
>
> B. 1. The child shall be released from emergency custody in the event the adjudication hearing is delayed beyond ninety (90) days from the date the petition is filed unless the court issues a written order with findings of fact supporting a determination that:
>
> a. there exists a reasonable suspicion that the health, safety, or welfare of the child would be in imminent danger if the child were returned to the home, and
>
> b. there exists either an exceptional circumstance to support the continuance of the child in emergency custody or the parties and the guardian ad litem, if any, agree to such continuance.
>
> 2. If the adjudicatory hearing is delayed pursuant to this subsection, the emergency custody order shall expire unless the hearing on the merits of the petition is held within one hundred eighty (180) days after the actual removal of the child.

¶17 The State filed its petition to adjudicate E.H. and J.H. as deprived and to immediately terminate mother's parental rights on March 23, 2016. Ninety days after the filing of the petition was June 21, 2016. By that date, there had not been an adjudication hearing or a written order issued pursuant to § 1-4-601(B)(1). By operation of law, the emergency custody order expired 180 days after the children were removed from Mother's custody, or on September 4, 2016. On October 31, 2016, Mother filed a Motion for Visitation and a Motion to Dismiss the Emergency Custody Order or alternatively requested the matter be set for a hearing on the merits. In the Motion to Dismiss, she cited § 1-4-601(B)(2) and argued the order expired by operation of law. On December 1, 2016, the trial court denied both of Mother's motions. Between December 2016 and March 2018, from the record, it appears the court conducted several disposition or review hearings and set the matter for jury trial at least twice. The jury trial to adjudicate the children deprived and terminate mother's parental rights was finally held March 13-14, 2018, two years after the children were removed from Mother's custody.

¶18 Due process is implicated in a parental rights termination proceeding. *In re A.M.*, 2000 OK 82, ¶ 6, 13 P.3d 484. Mother cites Okla. Const. art. 2, § 7 in support of her argument. Section 7 provides "[n]o person shall be deprived of life, liberty, or property, without due process of law." Before a deprivation can occur, due process requires a meaningful opportunity to be heard. *Flandermeyer v. Bonner,* 2006 OK 87, ¶ 10, 152 P.3d 195. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* citing *Wood v. Indep. Sch. Dist. No. 141 of Pott. Co.*, 1983 OK 30 ¶ 17, 661 P.2d 892. Before Mother's due process rights are violated, it must be shown that the action was arbitrary, oppressive and shocking to the conscience of the court. *Id.* citing *Meadows v. Meadows*, 1980 OK 158, ¶ 7, 619 P.2d 598.

The passage of time alone does not establish an unconstitutional delay or a violation of due process. *Simpson v. State*, 1982 OK CR 35, ¶ 6, 642 P.2d 272.

¶19 In determining whether an individual has been denied procedural due process we engage in a two-step inquiry, asking whether the individual possessed a protected interest to which due process protection applies and if so, whether the individual was afforded an appropriate level of process. *In re A.M.,* 2000 OK 82, ¶ 7, 13 P.3d 484, 487 citing *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); U.S. Const. amend. XIV, § 1; Okla. Const., art. 2 § 7.

¶20 In the context of a proceeding to terminate parental rights, the answer to the first inquiry is clear. Parents have a constitutionally protected liberty interest in the continuity of the legal bond with their children. *Id.* at ¶ 8, citing *In re Delaney*, 1980 OK 140, 617 P.2d 886; *In re Christina T.*, 1979 OK 9, 590 P.2d 189. The fundamental nature of parental rights requires that the full panoply of procedural safeguards must be applied to child deprivation hearings. *Id.* citing *In re Chad*, 1978 OK 94, 580 P.2d 983, 985.

¶21 The answer to the second inquiry, however, must be determined on a case-by-case basis because the due process clause does not by itself mandate any particular form of procedure. It calls for such procedural protection as the particular situation demands. *Id.* at ¶ 9. In the context of a proceeding to terminate parental rights, the essence of procedural due process is a "meaningful and fair opportunity to defend." *Id.* In assessing whether Mother was afforded an appropriate level of process, three factors are used. *See id.* at ¶ 10. A court must consider the private interest affected by the state's action, the risk of erroneous deprivation posed by the procedures employed, and the probable value, if any, that additional or substitute procedures would provide and the governmental interest at stake. *Id.*

¶22 In this case, the procedure employed by the court was the delay in the adjudication hearing. The trial court clearly violated § 1-4-601 when it did not conduct a hearing within 90 days or otherwise comply with § 1-4-601. Mandatory language is used in the statute; it is clear the legislature intended the hearing to be held within a certain time frame.

¶23 In determining whether there was a deprivation of Mother's rights, it is helpful to review legislative intent with regard to the Oklahoma Children's Code. We presume it is in a child's best interest to be in the custody of their natural parents; however, this presumption is overcome when there is evidence of abuse, neglect or threat of harm to a child in their parents' care. 10A O.S. § 1-1-102(A)(1). Where a child is alleged to be deprived, the State is to only intervene when necessary and to rehabilitate and reunite the family, if possible. *See* 10A O.S. §§ 1-1-102(B)(1)-(8). When rehabilitation and reunification are not possible, the goal is to place the child in an adoptive home or other permanent living arrangement. *Id.* at 1-1-102(B)(7).

