THE OKLAHOMA BAR
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Court Issue

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THE OKLAHOMA BAR
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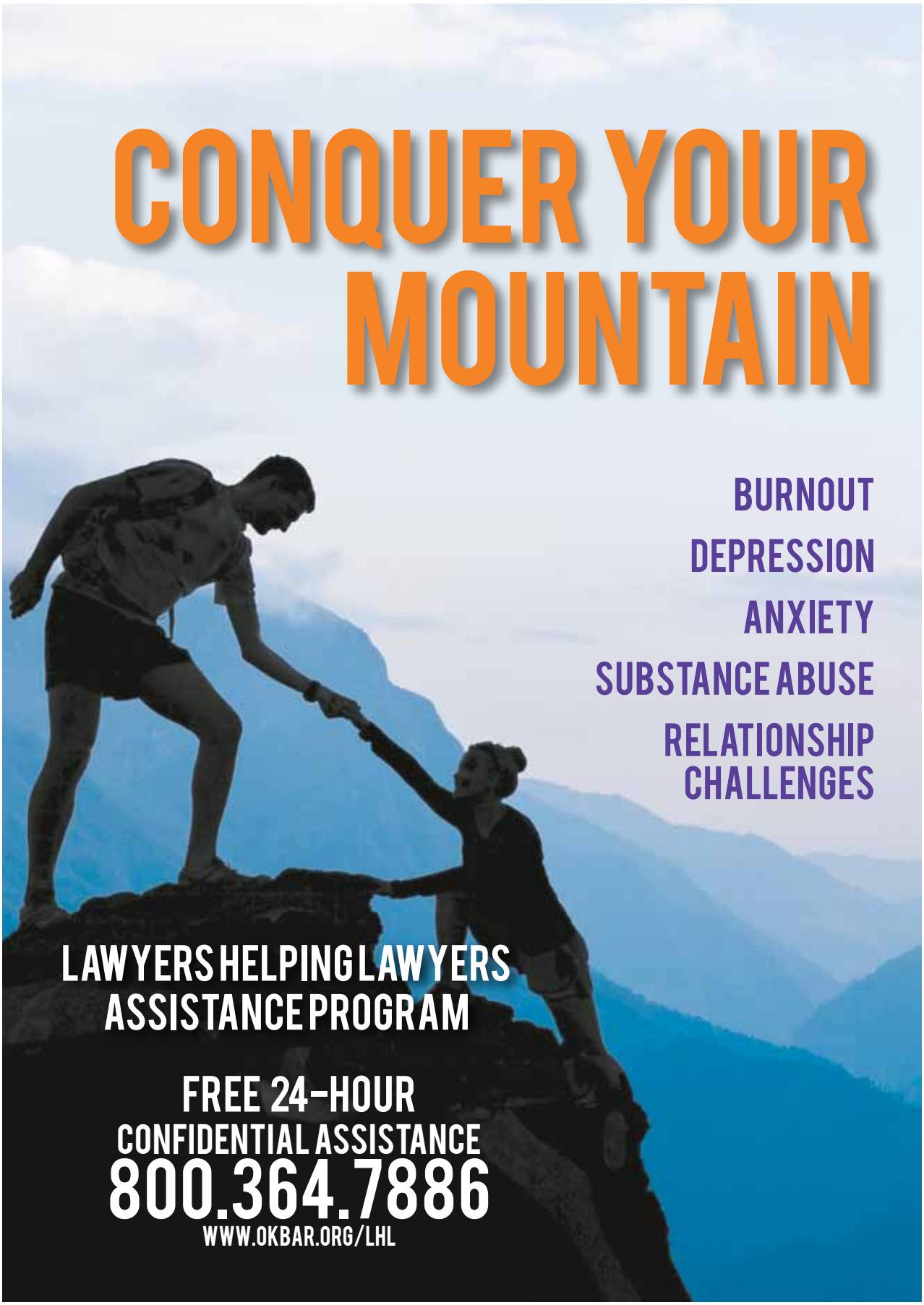
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2018 OK 86

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 90

JERED BARRIOS, as the Personal Representative of the ESTATE OF RANDALL BARRIOS, deceased, Plaintiff, v. HASKELL COUNTY PUBLIC FACILITIES AUTHORITY; BRIAN HALE, individually; KATRINA CHRISTY, individually and in her official capacity; SHERIFF TIM TURNER, in his official capacity; and DOES I through V, Defendants. KELLY L. FOUTCH, administrator of the ESTATE OF RUSSELL TED FOUTCH, deceased, Plaintiff, v. TURN KEY HEALTH, LLC, d/b/a TURN KEY MEDICAL and TURN KEY; CREEK COUNTY PUBLIC FACILITIES AUTHORITY; JANE DOE NURSE I; JANE DOE NURSE II; and JOHN/JANE DOES III-X, Defendants.

Case No. 117,103 (Comp. w/ 117,107 (Cons. w/ 117,154)). December 4, 2018

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA AND FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

¶0 The United States District Court for the Eastern District of Oklahoma and the United States District Court for the Northern District of Oklahoma certified several questions of state law to this Court pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S.2011 §§ 1601-1611.

CERTIFIED QUESTIONS ANSWERED

Andrew M. Casey, FOSHEE & YAFFE, Oklahoma City, Oklahoma, for Plaintiffs, Jered Barrios ex rel. Estate of Randall Barrios, deceased, and Kelly L. Foutch ex rel. Estate of Russell Ted Foutch, deceased.

Jamison C. Whitson, COLLINS, ZORN & WAGNER, P.C., Oklahoma City, Oklahoma, for Defendants Haskell County Public Facilities Authority, Katrina Christy, Sheriff Tim Turner, and Creek County Public Facilities Authority.

Randall J. Wood and Jeffrey C. Hendrickson, PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P., Oklahoma City, Oklahoma, for Defendant Brian Hale.

Anthony C. Winter, JOHNSON HANAN & VOSLER, Oklahoma City, Oklahoma, for Defendant Turn Key Health, LLC d/b/a Turn Key Medical and Turn Key.

Devan A. Pederson, OKLAHOMA OFFICE OF THE ATTORNEY GENERAL, Oklahoma City, Oklahoma, for Amicus Curiae, State of Oklahoma.

Wyrick, J.:

¶1 Two federal courts have certified to us the following questions:

1. The Governmental Tort Claims Act renders the State immune from any tort suit arising out of the "[p]rovision, equip-

ping, operation or maintenance of any prison, jail or correctional facility." Do Sections 7 and 9 of Article II of the Oklahoma Constitution nonetheless allow an inmate to bring a tort claim for denial of medical care?

2. If so, is the private cause of action to be recognized retrospectively?

¶2 Answering these questions requires us to determine whether we should extend our holding in *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, to include tort claims brought by inmates alleging violations of their rights to due process and to be free from cruel or unusual punishments. Because the Legislature responded to our decision in *Bosh* by amending the Governmental Tort Claims Act ("GTCA"), 51 O.S. §§ 151 *et seq.*, to clarify that the State's immunity from suit extended even to so-called "constitutional" torts,[1] we answer the first question "no." Accordingly, we do not reach the second question.

I

¶3 Russell Foutch and Randall Barrios died while incarcerated in county jails, Barrios by his own hand,[2] Foutch from complications related to pneumonia.[3] Their estates sued the respective jails, one sheriff, and various employees and healthcare contractors of those jails. Their claims included (1) federal civil rights claims under 42 U.S.C. § 1983 alleging violations of the Eighth and Fourteenth Amendments of the federal constitution, (2) negligence and wrongful death claims, (3) negligent conduct, training, hiring, and supervision claims, and (4) tort claims alleging violations of rights guaranteed by Sections 7 and 9 of Article II of the Oklahoma Constitution.[4]

¶4 In Foutch's case, the healthcare contractor filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss Foutch's negligence, state constitutional, and § 1983 claims, while the jail filed a partial motion to dismiss all of Foutch's negligence and state constitutional claims. Both the healthcare contractor and the jail argued they were immune from suit under the Oklahoma GTCA and that Foutch had failed to raise a plausible claim for denial of medical care under Article II, Section 7 or 9 of the Oklahoma Constitution.[5] The trial court granted the jail's partial motion to dismiss and the healthcare contractor's motion to dismiss Foutch's state constitutional claims, but allowed Foutch's § 1983 claim to proceed. Both dismissals were premised on the district court's conclusion that this Court had never recognized a cause of action for denial of inmate medical care under Article II, Section 7 or 9 of the Oklahoma Constitution. Foutch subsequently filed a motion to reconsider and asked the district court to certify questions to this Court for guidance on whether such a cause of action exists. The trial court denied Foutch's motion to reconsider, but granted Foutch's motion to certify the questions.