¶24 Where families can be rehabilitated after a child has been adjudicated deprived, § 1-4-704 requires DHS to prepare an individualized service plan for parents to complete in an effort to regain custody of their children. 10A O.S. § 1-4-704. While some families can be rehabilitated, certain abuse may warrant immediate termination of the parents' rights. *See* 10A O.S. § 1-4-904(A)(1). Adjudication of a child as deprived can occur concurrently with a proceeding to terminate parental rights. *Id.* Where the state files a petition alleging a child is deprived and also immediately requests termination of parental rights, the parent is entitled to a jury trial in which the court determines if the child should be adjudicated deprived and the jury determines if the parental rights should be terminated. 10A O.S. § 1-4-502(1). In the case at hand, the State filed a petition alleging E.H. and J.H. were deprived and also sought to terminate Mother's parental rights. A parent's interest in a timely adjudication hearing is heightened when the facts offered to prove a child is deprived are capable of correction. In this case, the State requested termination in its petition based on allegations of failure to protect from heinous and shocking sexual abuse. The risk of an erroneous deprivation posed by the procedure employed by the trial court is outweighed by the risk of substantial harm to the children involved.

¶25 While the delay in the adjudication hearing violates the statute, we find no due process violation occurred given Mother had a meaningful and fair opportunity to defend. *Cf. In re Christina T.*, 1979 OK 9, ¶¶ 9-10, 590 P.2d 189 (the father's due process rights were violated when the trial court entered summary judgment against him and did not provide him a meaningful opportunity to be heard). Due pro-

cess requires an orderly proceeding adapted to the case in which the parties have an opportunity to be heard, and to defend, enforce and protect their rights. *Malone v. Malone*, 1979 OK 21, ¶ 4, 591 P.2d 296. On March 13 and 14, 2018, Mother was represented by counsel at the jury trial. She had the opportunity to cross-examine the State's witnesses, as well as put on her case in chief.

¶26 In addition to Mother's presence and participation at the jury trial, we note the trial court did not lose jurisdiction when the emergency custody order expired. 10A O.S. § 1-4-601(C). *See also In re C.R.G.*, 2012 OK CIV APP 52, ¶ 16, 276 P.3d 1114. Subsection (C) provides:

> The release of a child from emergency custody due to the failure of an adjudication hearing being held within the time frame prescribed by this section shall not deprive the court of jurisdiction over the child and the parties or authority to enter temporary orders the court deems necessary to provide for the health, safety, and welfare of the child pending the hearing on the petition.

10A O.S. § 1-4-601(C).

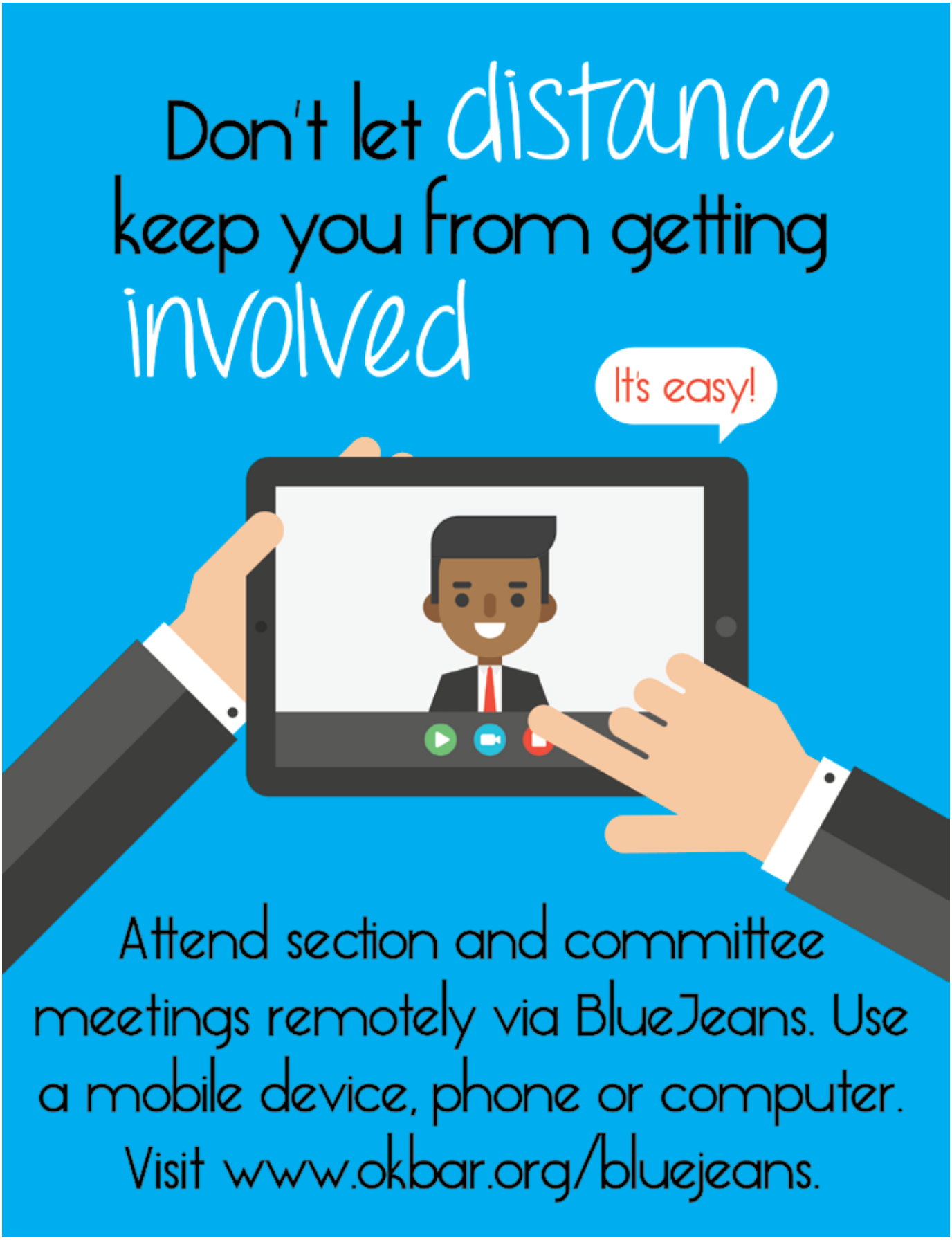
¶27 The legislature intended that the best interest of the children be the paramount consideration in all proceedings under the Oklahoma Children's Code. 10A O.S. § 1-1-102(E). Furthermore, "[n]othing contained in the [code] shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical or behavior health treatment, to protect the child's health, safety, or welfare." 10A O.S. § 1-4-207.