¶5 In Barrios's case, the jail and its employees filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss Barrios's negligent training/hiring/supervision and state constitutional claims. The former sheriff also filed a partial motion to dismiss the same claims, as well as Barrios's negligence and wrongful death claims. The trial court ordered the parties to show cause why the state immunity questions should not be certified to the Oklahoma Supreme Court. Barrios wanted the questions certified; the defendants did not. The trial court certified the questions.

¶6 Due to the commonality of the questions presented, we made the cases companion cases and now answer the certified questions in this single opinion.[6]

II

A

¶7 We have long recognized that the Legislature has the final say in defining the scope of the State's sovereign immunity from suit.[7] Indeed, when the Court eliminated the State's judicially-created common law immunity from tort suits in *Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153, we were careful to note our lack of power to withdraw immunity granted by legislative act.[8] A decision as to whether to allow tort suits is, after all, a decision as to whether the People's tax dollars should be used to pay money damages to those who successfully sue the state; so this recognition is consonant with our longstanding recognition of the Legislature's exclusive power to set the State's fiscal policy.[9]

¶8 The Legislature has oft exercised its power to define the scope of the State's immunity from suit. After *Vanderpool*, the Legislature enacted the GTCA and unequivocally abrogated *Vanderpool's* common law decision with a statute declaring that "[t]he State of Oklahoma does hereby adopt the doctrine of sovereign immunity" from tort suits, while simultane-

ously waiving that immunity for certain tort claims.[10] Accordingly, in cases including tort claims against the State and state actors, the Court begins with the understanding that the State is statutorily immune from tort suit unless the Legislature has expressly waived that immunity. We thus look next to the text of the GTCA to determine whether its limited waivers of sovereign immunity from tort suit encompass the particular tort suit at issue.[11]

¶9 Analyzing a prior version of the GTCA, this Court did just that in *Bosh*, holding that the GTCA did not bar a tort claim alleging that excessive force was used against a pre-trial detainee in violation of the detainee's Article II, Section 30 right not to be unreasonably seized. We read the GTCA as stopping short of "immunizing the state completely from all liability for violations of the constitutional rights of its citizens."[12] The text of the GTCA certainly didn't expressly include tort claims arising from alleged deprivations of constitutional rights-and we have always said that "[i]mmunity cannot be read into a legislative text that is silent, doubtful or ambiguous."[13] Accordingly, we recognized a common law tort remedy for claims arising from alleged violations of Article II, Section 30 rights.[14]

¶10 As it did after *Vanderpool*, the Legislature in 2014 responded to *Bosh* by amending the GTCA to specify that the State's immunity from suit extended even to torts arising from alleged deprivations of constitutional rights.[15] The Legislature first amended the definition of "tort" to include tort claims arising from alleged violations of constitutional duties:

> "Tort" means a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.[16]

It next made a similar addition to the section describing the scope of the State's tort liability:

> The liability of the state or political subdivision under ~~this act~~ The Governmental Tort Claims Act shall be exclusive and ~~in place of all other~~ shall constitute the extent of tort liability of the state, a political subdivision or employee ~~at~~ arising from common law, statute, the Oklahoma Constitution, or otherwise.[17]

And then lastly, it mandated that even if a court nonetheless recognized a constitutional tort, such a tort claim is subject to the GTCA's liability limits.[18]

B

¶11 We must now determine whether, in spite of the legislative response described above, *Bosh's* holding can be extended to allow inmates alleging violations of their Article II, Sections 7 and 9 rights to bring suit against the State for money damages.

¶12 It cannot. The Legislature's amendment of the GTCA to specify that the GTCA applies even to tort suits alleging violations of constitutional rights was an exercise of the Legislature's long-recognized power to define the scope of the State's sovereign immunity, which forecloses our ability to expand the common law in a manner that would conflict with statutory law.[19] Thus, because these "constitutional" torts are now clearly "torts" governed by the GTCA, the GTCA's specific prohibition against tort suits arising out of the "operation or maintenance of any prison, jail or correctional facility" bars the claims at issue here.[20]

¶13 Even if not barred by sovereign immunity, however, it is doubtful that such claims would exist in the Oklahoma common law. Certainly nothing in the text of Article II, Sections 7 and 9 creates a tort cause of action for money damages as a remedy to vindicate violations of those rights, nor do these plaintiffs point to any common law tradition of the State paying money damages to the families of inmates who take their own lives or succumb to illness while in prison.[21] These plaintiffs instead rely primarily on our decision in *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, where we assumed for purposes of our decision that Article II, Section 9 creates a cause of action for an inmate to bring a tort claim alleging violations of his or her right to be free from cruel or unusual punishments.[22] We resolved that case, however, on the basis that the inmate failed to adequately plead such a claim; so we have never squarely held that such a claim exists.[23]

¶14 The best support for the notion that violations of Article II, Section 9 rights should be vindicated through tort suits comes from the United States Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), where that

Court held that Eighth Amendment rights could be vindicated through tort suits. In the very recent decision of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), however, the United States Supreme Court declined to recognize a tort claim brought by detainees who alleged they were abused in violation of their Due Process Rights. In so doing, the *Ziglar* Court called the continuing validity of *Carlson* into grave doubt,[24] saying that it might decide the case differently today because "the arguments for recognizing implied causes of action for damages" had "los[t] their force."[25]

¶15 "[W]hen the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself,"[26] the *Ziglar* Court said, "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against [government] officials in order to remedy a constitutional violation."[27] Because "claims against [government] officials often create substantial costs," including "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process," it is the Legislative Branch that has "substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the [State] Government."[28] The Court noted that Congress had in a similar context specified that the Federal Tort Claims Act did not authorize any claim against a federal employee "which is brought for a violation of the Constitution,"[29] leading it to conclude that there, "Congress [had] . . . weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations."[30]

¶16 For all those reasons, the *Ziglar* Court "made clear" that expanding tort remedies for constitutional violations is now a "disfavored judicial activity."[31] Accordingly, "[w]hen a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a . . . statute, separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, [the Legislature] or the courts?"[32]

¶17 We agree that "[t]he answer most often will be" the Legislature, because "[w]hen an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'"[33] Thus, because the Legislature amended the GTCA after our decision in *Bosh* to specify that the GTCA applies even to tort suits alleging violations of constitutional rights,[34] we conclude that the GTCA's specific prohibition against tort suits arising out of the "operation or maintenance of any prison, jail or correctional facility" is a legislative determination to which we must now defer.

* * *

¶18 In answer to the certified questions, we declare that (1) because the Legislature invoked the State's sovereign immunity as to constitutional torts via the GTCA, Sections 7 and 9 of Article II of the Oklahoma Constitution do not allow an inmate to bring a tort claim for denial of medical care, and (2) accordingly, the second question is moot.

CERTIFIED QUESTIONS ANSWERED

Combs, C.J., and Kauger, Winchester, Reif, and Wyrick, JJ., concur.

Gurich, V.C.J., and Edmondson (by separate writing) and Darby, JJ., concur in result.

Colbert, J., dissents.

EDMONDSON, J., Concurring in result.

¶1 I concur in the result of the Court's opinion. The effect of the Court's opinion will be *sub silentio* to disapprove or distinguish language in *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, and *Washington v. Barry,* 2002 OK 45, 55 P.3d 1036. Any statements in either *Bosh* or *Washington impliedly or expressly* indicating an alleged state or federal constitutional violation may be used for either (1) a governmental statutory tort claim or (2) a "constitutional tort" claim against the State and its officials, *when otherwise expressly forbidden by the State's sovereign immunity statutes*, should be expressly disapproved by this Court to avoid confusion by the Bench and Bar. The Court's opinion today is inconsistent with *Perry v. City of Norman,* 2014 OK 119, 341 P.3d 689, and *Perry* should be overruled to the extent it allows a constitutional tort claim against the public purse when such a claim is expressly prohibited by the Oklahoma Governmental Tort Claims Act.

¶2 Our 1972 opinion in *State ex rel. Department of Highways v. McKnight* explained Oklahoma's sovereign immunity from a legal action in an Oklahoma court is based upon Oklahoma statutes, *and a statute must clearly permit the state to be sued or the right to do so will not exist*.[1] In *McKnight* we quoted language from *State ex rel. Williamson, Attorney General, v. Superior Court of Seminole County*, and again stated "It is fundamental that the State cannot be sued in any manner, *or upon any liability, constitutional, statutory, or contractual,* unless there is express consent thereto."[2] The petition in *State ex rel. Williamson* alleged violations of several provisions of the Oklahoma Constitution.[3] The fact that the present actions are brought based upon the alleged violation of federal constitutional rights is insufficient to supplant Oklahoma's statutory sovereign immunity when the alleged federal constitutional rights are asserted as a basis for a tort action *for monetary damages.*

¶3 Generally, there are several types of actions where a plaintiff may bring an action against a state governmental agency and assert the personal deprivation of state and federal constitutional rights. One authority has stated the following.