¶28 Between December 1, 2016, the date the court denied Mother's Motion to Dismiss, and March 13-14, 2018, the time when the adjudication hearing and jury trial occurred, it appears from the record that the trial court conducted several review hearings with court minute entries stating the children were to remain in DHS custody.

¶29 While the trial court failed to conduct the adjudication hearing within the time proscribed by § 1-4-601, the court did maintain jurisdiction of the matter and the delay in the adjudication hearing did not violate mother's constitutional guarantee of due process of law.

¶30 AFFIRMED.

SWINTON, P.J., and MITCHELL, J. concur.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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, November 8, 2018

F-2016-194 — Donte Lamar Payton, Appellant, was tried by jury for the crime of Manslaughter in the First Degree, in Case No. CF-2014-7586, in the District Court of Oklahoma County. The jury deadlocked on punishment. The Honorable Donald L. Deason, District Judge, sentenced Appellant to life imprisonment. From this judgment and sentence Donte Lamar Payton has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Recuses.

C-2017-1044 — Auntra Lawan Edmonds, Petitioner, was charged in Greer County District Court, Case No. CF-2016-37, with two counts of First Degree Manslaughter, After Former Conviction of a Felony. Edmonds entered a blind plea of no contest to these charges before the Honorable W. Mike Warren, Associate District Judge. Judge Warren accepted Edmonds' plea, and the trial court sentenced Edmonds to life imprisonment on each count and ordered the sentences run concurrently. Edmonds was additionally ordered to pay various fines, fees, and costs. Edmonds then filed an application to withdraw his plea. After a hearing, Judge Warren denied Petitioner's motion to withdraw his plea. Edmonds now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2017-706 — In the District Court of Stephens County, Case No. CF-2012-436A, Appellant, Thomas Lynn Spann, while represented by counsel, entered a plea of guilty to Cruelty to Animals. On October 10, 2013, in accordance with a plea agreement, the Honorable Joe H. Enos, District Judge, sentenced Appellant to five (5) years imprisonment, with all but the first one (1) year suspended under written rules of probation. On June 22, 2017, the Honorable Ken Graham, District Judge, found Appellant had violated his probation, and he revoked the suspension order in full. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

F-2017-762 — Kendell Paul Sparrow, Appellant, was tried by jury for the crime of Murder in the First Degree (Malice Aforethought) in Case No. CF-2015-699 in the District Court of Payne County. The jury returned a verdict of guilty and set punishment at life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Kendell Paul Sparrow has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs in results.

F-2017-994 — Holly Tegan Zuniga-Griffin, Appellant, was tried by jury for the crime of Enabling Child Abuse in Case No. CF-2016-912 in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment 10 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Holly Tegan Zuniga-Griffin has perfected her appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in result; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-851 — Appellant Anthony Harold Warnick was tried in a non-jury trial before the Honorable Curtis DeLapp, District Judge, for Possession of Child Pornography, After Former Conviction of Two or More Felonies in the District Court of Washington County, Case No. CF-2016-395. Appellant was found guilty as charged and sentenced to thirty (35) years in prison. From this judgment and sentence Anthony Harold Warnick has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

COURT OF CIVIL APPEALS
(Division No. 2)
Wednesday, November 7, 2018

116,932 — Denise Enriquez-Taylor, Plaintiff/Appellant, vs. Lowes Building Material Centers, Inc., d/b/a Lowe's Home Improvement Stores, Defendant/ Appellee. Appeal from an order of the District Court of Comanche, County, Hon. Irma Newburn, Trial Judge, dismissing Plaintiff's lawsuit for negligence against Defendant. Plaintiff, who was employed by Defendant, brought suit after sustaining an injury in Defendant's parking lot while returning to work after her lunch break. Plaintiff submitted a claim for workers' compensation benefits to Defendant's insurance carrier which was denied as "not compensable." Plaintiff did not include any documentation in the record demonstrating that she then filed a claim for benefits with the Oklahoma Workers' Compensation Commission. Instead, Plaintiff filed suit for negligence in the District Court of Comanche County nearly two years later. Defendant filed a motion for summary judgment, arguing "Plaintiff's exclusive remedy for injuries sustained during employment is through the workers' compensation system." We first conclude that because 85A O.S. Supp. 2014 § 5 mandates the AWCA [Administrative Workers' Compensation Act] as the exclusive remedy for employees injured on the job, Plaintiff may not bring a tort action against Defendant in district court but must pursue relief through the AWCA. The facts of the case also bring us to conclude Plaintiff was an employee of Defendant as defined by 85A O.S. Supp. 2014 § 2(18)(a) at the time of her injury. We also agree with the trial court's finding that Plaintiff was within the course and scope of her employment when injured and was not excluded from the application of the AWCA because she was injured in the parking lot when she was clocked out (85A O.S. Supp. 2014 § 2(13)). The trial court was correct to dismiss the case for lack of subject matter jurisdiction when jurisdiction over Plaintiff's claims lay not in the district court, but with the Workers' Compensation Commission. After review of the record and applicable law, finding no error, we affirm the trial court's dismissal of Plaintiff's negligence action. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., concurs, and Fischer, J., dissents.

Tuesday, November 13, 2018

116,484 — Paige S. Burke, Petitioner, vs. Rosewood Terrace, Own Risk #18132, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of the Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge, denying Claimant's request to reopen her claim based on a change of condition. After reviewing her testimony, we conclude Claimant did not fully articulate how her lumbar condition had changed for the worse. In reviewing and weighing the evidence, the trial court could have found Claimant's testimony did not successfully establish any change of condition, or if it had occurred, that it was due to her original injury. The independent medical examiner (IME) was also Claimant's treating physician and performed her surgery after the original injury, and he found no change of condition after she filed her motion to reopen. The IME's report constitutes competent evidence to support the Workers' Compensation Court's decision. Although another physician reached a different conclusion, his view is not determinative on the issue of whether Claimant sustained a change of condition. We conclude there is competent evidence to support the trial court's denial of Claimant's motion to reopen for a change of condition, and the Workers' Compensation Court's order is sustained. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Friday, November 2, 2018

115,811 — Kevin Easley, Plaintiff/Appellee, vs. City of Norman, Oklahoma, an Oklahoma municipal corporation, Defendant/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Tracy Schumacher, Trial Judge. Appellant, City of Norman, seeks review of the district court's order finding City's ordinances unconstitutionally vague and granting Appellee, Kevin Easley, a variance. At issue in this case is a residential historic district in Norman. Appellee installed new windows on his home without obtaining prior approval from the City's Historic District Commission. The two ordinances at issue in the case, the Historic District Ordinance and the Chautauqua Historic District Designation Ordinance, require homeowners to secure a Certificate of Appropriateness before modifying the exterior of buildings located within the

Chautauqua Historic District. When this fact was brought to Appellee's attention, he applied for a retroactive Certificate but the City denied it. He filed a petition in the district court to review the adverse determination. The court granted a variance and determined the ordinances are unconstitutionally vague. The City of Norman appealed. We hold (1) the district court lacked authority to grant a variance because that relief was not initially determined by the Norman Board of Adjustment, and (2) the ordinances are not unconstitutionally vague because homeowners have fair notice of the existence of the historic district and access to the relevant compliance guidelines. REVERSED AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,697 — John Christopher Biebrich, Petitioner, vs. KOKH Channel 25, Travelers Indemnity Co. of America, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of The Workers' Compensation Court of Existing Claims. Claimant/Petitioner, John Christopher Biebrich, appeals an order of the Workers' Compensation Court of Existing Claims denying compensability. The court determined Claimant's post traumatic stress disorder did not meet the definition of compensable injury. We sustain the order because the clear weight of the evidence proved Claimant's mental injury did not arise "directly as a result of a compensable physical injury" as required by 85 O.S. Supp. 2011 §308(10)(f). Furthermore, the statute is not an unconstitutional restriction upon access to the courts, it does not offend substantive due process of law, and it is not unconstitutional special legislation. SUSTAINED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

Wednesday, November 7, 2018

116,004 — In Re the Marriage of Rivers and Taylor: Paul T. Rivers, Petitioner/Appellant, vs. Catherine S. Taylor, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Trial Judge. Petitioner/Appellant Paul T. Rivers (Father) appeals from an Order entered on remand after a prior appeal in this divorce proceeding. The trial court was ordered to specify the incomes of the parties it used to determine child support. The trial court adopted the child support computation submitted by Respondent/Appellee Catherine S. Taylor and retained its above-the-guidelines award of $2,000 per month. We find the trial court did not err in its income calculation for either party. We further find the trial court did not err by apportioning transportation expenses for the parties' minor child in proportion to each parties' adjusted gross income, nor did the trial court err by ordering Father to pay 100% of the child's health insurance premium. Finally, we find the court's ruling ordering Father to pay $2,000 per month in child support is not against the clear weight of the evidence. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Wednesday, October 31, 2018