> The courts have looked to whether the relief sought would serve an anticipatory or preventive purpose other than to compel affirmative action on the part of, or to establish a claim against, the government or its agents. In the former instance, the action may be maintained, in the latter it is barred. Similar reasoning has been applied where the courts have lifted the bar of immunity from actions for injunctive relief, again, especially in constitutional litigation.

Civil Actions Against State Government, Its Divisions, Agencies and Officers (W. Winborne ed. 1982) 59-60, Section 2.29.

As explained further, "whether a particular action falls within the prohibition of suits against the state is dependent on the particular issues involved and the relief sought[4] . . . an action for a money judgment against the state is usually barred[5] . . . to avoid the bar of immunity it must appear that the payment of a judgment rendered in the action would not come from state coffers." *Civil Actions Against State Government*, at 73, § 2.34. It is noteworthy that this last rule cites in support thereof our opinion in *State ex rel. Department of Highways v. McKnight*.[6]

¶4 The issue of paying a judgment from public funds also arises in jurisprudence relating to a state's Eleventh Amendment immunity in federal courts, and the power of Congress to authorize an action against a State Treasury pursuant to § 5 of the Fourteenth Amendment to the U. S. Constitution. For example, the U. S. Supreme Court has explained that in *Will v. Michigan Dept. of State Police, Congress did not authorize a federal constitutional claim under 42 U.S.C. § 1983 against a State's Treasury in either federal or state courts.*[7]

> *Will's* holding does not rest directly on the Eleventh Amendment. Whereas the Eleventh Amendment bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974), *Will* arose from a suit in state court. We considered the Eleventh Amendment in Will only because the fact that Congress did not intend to override state immunity when it enacted § 1983 was relevant to statutory construction: "Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims," Congress' failure to authorize suits against States in federal courts suggested that it also did not intend to authorize such claims in state courts. 491 U.S. at 66, 109 S.Ct. at 2310.

Hafer v. Melo, 502 U.S. 21, 30, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

The remedy of 42 U.S.C. § 1983 is available in an Oklahoma state court regardless of state statutory sovereign immunity.[8] A 42 U.S.C. § 1983 claim is not one against the State Treasury. *Hafer, supra*. Any alleged federal or state right must be adjudicated within the remedial framework of a legally cognizable action, and the Governmental Tort Claims Act[9] does not provide a remedy or recognize a cause of action when that Act expressly prohibits a party using a state constitutional right "or otherwise" as a basis *for any tort liability against the state when the cause of action is otherwise prohibited by that Act*.

¶5 A problematic argument may be made for recognizing a cause of action for "constitutional damages" *as a state tort claim* based upon opinions such as *Bivens v. Six Unknown Named*

Agents of Federal Bureau of Narcotics,[10] or *Carlson v. Green*.[11] *Bivens* was brought as a general federal question jurisdiction case and viewed as a complementary cause of action brought pursuant to the Federal Tort Claims Act.[12] However, a *Bivens* remedy does not establish any substantive rights; it authorizes a suit against *an individual official*, and "*the sovereign still remains immune from suit*."[13] *Bivens* provided a §1983-type remedy against "federal individuals" and did not negate sovereign immunity. In *Carlson* the Court noted "we have here *no explicit congressional declaration* that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress.[14] Neither Congress or the U.S. Supreme Court has required Oklahoma or any other state to allow litigants to assert violations of federal constitutional law as a basis for *state tort claims* which are expressly prohibited by that state's sovereign immunity statutes.

¶6 Section 153 (B) of Title 51 (O.S.Supp.2015) (emphasis added) states:

> B. The liability of the state or political subdivision under The Governmental Tort Claims Act shall be *exclusive and shall constitute the extent of tort liability of the state, a political subdivision or employee arising from common law, statute, the Oklahoma Constitution, or otherwise*. If a court of competent jurisdiction finds tort liability on the part of the state or a political subdivision of the state based on a provision of the Oklahoma Constitution or state law other than The Governmental Tort Claims Act, the limits of liability provided for in The Governmental Tort Claims Act shall apply.

This statute includes all "tort liability" of the state or political subdivision and the statute makes no distinction in liability between a breach arising from statutory, constitutional, common law duties "or otherwise." It is consistent with State ex rel. Williamson, Attorney General v. Superior Court of Seminole County, supra, and sovereign immunity applies to an alleged breach of federal or constitutional law when tort monetary damages are prohibited by the Oklahoma Governmental Tort Claims Act.

¶7 *Bosh* includes language as follows.

> In *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, this Court held that a private cause of action may exist for inmates to recover for excessive force under the provisions of the Okla. Const. art. 2, § 9 and the 8th Amendment of the United States Constitution – despite the provisions of the OGTCA.

Bosh, 2013 OK 9, ¶ 18, 305 P.3d 994, 1000-1001, notes omitted.

We later stated in *Perry v. City of Norman*,[15] that a *Bosh* action was not available when a claim was available pursuant to the Oklahoma Governmental Tort Claims Act. We stated *Bosh* recognized "notwithstanding the OGTCA" "a private constitutional excessive force action may exist for prison inmates against prison officials."[16] The Court recognized a "constitutional tort" against the State of Oklahoma when the claim fell outside the statutory boundaries set by the Legislature in the Oklahoma Governmental Tort Claims Act. *There is no viable tort claim outside the boundaries of the OGTCA when the claim seeks a money judgment for damages against the State of Oklahoma.*

¶8 In *Vanderpool v. State*,[17] this Court acknowledged *the Legislature's right* to enact sovereign immunity by statute. Nothing has changed since *Vanderpool* on the question whether the Legislature may determine the scope of liability for tort claims seeking money from the public purse. Our legislative body, the Oklahoma Legislature, has expressly stated in 51 O.S. Supp.2016 § 153(B) the extent of liability pursuant to the OGTCA *shall be exclusive* and is the *extent of tort liability* of the state arising from common law, statute, *the Oklahoma Constitution, or otherwise*. An alleged violation of federal or constitutional law, statute, common law, or otherwise may not be used for either (1) a OGTCA claim prohibited by the OGTCA, or (2) a constitutional tort claim outside the bounds set by the Legislature in the OGTCA.

¶9 The U.S. Supreme Court has stated "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries."[18] Statutory sovereign immunity granted to the State of Oklahoma and its officials and employees does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution.[19] The doctrine of sovereign immunity was a well-established principle of common law at the time the Oklahoma Constitution was created.[20] *Limiting tort claims for damages against the State to those al-*

lowed by the OGTCA does not violate either the federal or Oklahoma Constitution.

¶10 Any statements in *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, or *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, indicating an alleged constitutional violation may be either (1) the basis of an OGTCA claim when expressly prohibited by that Act, or (2) a viable tort claim against the State and its officials, *when otherwise expressly forbidden by the State's sovereign immunity statutes*, should be expressly disapproved. Our opinion in *Perry v. City of Norman*, 2014 OK 119, 341 P.3d 689, should be expressly overruled on *Perry's* statement a constitutional tort claim may brought against the State when the OGTCA prohibits the claim. The Oklahoma Governmental Tort Claims Act provides the State of Oklahoma shall not be liable for a monetary tort damages if a loss or claim results from provision, equipping, operation or maintenance of any prison, jail or correctional facility.[21] If the OGTCA bars a plaintiff's tort claim, then the fact that the alleged breach is based upon a constitutional duty does not thereby authorize *a state law claim based on constitutional, statutory, or common-law claim in tort* for damages against the State.

Wyrick, J.:

1. *See* Act of April 21, 2014, ch. 77, §§ 1-2, 2014 O.S.L. 245, 249-50 (codified at 51 O.S.Supp.2014 §§ 152(14), 153(B)).

2. Order Certifying Questions of State Law to Sup. Ct. of Okla. [Doc. 54] at 2, *Barrios ex rel. Estate of Barrios v. Haskell Cty. Pub. Facilities Auth.*, No. 6:17-cv-00325-SPS (E.D. Okla. June 13, 2018). The underlying facts in this matter are set out in the certification orders from the federal courts. In answering a certified question, this Court does not presume facts outside those offered by the certification order. *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 1, 415 P.3d 521, 524. Although this Court will neither add nor delete such facts, we may consider uncontested facts supported by the record. *Id.* ¶ 1, 415 P.3d at 524.

3. Compl. [Doc. 2] ¶ 9, at 3, *Foutch ex rel. Estate of Foutch v. Turn Key Health, LLC*, No. 4:17-cv-00431-GKF-JFJ (N.D. Okla. filed July 20, 2017).

4. Compl. [Doc. 2] ¶¶ 24-73, at 6-17, *Barrios*, No. 6:17-cv-00325-SPS (E.D. Okla. filed Aug. 30, 2017); Order Certifying Questions of Law to the Sup. Ct. of Okla. [Doc. 49] at 2, *Foutch*, No 4:17-cv-00431-GKF-JFJ (N.D. Okla. June 27, 2018).

5. Generally speaking, the staff of a healthcare contractor at a jail are "employees" who are entitled to tort immunity under the GTCA by virtue of sections 152(7)(b), 153(A), and 155(25). See 51 O.S.Supp.2015 § 152(7)(b) ("As used in The Governmental Tort Claims Act: . . . 7. 'Employee' means any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time basis. . . . b. For the purpose of The Governmental Tort Claims Act, the following are employees of this state, regardless of the place in this state where duties as employees are performed: . . . (5) physicians who provide medical care to inmates pursuant to a contract with the Department of Corrections, [and] . . . (7) licensed medical professionals under contract with city, county, or state entities who provide medical care to inmates or detainees in the custody or control of law enforcement agencies . . . ."); *id.* §§ 153(A), 155(25). We have not been asked whether Turn Key Health, LLC or its staff are "employees" under section 152(7)(b), but have assumed they are for purposes of answering the questions certified to us.

6. This Court has the power to answer these certified questions of law. Such power exists so long as the certified questions are presented in accordance with the provisions of the Revised Uniform Certification of Questions of Law Act, 20 O.S.2011 §§ 1601-1611. *Odom*, 2018 OK 23, ¶ 7, 415 P.3d at 525. This Court's discretionary power to answer is set out in section 1602, which provides:

> The Supreme Court and the Court of Criminal Appeals may answer a question of law certified to it by a court of the United States, or by an appellate court of another state, or of a federally recognized Indian tribal government, or of Canada, a Canadian province or territory, Mexico, or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or statute of this state.

Accordingly, in assessing whether a certified federal question of law should be answered by this Court, both factors mentioned by section 1602 should be addressed: (1) Would the answer be dispositive of an issue in pending litigation in the certifying court? (2) Is there established and controlling law on the subject matter?

In this matter, there is no controlling Oklahoma precedent. In *Barrios*, the questions certified would be dispositive of Barrios's "constitutional" tort claims in the underlying federal action. In *Foutch*, however, the federal district court has already dismissed the relevant claims and has denied a motion to reconsider that ruling, which raises doubt about whether the questions from the *Foutch* case are certifiable. *See Cray v. Deloitte Haskins & Sells*, 1996 OK 102, ¶¶ 6, 8, 925 P.2d 60, 62 (declining to answer a certified federal question where, much like *Foutch*, the federal court had granted a dispositive motion, denied a motion to reconsider, and granted a motion to certify, because such actions indicated "the trial court [had] finalized its determination on the question" and because this Court did not wish "to afford appellate review of a ruling made by a federal judge under the guise of a certified question of law"). But even if the questions in *Foutch* are not properly presented, we will nonetheless answer the substantively similar questions in the *Barrios* case. Thus, we see no need to quibble with the certifiability of the *Foutch* questions.

7. *Vanderpool v. State*, 1983 OK 82, ¶ 24, 672 P.2d 1153, 1157 ("[T]his Court is mindful of the oft-expressed view of this Court that if the doctrine of governmental immunity is to be totally abrogated, such should be done by the Legislature and not by the courts of this State." (citing *Ruble v. Dep't of Transp.*, 1983 OK 24, 660 P.2d 1049; *Spaulding v. State ex rel. Dep't of Transp.*, 1980 OK 145, 618 P.2d 397)); *see also Perry v. City of Norman*, 2014 OK 119, ¶13, 341 P.3d 689, 692 ("[T]he Court, in *Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153, abrogated the doctrine [of governmental immunity] and acknowledged *the Legislature's right to enact sovereign immunity by statute*." (emphasis added)); *Schmidt v. Grady County*, 1997 OK 92, ¶ 6, 943 P.2d 595, 597 (same).

8. 1983 OK 82, ¶ 25, 672 P.2d at 1157 ("Our decision is limited in its effect to the heretofore judicially created and recognized doctrine of governmental immunity and is not to be taken as in any way rendering ineffective any act of the Legislature in the area of governmental immunity whether presently in effect or hereafter passed.").

9. *See, e.g., In re Application of Okla. Capitol Improvement Auth.*, 1998 OK 25, ¶ 5, 958 P.2d 759, 762 ("As a matter of fundamental law, the fiscal policy of this state is determined by the legislative department of government."); *Calvey v. Daxon*, 2000 OK 17, ¶ 21, 997 P.2d 164, 171 ("Except where it encounters a specific constitutional prohibition, the Legislature has the right and the responsibility to declare the fiscal policy of Oklahoma. This Court has no authority to consider the desirability, wisdom, or practicability of fiscal legislation. . . . Whether an act is wise or unwise, whether it is based on sound economic theory or whether it is the best means to achieve the desired result are matters for legislative determination." (footnote omitted)).

10. The Governmental Tort Claims Act, ch. 226, § 3, 1984 O.S.L. 811, 813 (codified at 51 O.S.Supp.1984 § 152.1).

11. *See, e.g., Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶¶ 16-20, 212 P.3d 1158, 1166-67 (analyzing 51 O.S. § 155(4) to determine whether a municipality may be held liable for the alleged negligence of its police officer); *Schmidt*, 1997 OK 92, ¶¶ 7-15, 943 P.2d at 597-98 (analyzing 51 O.S. § 155(6) to determine whether the county may be held liable for the alleged negligence of its deputy sheriff); *Nguyen v. State*, 1990 OK 21, ¶¶ 3-5, 8-9, 788 P.2d 962, 964-66 (analyzing 51 O.S. § 155(5) and (28) to determine whether the State may be held liable for injuries resulting from a state institution's release of a mental patient).

12. *Bosh*, 2013 OK 9, ¶ 23, 305 P.3d at 1001.

13. *Gunn v. Consol. Rural Water & Sewer Dist. No. 1, Jefferson Cty.*, 1992 OK 131, ¶ 7, 839 P.2d 1345, 1349 (citing *Nguyen*, 1990 OK 21, ¶ 1, 788 P.2d at 966-67 (Opala, V.C.J., concurring); *Ingram v. State*, 1990 OK 2, ¶ 9, 786 P.2d 77, 80; *Huff v. State*, 1988 OK 118, ¶ 6 n.19, 764 P.2d 183, 186 n.19; *Jarvis v. City of Stillwater*, 1983 OK 88, ¶ 10, 669 P.2d 1108, 1111).

Additionally, by operation of the Supremacy Clause, the GTCA couldn't eliminate a state actor's liability under federal laws like 42 U.S.C. § 1983, s*ee Tiemann v. Tul-Ctr., Inc.*, 18 F.3d 851, 853 (10th Cir. 1994), nor did it affect claims that fail to implicate the state's sovereign immunity, such as those against state officials in their individual capacity and those seeking only prospective injunctive relief. *See, e.g., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 436-37 (2004).

14. Article II, Section 30 of the Oklahoma Constitution does not itself create a cause of action. Thus, the cause of action we recognized was not one created by the Oklahoma Constitution, but rather by the Court through its common law power to create a cause of action for the alleged deprivation of a constitutional right. *See Bosh*, 2013 OK 9, ¶ 8, 305 P.3d at 997 (citing *Ohio Casualty Insurance Co. v. Todd*, 1991 OK 54, 813 P.2d 508, for the proposition that "a court may recognize private causes of action").

15. Act of April 21, 2014, ch. 77, §§ 1-2, 2014 O.S.L. 245, 249-50 (codified at 51 O.S.Supp.2015 §§ 152-153).

16. *Id.* sec. 1, § 152(14), 2014 O.S.L. at 249 (codified at 51 O.S. Supp.2015 § 152(14)).

17. *Id.* sec. 2, § 153(B), 2014 O.S.L. at 250 (codified at 51 O.S.Supp.2015 § 153(B)).

18. *Id.* In 2015, the Legislature again amended section 153 of the GTCA to specify that tort claims arising under the Oklahoma Constitution cannot name any state employee as a defendant unless the employee is alleged to have been acting outside the scope of their employment. Act of May 12, 2015, ch. 308, sec. 1, § 153(C), 2015 O.S.L. 1134, 1135 (codified at 51 O.S.Supp.2016 § 153(C)).