115,807 — Claude C. Arnold Non-Operated Royalty Interest Properties, L.L.C.; William V. York & Geleeta M. York Revocable Trust; Gunn Living Trust Dated 12-17-91; and Sharon L. Martin, Plaintiffs/Appellees, v. Cabot Oil & Gas Corporation, Defendant/Appellant. Appeal from the District Court of Beaver County, Hon. Jon Parsley, Trial Judge. After a four-day bench trial, the trial court entered its Journal Entry of Judgment rendering judgment in favor of Plaintiffs/Appellees (collectively, Plaintiffs or Arnold) on their claims for declaratory judgment, quiet title, violation of the Production Revenue Standards Act, 52 O.S. 2011 §§ 570.0-570.15 (PRSA), and negligence against Defendant/Appellant Cabot Oil & Gas Corporation (Cabot). The trial court found Arnold owns an overriding royalty interest in oil and gas produced from the Marmaton formation underlying land in Beaver County, Oklahoma, arising out of certain leases executed in 1973 (the 1973 Leases) and assignments of those leases to Cabot's predecessors in interest. In 1984, Cabot's predecessors in interest filed new leases (the 1984 Leases) that were executed by the same lessors and covered the same land as the 1973 Leases from which Arnold derived its override. In 2012 and 2013, Cabot drilled three horizontal Marmaton wells but refused to pay Arnold's overriding royalty. Cabot appeals raising various issues of error; however, the dispositive issue on appeal is Cabot's assertion the trial court erred in determining that Arnold's quiet title action was not barred by the applicable statute of limitations. We conclude Arnold's quiet title action accrued and the statute of limitations began to run when the 1984 Leases appeared in the public record signaling a claim to the Marmaton adverse to Arnold's under the 1973 Leases. The record reveals the 1984 Leases were a cloud on

Arnold's overriding royalty interest derived from the 1973 Leases; thus, its quiet title action accrued when the 1983 Leases were filed of record. Further, the owner of an override interest that could be extinguished by the execution of a new lease by its lessee should be expected to use ordinary due diligence and inspect the land records. The record contains no evidence of fraud or concealment concerning those filed leases. "A party must be presumed to know what, by the exercise of reasonable diligence, he might have discovered[.]" *Calvert v. Swinford,* 2016 OK 100, ¶ 18, 382 P.3d 1028. We therefore conclude the discovery rule does not apply under the facts of this case to toll the statute of limitations and, therefore, the trial court erred in concluding the limitations period did not act to bar Arnold's quiet title action. Consequently, the trial court erred in finding Arnold's quiet title action was not time barred. Further, Arnold's declaratory judgment, negligence, and PRSA claims arise from its claims that it is the owner of overriding royalties from production in the Marmaton derived from the 1973 Leases. Because we conclude Arnold's assertion of that ownership is time barred, other claims it makes based on that ownership interest are precluded. Consequently, the trial court erred in rendering judgment to Arnold on those claims. Accordingly, we reverse the judgment. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, November 2, 2018

116,775 — Hipolito Castaneda, Petitioner, v. Seaboard Foods LLC, Respondent, and American Zurich Insurance Co., Insurance Carrier, and Carole Wangrud, Additional Party Respondent. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. Margaret A. Bomhoff, Trial Judge. This is an appeal from the decision of the Three-Judge Panel of Workers' Compensation Court of Existing Claims. The dispute below involved a division of attorney fees between Claimant's (Hipolito Castaneda) original counsel, Carole A. Wangrud, (Wangrud) and Claimant's current counsel Aaron Corbett (Corbett). The decision in *Duffy v. Cope,* 2000 OK CIV APP 140, 18 P.3d 366, provides guidance here. There the issue involved division of a fee in a tort case. The Court ruled, "The main objective is to evaluate the totality of the involved lawyers' efforts in terms of their proportional contribution to the creation of the fee fund to be divided." Here, the division depends upon the weight to be afforded to Attorney Wangrud's statements about the time, efforts and mediation when she was involved. Clearly, the trial court and Three-Judge Panel considered this as competent evidence and found accordingly. In this appeal, Current counsel's arguments essentially take issue with the accuracy of Attorney Wangrud's statements and add the argument that current counsel did the most valuable part of the work leading to the ultimate outcome both on the claim's merits and the assertion by Employer for penalty and sanctions. However, on review, this Court finds that the decision of the Three-Judge Panel is supported by competent evidence and is therefore sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,114 — Neal McGee Homes, Inc., Plaintiff/Appellant, v. Mid-Continent Group and Mid-Continent Casualty Company, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge. Appellant appeals from the trial court's order denying its motion to vacate the trial court's sua sponte order striking Appellant's petition. This appeal concerns the legal effect of a petition filed by a non-lawyer corporate officer on behalf of a corporation and whether such a filing is automatically a nullity and must be stricken, or whether it is a defect subject to being cured through amendment. We conclude that under appropriate circumstances the filing of such a petition is a curable defect subject to amendment. Consequently, we conclude the trial court abused its discretion in failing to vacate its order dismissing Appellant's petition. Accordingly, we reverse the trial court's order and remand the case to the court for an evidentiary hearing consistent with this Court's Opinion. REVERSED AND REMANDED WITH DIRECTION. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Tuesday, November 6, 2018