19. *See Fuller v. Odom*, 1987 OK 64, ¶¶ 4-5, 741 P.2d 449, 451-52 ("The plain language of the Act expresses the Legislature's intent to abrogate any common law theories of recovery if a governmental tortfeasor may be liable. The Legislature has specifically abrogated any previously existing common law or statutory right of recovery for torts committed by a governmental entity or its employees while acting within the scope of their employment. In Oklahoma, statutes in derogation of the common law are to be liberally construed in order to promote their object. . . . The determination of legislative intent controls judicial statutory interpretation . . . ."); *cf. Lee v. Bueno*, 2016 OK 97, ¶ 51, 381 P.3d 736, 752 (discussing "the power of the Legislature to modify or abrogate the common law by statute" within the context of the interplay between 12 O.S. § 3009.1 and the Collateral Source Rule).

20. 51 O.S.Supp.2015 § 155(25).

21. It is also worth remembering that "a prisoner has a significantly greater burden to bear in establishing his right to a cause of action than does a person who is not incarcerated." *Washington v. Barry*, 2002 OK 45, ¶ 10, 55 P.3d 1036, 1039 (citing *Whitley v. Albers*, 475 U.S. 312 (1986)). Additionally, we have previously declined to create a new tort cause of action for an alleged constitutional violation where an alternative remedy existed to vindicate the alleged wrong. *See Perry*, 2014 OK 119, ¶ 19, 341 P.3d at 693. Here, 42 U.S.C. § 1983 provides citizens a private cause of action for the deprivation of their federal constitutional rights by a state actor. Since Article II, Sections 7 and 9 of the Oklahoma Constitution mirror the Fourteenth and Eighth Amendments to the United States Constitution, respectively, a violation of these Oklahoma state constitutional rights necessarily gives rise to a § 1983 claim. *See Phillips v. Wiseman*, 1993 OK 100, ¶ 9, 857 P.2d 50, 53; *Duckett v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 986 F. SupP.2d 1249, 1258 (W.D. Okla. 2013) ("It is well settled that '[a] § 1983 claim may be available, even though a state remedy is foreclosed by the Oklahoma Governmental Tort Claims Act.'" (alteration in original) (quoting *Tiemann*, 18 F.3d at 853)). Furthermore, an action against a state actor in their individual capacity seeking prospective injunctive relief could be maintained to prevent a continuing constitutional violation. *See Frew*, 540 U.S. at 436-37 (recognizing such an action for alleged violations of federal constitutional rights); *Gay Activists Alliance v. Bd. of Regents of Univ. of Okla.*, 1981 OK 162, ¶ 30, 638 P.2d 1116, 1123 ("It is important to note at this point that for the purpose of the injunction, the Board of Regents, as a body corporate, can be enjoined. *Gay Student Services v. Texas A & M University*, 612 F.2d 160 (5th Cir.), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980). The Fifth Circuit, citing *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), stated that 'prospective injunctive relief is clearly allowed against state officials in their official capacities.' 612 F.2d at 165.").

22. 2002 OK 45, ¶ 10, 55 P.3d at 1039.

23. *Id.* ¶ 18, 55 P.3d at 1041-42; *see also Bosh*, 2013 OK 9, ¶ 21, 305 P.3d at 1001 (describing *Washington* as merely recognizing a "potential" cause of action).

24. *Ziglar*, 137 S. Ct. at 1856 ("[I]n light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."). *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), is the federal precursor and analog to *Bosh*, where the United States Supreme Court recognized a money-damages claim against federal officers for violations of the Fourth Amendment. In the decade after *Bivens*, that Court recognized an implied cause of action in only two other cases involving other constitutional violations. *Davis v. Passman*, 442 U.S. 228 (1979) (holding that the Fifth Amendment Due Process Clause provides a damages remedy claim of gender discrimination); *Carlson*, 446 U.S. 14 (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause provides a damages remedy for failure to provide adequate medical treatment). Those three cases – *Bivens, Davis*, and *Carlson* – are the lone instances in which the United States Supreme Court has approved of an implied damages remedy for constitutional violations. *Ziglar*, 137 S. Ct. at 1855. In the 47 years since *Bivens*, the Supreme Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Id.* at 1857 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). More tellingly, the Supreme Court has suggested that the continuing validity of *Bivens, Davis*, and *Carlson* turns in part on the lack of congressional disapproval of the decisions. *Id.* at 1856 (noting that "no congressional enactment has disapproved of these decisions").

25. *Ziglar,* 137 S. Ct. at 1856.

26. *Id.* at 1855.

27. *Id.* at 1856.

28. *Id.*

29. *Id.* (citing 28 U.S.C. § 2679(b)(2)(A) (2012)).

30. *Id.*

31. *Id.* at 1857 (internal quotation marks omitted).

32. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

33. *Id.* (internal quotation marks omitted) (quoting *Bush*, 462 U.S. at 380).

34. 51 O.S.Supp.2015 §§ 152(14), 153(B).

EDMONDSON, J., Concurring in result.

1. *State ex rel. Department of Highways v. McKnight*, 1972 OK 3, 496 P.2d 775 (a sovereign state cannot be sued except by express legislative enactment, the right of the sovereign state to immunity from suit is a public right and must not be treated as relinquished or conveyed away by inference or construction, and statutes must clearly permit the state to be sued or the right to do so will not exist).

2. *State ex rel. Department of Highways v. McKnight*, 1972 OK 3, 496 P.2d at 782, quoting *State ex rel. Williamson, Attorney General v. Superior Court of Seminole County*, 1958 OK 52, 323 P.2d 979, 981.

3. *State ex rel. Williamson*, 323 P.2d at 981 (petition alleged a legislative act violated one, or more, of all of the following provisions of the Constitution of Oklahoma (1951) Art. 5 §§ 46, 55, 59; Art. 7 § 10; Art. 10 §§ 14, 15, 23).

4. *Civil Actions Against State Government, Its Divisions, Agencies and Officers*, 73, § 2.34 citing *State v. Norman Tobacco Co.*, 273 Ala. 420, 142 So.2d 873 (1962); *Scoa Industries, Inc. v. Howlett*, 33 Ill.App.3d 90, 337 N.E.2d 305 (1975); *Board of Commissioners of Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So.2d 19 (La 1973); *New York State Throughway Authority v. Hurd*, 29 A.D.2d 157, 286 N.Y.S.2d 426 (1968).

5. *Civil Actions Against State Government, Its Divisions, Agencies and Officers*, 73, § 2.34 citing *Magee v. Barnes*, 160 N.W.2d 815 (Iowa 1968); *O'Neill v. State Highway Dept.*, 50 N.J. 307, 235 A.2d 1 (1967); *Koynok v. Commonwealth, State Bd. of Private Academic Schools*, 12 Pa. Cmlth. 375, 316 A.2d 118 (1974); *Lister v. Board of Regents of University of Wisconsin Sys.*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976).

6. *Civil Actions Against State Government, Its Divisions, Agencies and Officers*, 73, § 2.34 citing *Armory Comm. v. Staudt*, 388 So.2d 991 (Ala. 1980) (appropriations for Commission payable from state treasury); *Rogan v. Bd. of Trustees For State Colleges*, 178 Conn. 579, 424 A.2d 274 (1979) (cost of expanded services would draw on public treasury); *Lostumbo v. Board of Education*, 36 Conn. Super. 293, 418 A.2d 949 (1980) (judgment paid from wholly nonstate funds); *Weinstein, Bronfin & Heller v. Le Blanc*, 249 La. 936, 192 So.2d 130 (1996) (wages of state senator would be drawn from state); *State ex rel. Department of Highways v. McKnight*, 1972 OK 3, 496 P.2d 775 (partial payment of judgment from local funds would not defeat immunity); *Garrettson v. Commonwealth*, 46 Pa. Cmlth. 136, 405 A.2d 1146 (1979) (monies collected by agency were paid into state treasury); *Ables v. Mooney*, 164 W.Va. 19, 264 S.E. 2d 424 (1979) (sovereign immunity bars relief sought to obtain a monetary recovery against the official based on official's acts).

7. 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989).

8. *Willborn v. City of Tulsa*, 1986 OK 84, 721 P.2d 803, 805.

9. 51 O.S.2011 §§151 - 172, inclusive, codified in 51 O.S.2011, Ch. 5.

10. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

11. 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

12. *Civil Actions Against the United States: Its Agencies, Officers and Employees* (W. Winborne ed. 1982) 399, Section 6.39 [citing 28 U.S.C. §§ 1346(b), 2671-2680) and *Carlson v. Green* 446 U.S. 14 (1980)].

13. *Civil Actions Against the United States: Its Agencies, Officers and Employees* (W. Winborne ed. 1982) 401, Section 6.41 (emphasis added).

14. *Carlson v. Green*, 446 U.S. at 19 (emphasis added).

15. 2014 OK 119, ¶ 1, 341 P.3d 689.

16. *Perry v. City of Norman*, 2014 OK 119, ¶¶ 9-11, 341 P.3d 689, 690-691.

17. 1983 OK 82, 672 P.2d 1153, 1156 (noting the "oft-expressed view of this Court that if the doctrine of governmental immunity is to be totally abrogated, such should be done by the Legislature and not by the courts of this State").

18. *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) quoting *Nevada v. Hall*, 440 U.S. 410, 414, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

19. *Smith v. State ex rel. Dept. of Transportation*, 1994 OK 61, 875 P.2d 1147, 1148-1149 (statutory tort immunity [51 O.S.Supp.1988 § 155(14)] for a claim resulting from a loss to any person covered by any workers' compensation act or any employers' liability act did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution); *Childs v. State ex rel. Oklahoma State University*, 1993 OK 18, 848 P.2d 571, 577 (State is not mandated by the U.S. Constitution to have a governmental tort liability act that creates delictual responsibility co-extensive with that of private tortfeasors).

20. *Wilson v. Gipson*, 1988 OK 35, 753 P.2d 1349, 1354 citing *Neal v. Donahue*, 1980 OK 82, 611 P.2d 1125, 1129.

21. 51 O.S.2011 § 155 (25) (and as amended) states: "The state or a political subdivision shall not be liable if a loss or claim results from: ... 25. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections...."

2018 OK 91

JON CHRISTIAN, Petitioner-Appellee, v. DAISY CHRISTIAN, Respondent-Appellant.

Case No. 115,474. December 4, 2018

CERTIORARI TO COURT OF CIVIL APPEALS, DIVISION IV,

HONORABLE DENNIS L. GAY, TRIAL JUDGE

¶0 Husband and Wife were divorced following a four-day trial. On June 30, 2016, a Decree of Dissolution of Marriage, memorializing the trial court's rulings, was filed in the proceeding. On July 15, 2016, Husband and Wife both filed motions seeking reconsideration of certain aspects of the Decree. Husband subsequently filed a response to Wife's motion, arguing it had not been filed within ten days; and therefore, was not timely under 12 O.S. 2011 § 653. Following a hearing, the trial court denied Wife's motion, concluding it had been filed out of time. On appeal, the Court of Civil Appeals, Division IV, affirmed the trial court's denial of Wife's motion to reconsider, also concluding Wife's motion was not timely filed. The Oklahoma Supreme Court granted Wife's petition for certiorari, and determined both tribunals erred by miscalculating the ten-day deadline in § 653 in light of the time computation requirements in 12 O.S. 2011 § 2006(A).

TRIAL COURT'S ORDER DENYING MOTION FOR NEW TRIAL IS REVERSED; COCA OPINION VACATED; MATTER REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

George H. Brown, Brown & Gould PLLC, Oklahoma City, OK, for Daisy Christian, Appellant

MaryGaye LeBoeuf, Oklahoma City, OK, for Jon Christian, Appellee

-and-

E.J. Buckholts II and Carl Buckholts, Ellis & Buckholts, Duncan, OK, for Jon Christian, Appellee

GURICH, V.C.J.

Facts & Procedural History

¶1 Jon Christian (Husband) and Daisy Christian (Wife) were divorced following a four-day trial in the Stephens County District Court. A Decree of Dissolution of Marriage memorializing the trial court's findings was filed on June 30, 2016. Both parties filed motions on July 15, 2016, requesting clarification and/or modification of the Decree. Husband also filed a post-judgment motion requesting an award of attorney fees and costs.

¶2 On September 29, 2016, the trial court held a hearing on the parties' respective motions. Although the trial judge sustained Husband's motion to clarify the decree by entering an order nunc pro tunc, he further determined Wife's motion was "not timely filed."[1] Separate journal entries were entered for each motion and filed of record on October 3, 2016.

¶3 Wife commenced the present appeal on October 27, 2016. The sole order attached to the petition in error was the Decree of Dissolution of Marriage. An order was issued by the Court of Civil Appeals following case assignment directing Wife to "file an amended petition in error, containing the trial court's October 3, 2016, order denying the motion for new trial, no later than November 15, 2017." Wife timely complied with COCA's directive.

¶4 On January 22, 2018, COCA issued its opinion affirming the trial court's denial of

Wife's motion for new trial. Specifically, the appellate court concluded:

> Wife filed a "Motion for New Trial/Motion to Reconsider" on July 15, 2016, more than ten, but less than thirty, days following the entry of the Decree. The trial court denied the motion in an order filed October 3, 2016, finding it without merit and untimely filed. Wife filed a Petition in Error on October 27, 2016, seeking review.
>
> ***If this Court considers Wife's motion to be one for a new trial, it is ineffective, because it was filed more than ten days after the final Decree was filed.*** . . . Therefore, we consider Wife's motion to be one to modify or vacate the Decree, pursuant to 12 O.S.2011, §§ 1031 and 1031.1. ***Further, such filing, made more than ten days following the Decree, does not operate to extend the time to appeal the Decree.***
>
> . . . .
>
> . . . ***Consequently, the June 30, 2016, Decree dividing the marital assets is beyond appellate review***.[2]

Wife filed a petition for rehearing, urging the appellate court to reconsider its finding that her appeal of the Decree had been filed out of time. Wife's petition informed COCA that it had failed to consider 12 O.S. 2011 § 2006(A) when calculating the ten-day time limit for filing a motion for new trial under 12 O.S. 2011 § 653(A). On March 28, 2018, COCA unanimously denied Wife's request for reconsideration of the opinion. Wife filed a petition requesting certiorari review, which we granted. After reviewing the record and relevant statutes, we hold the trial judge erroneously concluded Wife's motion for new trial was untimely by failing to account for the statutory time computation requirements in 12 O.S. 2011 § 2006(A).

Standard of Review

¶5 When this Court is faced with a question of statutory interpretation, we apply a de novo standard of review. Legarde-Bober v. Okla. State Univ., 2016 OK 78, ¶ 5, 378 P.3d 562, 564. When reviewing a statute, the Court's primary goal is to determine the legislative intent through the "plain and ordinary meaning" of the statutory language. In re Protest of Hare, 2017 OK 60, ¶ 10, 398 P.3d 317, 319-20. We will only employ rules of statutory construction when legislative intent cannot be ascertained (e.g., in cases of ambiguity). Odom v. Penske Truck Leasing Co, 2018 OK 23, ¶ 18, 415 P.3d 521, 528. Our test for determining if a statute contains an ambiguity is whether its language is susceptible to more than one meaning. Am. Airlines, Inc. v. State ex rel. Okla. Tax Comm'n, 2014 OK 95, ¶ 33, 341 P.3d 56, 64. Applying these principles to the present case, we find no ambiguity in the plain words of the statutes.

Analysis

¶6 The Oklahoma Legislature has vested litigants with the right to pursue relief from a final civil judgment by filing a motion within the specified period of time. Title 12 O.S. 2011 § 653 sets out the time limitations for bringing a motion seeking a new trial:

> A. Unless unavoidably prevented, an application for a new trial by motion, if made, must be filed not later than ten (10) days after the judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed. More than ten (10) days after the judgment, decree, or appealable order which conforms with Section 696.3 of this title has been filed, an application for a new trial by petition may be filed in conformance with the provisions of Section 655 of this title.
>
> B. If the moving party did not prepare the judgment, decree, or appealable order, and Section 696.2 of this title required a copy of the judgment, decree, or appealable order to be mailed to the moving party, and the court records do not reflect the mailing of a copy of the judgment, decree, or appealable order to the moving party within three (3) days, exclusive of weekends and holidays, after the filing of the judgment, decree, or appealable order, the motion for new trial may be filed no later than ten (10) days after the earliest date on which the court records show that a copy of the judgment, decree, or appealable order was mailed to the moving party.
>
> C. A motion for new trial filed after the announcement of the decision on all issues in the case but before the filing of the judgment or decree shall be deemed filed immediately after the filing of the judgment or decree.

The Decree of Dissolution reflected service on both parties the same day it was filed. Thus, under § 653(A), Wife had ten (10) days from

June 30, 2016, to file a motion seeking a new trial. Reading this provision alone would establish a deadline of July 10, 2016; however, the temporal constraints in § 653(A) must be read in harmony with 12 O.S. 2011 § 2006(A). See Rogers v. Quiktrip Corp., 2010 OK 3, ¶ 11, 230 P.3d 853, 859 (noting "different provisions must be construed together to effect a harmonious whole and give intelligent effect to each").

¶7 Section 2006(A)(1) reads as follows:

> ***In computing any period of time prescribed or allowed by this title***, by the rules of any court of this state, or by order of a court of this state, ***the day of the act, event, or default from which the designated period of time begins to run shall not be included.*** The last day of the period so computed shall be included, unless it is a legal holiday as defined by Section 82.1 of Title 25 of the Oklahoma Statutes or any other day when the office of the court clerk does not remain open for public business until the regularly scheduled closing time, in which event the period runs until the end of the next day which is not a legal holiday or a day when the office of the court clerk does not remain open for public business until the regularly scheduled closing time. Except for the times provided in Sections 765, 990.3, 1148.4, 1148.5, 1148.5A, and 1756 of this title, ***when the period of time prescribed or allowed is less than eleven (11) days, intermediate legal holidays and any other day when the office of the court clerk does not remain open for public business until the regularly scheduled closing time, shall be excluded from the computation.*** (emphasis added).