117,006 — McAlester Regional Health Center and Own Risk No. 19534, Petitioners, v. Richey Gowens and the Workers' Compensation Commission, Respondents. Proceeding to review an Order of the Workers' Compensation Commission, Hon. Michael T. Egan, Administrative Law Judge. Petitioners (collectively, Employer) seek review of the Commission's Order affirming the decision of an Administrative Law

Judge finding Richey Gowens (Claimant) sustained compensable work-related injuries to his left arm and left shoulder, and awarding permanent partial disability (PPD) benefits. Employer, having stipulated below that Claimant sustained a compensable injury to his left shoulder, but not to his left arm, seeks review of that portion of the Order pertaining to Claimant's left arm. Employer does not contest the calculated percentage or amount of PPD; instead, Employer asserts, more fundamentally, that no competent medical evidence supports the finding of compensability with regard to Claimant's left arm. However, Claimant's testimony and the medical reports support the finding of compensability as to Claimant's arm. The Commission's findings are supported by substantial evidence; thus, we must sustain. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

116,926 — Oklahoma Turnpike Authority and State of Oklahoma, Petitioners, v. Tamary S. Rhodes and the Workers' Compensation Commission, Respondents. Proceeding to review an Order of the Workers' Compensation Commission, Hon. Patricia Sommer, Administrative Law Judge. Petitioners (collectively, Employer) seek review of the Commission's Order affirming the decision of an Administrative Law Judge awarding Tamary S. Rhodes (Claimant) temporary total disability (TTD) benefits. Employer asserts Claimant refused to perform alternative work following her injury and that she is therefore not entitled to TTD benefits. Employer bases its argument on 85A O.S. Supp. 2015 § 45(B)(3), which provides, in pertinent part, that "[i]f the employee refuses to perform the alternative work offered by the employee (sic), he or she shall not be entitled to" TTD benefits. However, "[a]n injured employee is entitled to TTD if temporarily unable to perform his or her job or any alternative work offered by the employer." *Nix v. First Staffing Grp. USA,* 2017 OK CIV APP 8, ¶ 7, 390 P.3d 978 (emphasis added) (citation omitted). Because substantial evidence was presented below that Claimant did not refuse to perform the alternative work offered by Employer, and that, instead, Claimant was unable to perform the alternative work, we reject Employer's argument. Employer also asserts Claimant was not TTD following her injury because she performed some work as a massage therapist during this period. However, mere occasional or sporadic work will not terminate the TTD period, and, here, Claimant was able to work only about fifteen percent of her pre-injury working hours. Thus, although Claimant performed some work during the period in question following the injury and prior to surgery, we conclude substantial evidence supports the conclusion that the massage therapy work performed by Claimant was not equivalent to substantially gainful employment for Claimant, but was, instead, mere occasional or sporadic work for her. Thus, the Commission did not err in this regard. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

116,237 — Melissa Mustachia, Plaintiff/Appellant, v. Vaughn Foods, Inc., an Oklahoma corporation, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge. Plaintiff appeals from the trial court's order granting Defendant's motion to dismiss. The present case constitutes, in essence, the refiling of a retaliatory discharge case that was dismissed. Although, in the prior action, the order of dismissal was not appealed, pursuant to this Court's ruling in *Willis v. RMLS Hop OKC, LLC,* 2018 OK CIV APP 13, 414 P.3d 374, and the doctrine of stare decisis, we conclude the trial court erred in finding the action was barred. As we explained in *Willis*, an exception to the doctrine of issue preclusion applies when a change of circumstances or law is such that to apply the preclusion doctrine would result in a manifestly inequitable administration of the laws. We conclude this exception applies here, for to rule otherwise would result in a manifestly inequitable administration of the laws. Therefore, we reverse the trial court's order and remand this case to the trial court for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., concurs, and Rapp, J., concurs specially.

Wednesday, November 7, 2018

117,022 — Texoma Truck Center, LTD, an Oklahoma Limited Partnership, Michael Hamilton, an individual, and Myrna Hamilton, an individual, Plaintiffs/Appellants, vs. Landmark Bank, N.A., Defendant/Appellee. Appeal from an Order of the District Court of Bryan County, Hon. Mark R. Campbell, Trial Judge, dismissing Texoma Truck Center, Ltd. (TTC), Michael Hamilton, and Myrna Hamilton's (collectively, "Plaintiffs") claim against Landmark