Because the time limit prescribed by § 653(A) is only ten days, weekends, legal holidays, and days when the court clerk is either closed or closes early, are required to be omitted when computing the statutory deadline for filing a motion for new trial.

¶8 The Christian Decree was filed on Friday, June 30, 2016. Under § 2006(A) the date of filing is excluded when establishing Wife's deadline. In addition, a total of five (5) days must be excluded from the computation – July 2-3, 2016 (Saturday and Sunday), the Fourth of July holiday, and July 9-10, 2016 (Saturday and Sunday). When these days are omitted from the calculation, Wife's deadline for filing a motion for new trial under § 653(A) was Friday July 15, 2016, the date Wife filed her motion. Applying this principle to the present case, there is no other conclusion to reach but to find the motion for new trial was timely filed. The trial judge should have afforded Wife a full and fair opportunity to present the issues raised in her motion and its attachments.

Conclusion

¶9 Because the trial court concluded Wife's motion was untimely, we reverse the order denying her motion for new trial and vacate the opinion of COCA. The matter is remanded to the trial court to proceed in a manner consistent with this opinion.

TRIAL COURT'S ORDER DENYING MOTION FOR NEW TRIAL IS REVERSED; COCA OPINION VACATED; MATTER REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

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

¶11 Reif, J., not participating.

GURICH, V.C.J.

1. Order Denying Motion for New Trial, Orig. Rec., at 1159. The trial court also summarily ruled Wife's motion lacked merit, without affording a full and fair opportunity to address the issues raised in the motion and its attachments.
2. Opinion, at 2-4 (COCA Div. IV, Jan. 22, 2018).

2018 OK 92

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION Complainant, v. STEVEN PAUL MINKS Respondent.

SCBD #6644. December 3, 2018

ORDER OF DISBARMENT

¶1 On March 29, 2018, the Oklahoma Bar Association (Bar Association), filed a complaint in this Court in OBAD #2178 against the respondent, Steven Paul Minks alleging multiple counts of criminal convictions, and misconduct. The respondent has never answered complaint, nor has he participated in the disciplinary proceeding, nor filed anything in this Court. The disciplinary proceedings, and all the misconduct concern the respondent's mishandling client's cases and funds, his failure to communicate with clients and to the Bar Association, and failure to appear on behalf of clients in trial court proceedings.

¶2 The respondent was previously suspended from the Oklahoma Bar Association in an order of immediate interim suspension on May 7, 2018. A disciplinary hearing was held on July 25, 2018. Because the respondent has not participated, the Bar Association seeks to have the allegations against him be deemed admitted pursuant to Rule 6.4 of Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A. The respondent's disciplinary proceedings demonstrate that disbarment is warranted. State *ex rel.* Okla. Bar Ass'n v. Rowe, 2012 OK 88, 288 P.3d 535; State *ex rel.* Okla. Bar Ass'n v. Passmore, 2011 OK 90, 264 P.3d 1238; and State *ex rel.* Okla. Bar Ass'n v. McCoy, 1996 OK 27, 912 P.2d 856.

¶3 THE COURT FINDS:

1. The respondent was previously suspended from the Oklahoma Bar Association in an immediate interim suspension which remains effective, but is immediately lifted in lieu of disbarment.
2. The respondent has not responded to the complaint filed against him or participated in any stage of these proceedings.
3. A disciplinary hearing was held on July 25, 2018. Because the respondent has not participated, the Bar Association seeks to have the allegations against him be deemed admitted pursuant to Rule 6.4 of Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A. Pursuant to Rule 6.4, they are deemed admitted.
4. The Bar Association has proven by clear and convincing evidence that the respondent has violated Rules 1.1, 1.3, 1.4, 1.5, and 1.15 of the Oklahoma Rules of Professional Conduct, 5 O.S. 2011 Ch. 1, App. 3-A, and Rule 1.3 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A.
5. The respondent's disciplinary proceedings demonstrate that disbarment is warranted. State *ex rel.* Okla. Bar Ass'n v. Rowe, 2012 OK 88, 288 P.3d 535; State *ex rel.* Okla. Bar Ass'n v. Passmore, 2011 OK 90, 264 P.3d 1238; and State *ex rel.* Okla. Bar Ass'n v. McCoy, 1996 OK 27, 912 P.2d 856.
6. The official roster addresses of the respondent as shown by the Oklahoma Bar Association are: 404 Dewey Avenue, Poteau, OK 74953 and 1400 West George Street, Pocola, OK 74902.
7. The respondent did not reply to the order issued by the Court on October 15, 2018, allowing respondent extra time to file an answer brief and/or answer the complaint.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Steven Paul Minks, is disbarred from the Oklahoma Bar Association and is no longer licensed to practice law in Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Steven Paul Minks, name be stricken from the roll of attorneys. The respondent may not make an application for reinstatement prior to the expiration of 5 years from the date of this order and must show that he has reimbursed the $1500.00 and the $2500.00 in unearned fees owed to clients. Pursuant to Rule 9.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, the respondent shall notify all of his clients, if any, having legal business pending with him within 20 days, by certified mail, of his inability to represent them and of the necessity for promptly retaining new counsel. The Bar Association is awarded costs of $2,868.82 in this proceeding which are due within 10 days of the filing of this order.

DONE BY ORDER OF THE SUPREME COURT THIS 3rd DAY OF DECEMBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2018 OK 93

IN THE MATTER OF C.M., E.M., and R.M., Children Under 18 Years of Age, NORMA MARTINEZ-MENDOZA, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. 116,494. December 4, 2018

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

HONORABLE RODNEY SPARKMAN, SPECIAL JUDGE

¶0 Norma Martinez-Mendoza (Mother) appeals the judgment of the Tulsa County District Court terminating her parental

rights to C.M., E.M., and R.M. (Children). We find the district court did not err in judgment.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

Isaiah Parsons, Charles Graham, and Matthew D. Day, PARSONS, GRAHAM & DAY, LLC, Tulsa, OK, for Appellant.

Kyle Felty, Assistant District Attorney, Tulsa County District Attorney's Office, Tulsa, OK, for Appellee.

OPINION

DARBY, J.:

¶1 The questions presented to this Court are whether 1) the Oklahoma Department of Human Services (DHS) provided reasonable efforts to reunite Mother with Children; 2) the State presented clear and convincing evidence to support the termination of parental rights; and 3) Mother's trial counsel provided effective assistance. We answer all questions in the affirmative.

I. BACKGROUND AND PROCEDURAL HISTORY

¶2 On August 27, 2013, DHS removed R.M, C.M., and E.M., then eight (8) years and six (6) months, six (6) years and ten (10) months, and four (4) years and ten (10) months old respectively, from Mother's custody. On September 5, 2013, the State filed a petition in Tulsa County District Court alleging that on August 25, 2013, at approximately 2 a.m., Mother and Children were at the home of some acquaintances who consumed illegal substances in their presence. At the scene, Mother and R.M. began to argue and someone called the police. Mother, who was highly intoxicated, was arrested on a complaint of child abuse for choking R.M. The State alleged in their petition that Mother's actions constituted **"neglect, physical abuse, substance abuse by caretaker[,] and failure to provide a safe and stable home."** The State requested that the district court adjudicate Children deprived based on the above alleged facts.

¶3 On January 21, 2014, Mother entered a non-jury trial stipulation to the allegations of the petition. That day, the Tulsa County District Court accepted Mother's stipulation and adjudicated Children deprived. The district court stated that the conditions to be corrected by Mother were neglect, physical abuse, exposure to substance abuse, and failure to provide a safe and stable home. On February 24, 2014, the district court imposed an individualized service plan (ISP), requiring Mother to correct the above-stated conditions.

¶4 On February 2, 2015, the State filed a motion to terminate Mother's parental rights to Children under Title 10A, Sections 1-4-904 (B)(5) and (7), alleging Mother had failed to correct the conditions that led to Children being adjudicated deprived and had not contributed to the support of Children. Also on February 2, the district court found that DHS had made reasonable efforts to reunite Mother and Children, and that those efforts had failed; therefore, the court changed the permanency plan to one for adoption. On November 9, 2015, the State filed an amended motion to terminate, again stating grounds for termination under Sections 1-4-904(B)(5) and (7) and adding grounds for termination under Section 1-4-904(B)(15), that Children had been in foster care for fifteen (15) of the most recent twenty-two (22) months. 10A O.S.Supp. 2013, § 1-4-904(B)(15).