Bank, N.A. (Bank). TTC owns and operates a gas and convenience store in Ardmore, Oklahoma, which was financed through Bank. Plaintiffs had the opportunity to develop a self-storage facility on adjoining property. Again, Bank financed the business operations. As part of the financing, an appraisal and survey were conducted to determine, among other things, if the property was in a flood zone. Plaintiffs contend Bank represented to them that the property was not in a flood zone. Several years later, Bank obtained a new appraisal and survey in conjunction with renewal of the loan. This appraisal and survey determined that approximately one-half of the self-storage property was located in a flood zone. Plaintiffs contend they were instructed by Bank not to notify their customers of this fact. Plaintiffs, however, did inform customers that the self-storage facility was located in a flood zone. Plaintiffs contend that Bank notified them of its intent to foreclose their loans upon learning that they had notified customers. Plaintiffs allege breach of contract, bad faith breach of contract, fraud, negligence, and gross negligence. Bank filed a motion to dismiss for failure to state a claim, which was granted by the trial court. We find the order filed by the trial court must be reversed for failure to comply with the mandates of 12 O.S. 2011, § 2012(G); *Fanning v. Brown*, 2004 OK 7, 85 P.3d 841, *Stauff v. Bartnick*, 2016 OK CIV APP 76, 387 P.3d 356; and *Pellebon v. State ex rel. Bd. of Regents of Univ. of Oklahoma*, 2015 OK CIV APP 70, 358 P.3d 288. Because the order under review fails to comply with the authorities set out above, we reverse it and remand the case to the trial court for further proceedings consistent with this opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,169 — Michael J. Porter, Plaintiff/Appellee, v. Hershell Lee Henson Jr., Defendant/Appellant. Appeal from the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. This appeal arises from an award of attorney fees following a plaintiff's verdict in an automobile negligence case. Plaintiff initiated this case by filing a petition alleging Defendant caused him injury by negligently driving his truck. The case ultimately went to trial by jury, after which the jury returned a verdict in favor of Plaintiff. The jury awarded damages to Plaintiff in the amount of $9,553.75. Plaintiff then sought attorney fees. In the order from which Defendant appeals, the trial court awarded attorney fees in the amount of $35,355, and also quashed a subpoena issued by Defendant to Plaintiff's attorney. On appeal, Defendant challenges the hourly rate and number of hours charged by Plaintiff's attorney. However, the trial court adopted an hourly rate and total number of hours within the range of evidence, and we conclude the trial court's rulings as to the appropriate hourly rate and number of hours are not without any rational basis in the evidence – that is, they are not clearly erroneous, against reason and evidence. Therefore, we affirm the portion of the order awarding attorney fees. Moreover, in light of certain factual representations made by Defendant's attorney at the hearing below, we conclude the trial court did not abuse its discretion in quashing the subpoena. Therefore, we also affirm this portion of the order. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., concurs, and Rapp, J., dissents.

116,312 — In Re The Marriage of: Clifford Eugene King, Petitioner/Appellee, v. Vicki Ann King, Respondent/Appellant. Appeal from an Order of the District Court of McClain County, Hon. Charles N. Gray, Trial Judge. The trial court respondent, Vicki Ann King (ex-Wife) appeals the trial court's Order denying reconsideration of the award of attorney fees against the petitioner, Clifford Eugene King (ex-Husband) in connection with ex-Husband's unsuccessful motion to enforce visitation. The parties' marriage was dissolved by consent Decree. Subsequently, ex-Husband filed a motion to enforce visitation rights pursuant to 43 O.S. Supp. 2017, § 111.3. After a trial, ex-Husband prevailed. On appeal, ex-Wife prevailed and the appellate court awarded her appeal related attorney fees to be fixed by the trial court on remand. The trial court heard conflicting evidence regarding the amount of a reasonable attorney fee related to defense of ex-Husband's motion to enforce visitation. In this appeal, ex-Wife has failed to show that the trial court's judgment was a clearly erroneous conclusion or that the judgment is against reason and the evidence. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., concurs, and Barnes, P.J., concurs in result.

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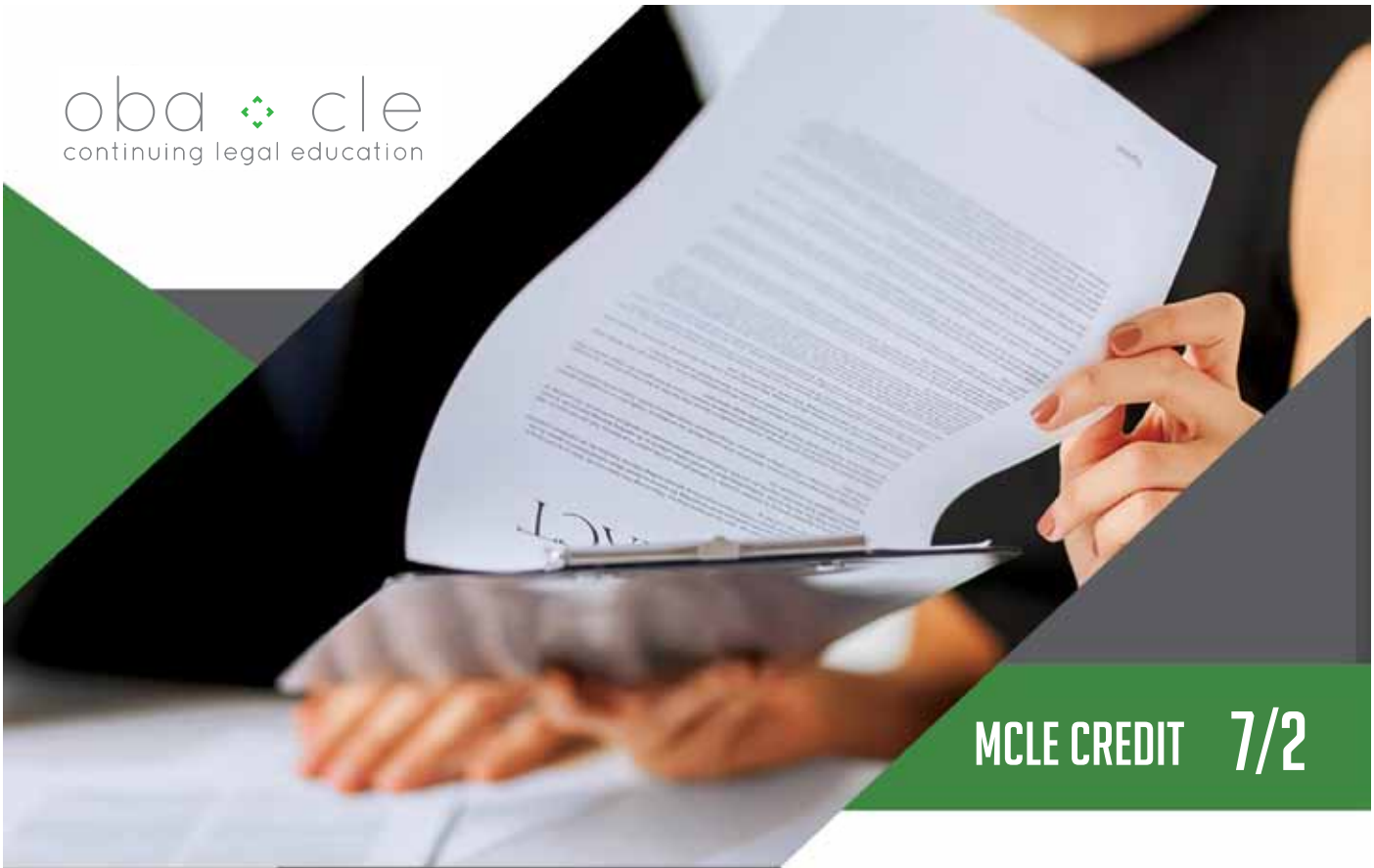

MCLE CREDIT 7/2

23 MISTAKES EXPERIENCED DRAFTERS USUALLY MAKE... BUT NOT YOU!

DECEMBER 20

9 A.M. - 4:05 P.M.

*Oklahoma Bar Center - **LIVE WEBCAST AVAILABLE***

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

Stay up-to-date and follow us on

FEATURED TRAINER:
Lenne' Eidson Espenschied

This seminar explains 23 typical stylistic and substantive drafting errors usually found in all kinds of transactions, including mergers and acquisitions, contracts for the sale of goods and services, licenses, real estate contracts, settlement agreements, employment and consulting agreements, partnership agreements, and much more. Novice and experienced drafters will learn highly practical techniques to advance their contract drafting skills to the next level. Ms. Espenschied will recap stylistic recommendations. She has taught in Oklahoma before, using new examples drawn from a 2017 high-profile merger agreement.

$200 for early registrations with payment received by December 13th. Registrations received after December 13th are $225 and walk-ins are $250. Continental breakfast and networking lunch included. For a $10 discount, enter coupon code FALL2018 at checkout when registering online for the in-person program. Registration for the live webcast is $225. Members licensed 2 years or less may register for $75 for the in-person program and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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REGISTRATION FOR THE FULL-DAY INCLUDES CONTINENTAL BREAKFAST AND LUNCH

AND A TOAST TO THE NEW YEAR

MCLE CREDIT 6/4
AM SESSION 3/3 PM SESSION 3/1

THE LEAST AWFUL ETHICS PROGRAM...EVER

DECEMBER 31 9 - 11:40 A.M.

Oklahoma Bar Center - Live Webcast Available

NAKED AND AFRAID: A LEGAL SURVIVAL SKILLS PROGRAM

DECEMBER 31 12:30 - 3:10 P.M.

Oklahoma Bar Center - Live Webcast Available

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

Stay up-to-date and follow us on

MORNING PROGRAM:

FEATURED SPEAKER FOR BOTH PROGRAMS:
Stuart Teicher, *CLE Performer*

No one likes ethics CLE. We know. That's why we have Stuart Teicher, "the CLE Performer," coming to town. You simply will not believe how he makes ethics...well, not horrible. We know that you don't particularly care about the rules that he will discuss (...which are 8.3 Reporting Misconduct, 1.6, Confidentiality, 1.7 Conflicts, and more). What you care about is that he won't make you fight back a nap for 3 hours. Trust us, this is a different kind of ethics...because it's not awful.

AFTERNOON PROGRAM:

Did you ever see that TV show where people are put into a survival situation, completely naked, and with no tools except a knife? They are forced to rely on their survival skills to make it out alive. Well, lawyers are in a similar situation every day. Sure, we are fully clothed, but we have to rely on some very basic survival skills to make it through the practice. Writing, negotiating, and communicating with clients are the survival tools of our trade.

Early registration by December 21, 2018, is $120 for either the morning or afternoon program or $200 for both programs. Registration received after December 21st will be $225 and $250 for walk-ins. For a $10 discount, enter coupon code FALL2018 at checkout when registering online for the in-person program. No other discounts apply. Registration for the live webcast is $150 each or $250 for both.