¶5 The week of November 15, 2016, the Tulsa County District Court held a jury trial on the amended motion to terminate. At trial, the State presented evidence that Children were insistent they did not wish to participate in therapeutic visitation with Mother. Children continued to express significant fear of Mother as well as concern that any changes made by Mother were insincere and superficial. The State also presented evidence that Children consistently made statements regarding prior abuse by Mother.

¶6 Children's therapist testified that Children responded to suggestions of visitation with Mother by expressing significant levels of fear in various ways such as by hiding under and behind furniture when her name was brought up, refusing to acknowledge the therapist any time she mentioned Mother, and one child banging his head on the furniture. Children's therapist testified that she read portions of a letter from Mother to Children, delivered gifts and homemade food, showed them a video Mother made, and gave them all copies of a photo of Mother and their family pet. One of the children confirmed the photo was his to do with as he wished before he crumpled it up and threw it away, while another requested a frame for the photo and then cut out Mother's image retaining only the animal's image. Only

one child, R.M., ever consented to visitation, but immediately changed his mind – expressing a fear of death if exposed to Mother, even with others present. R.M. told the therapist that he requested to be baptized out of fear for his immortal soul on the chance he was required by the court to visit with Mother.

¶7 Children's therapist clarified that her job was not to facilitate therapeutic visitation, but rather to help Children process trauma and engage in healthy behavior. Mother's therapist explained the importance for Children to connect with Mother so they could receive new information about the changes Mother had made. Mother's therapist testified that Mother had requested phone calls between Mother and Children, but stated that the calls were not allowed due to the foster mother's inability to speak Spanish. She also testified that Mother was not allowed photographs or information about the Children through this process. As for DHS, the caseworker testified that due to Children's *extreme fear and anxiety* towards Mother, visitation was never safe in this case. Therefore, DHS did not provide opportunities for Mother and Children to connect and remain familiar with each other.

¶8 On November 18, 2016, the jury unanimously voted to terminate Mother's parental rights to Children under Section 1-4-904(B)(15) only. The district court sustained the jury's verdict and entered a formal order terminating Mother's parental rights on September 21, 2017. Mother appealed with three propositions of error: 1) DHS failed to provide reasonable efforts to reunite Mother and Children; 2) the district court committed reversible error in sustaining the State's motion to terminate as the ruling was not supported by clear and convincing evidence; and 3) ineffective assistance of counsel. We address the issues in the order of occurrence.

II. ANALYSIS

A. Reasonable Efforts to Reunite

¶9 Mother first argues that DHS failed to provide reasonable efforts to reunite her and Children. She asserts that there was no legitimate opportunity for reunification because of the lack of visitation. Mother acknowledged that DHS provided counseling for her and Children as well as other services for her to complete her ISP; however, she felt that DHS should have done more to facilitate visitation.

¶10 While the record shows that Mother regularly requested visitation throughout the case, Mother's argument fails in light of the rest of the record. Mother and Children all attended extensive counseling. Throughout therapy, Children were insistent that they did not wish to participate in therapeutic visitation with Mother. Children's therapist made numerous efforts to help Children process their trauma, yet none of them were ever willing to see Mother again due to their fear and mistrust.

¶11 Where the agent who is entrusted with the duty to help salvage the family relationship contributes to the fact situation warranting the termination of parental rights, the court must stop short of severing the parent-child relationship. *In re Christopher H.*, 1978 OK 50, ¶ 18, 577 P.2d 1292, 1295 (where social worker misled the parent). In the case at issue, however, no evidence was presented that DHS contributed to the circumstances which justified keeping Mother and Children apart. Instead, DHS set in motion the steps for Mother to complete her ISP within a reasonable time and assigned a caseworker fluent in Mother's native language. DHS also provided extensive therapy to Children.

¶12 Mother does not identify *any* services that DHS failed to offer her other than visitation. The Oklahoma Children's Code provides that:

> If the court determines that reunification services are appropriate for the child and a parent, the court shall allow reasonable visitation with the parent or legal guardian from whose custody the child was removed, *unless visitation is not in the best interest of the child, taking into consideration:*
>
> (1) protection of the physical safety of the child,
>
> (2) protection of the life of the child,
>
> (3) *protection of the child from being traumatized by contact with the parent,* and
>
> (4) *the child's expressed wishes.*

10A O.S.2011, §1-4-707(A)(6)(a) (emphasis added). The State provided extensive evidence that visitation would likely traumatize Children and that Children continued to regularly express their desire to not have any contact with Mother.

¶13 In *In the Matter of B.T.W.*, the mother asserted that there was no opportunity for

reunification due to the foster placement and inadequate visitation. *In re B.T.W.*, 2010 OK 69, ¶22, 241 P.3d 199, 211. Throughout the case the mother was allowed some visitation, however, DHS suspended all visitation after B.T.W. became physically sick after a visitation, after which the mother was eventually allowed visitation once per week. *Id.* ¶¶ 7-8, 241 P.3d at 203-204. The Court noted that the child had initially expressed loving and missing her mother, but over time began to express fearing her. *Id.* ¶ 17, 241 P.3d at 207. B.T.W. eventually expressed desire that visitations with her mother stop and that she remain with the foster mother. *Id.* ¶ 18, 241 P.3d at 208.

¶14 B.T.W. complained that her mother yelled at her, used foul language, and interfered with her participation in church activities. *Id.* ¶ 5 n.7, 241 P.3d at 202 n.7. B.T.W. later alleged that her mother twice threatened to choke or strangle her. *Id.* ¶ 7 nn.14, 16, 241 P.3d at 203 nn.14, 16. The district court, however, opined that the events "did not appear to be much more than words of frustration or anger," and was not concerned that the mother would be physically violent with B.T.W. *Id.* ¶ 7 n.16, 241 P.3d at 203 n.16.

¶15 Two counselors testified that they believed the child's fears of her mother and being returned to her mother's care were genuine. *Id.* ¶ 20, 241 P.3d at 209. B.T.W.'s therapist recommended ceasing efforts towards reunification and terminating visitation instead. *Id.* ¶¶ 8, 20, 241 P.3d at 204, 209. The Court noted that DHS provided foster care, monthly visits of the foster home, arranging and supervising visitation, talking with providers, facilitating transportation for B.T.W.'s visits with her mother, and that the mother and B.T.W. attended court-ordered counseling. *Id.* ¶22, 241 P.3d at 211. Therefore, we determined the trial court did not err in finding the state made reasonable efforts towards reunification. *Id.*

¶16 In the present case, unlike *In the Matter of B.T.W.,* from the time Children were taken into custody, they expressed fear of Mother and desire to not participate in visitation. The State presented evidence that unlike *B.T.W.*, Children made undeviating disclosures of abuse by Mother which she categorically denied. R.M. described Mother hitting him and his siblings with a belt on their shoulders and legs and slapping them in the face with her hand. R.M. described these incidents as leaving red marks and bruises on various parts of his body. The State also presented evidence of consistent descriptions by the two older children of the incident which had them removed from Mother – where Mother strangled R.M., while C.M. tried to pull Mother off of R.M. and yelled for help.

¶17 Children all underwent counseling for two years. Children all expressed fear of seeing Mother again, with a firm basis in their past experiences of abuse from Mother. Like *B.T.W.,* Children's therapist testified that Children would likely be further traumatized by any further contact with Mother.

¶18 Mother alleges that DHS could have allowed phone visitation via an interpreter. Lack of phone calls, however, does not necessarily show a lack of reasonable efforts by DHS, especially in light of the genuine fear expressed by Children here. Further, Title 10A, Section 1-4-707(C)(2) mandates that when reasonable efforts to reunite are required, the time for reunification services may not exceed seventeen (17) months from the date that the child was initially removed from home without compelling reason to the contrary. 10A O.S.2011, § 1-4-707(C)(2). Children had been initially removed from their home seventeen (17) months before the district court found reasonable efforts had failed and changed the permanency plan to adoption. There were no compelling reasons at that time to extend the period for reunification services. We find the district court did not abuse its discretion when it found that DHS made reasonable efforts toward reunification. *See In re B.T.W.*, 2010 OK 69, ¶22, 241 P.3d at 211.

B. Clear and Convincing Evidence

¶19 In parental termination cases, the State bears the burden to show by clear and convincing evidence that the child's best interest is served by the termination of parental rights and that Section 1-4-904 requirements have been met. *In re J.L.O.*, 2018 OK 77, ¶ 29, 428 P.3d 881, 890; *In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082. Clear and convincing evidence is the degree of proof which produces a firm belief or conviction as to the truth of the allegation in the mind of the trier of fact. *In re J.L.O.*, 2018 OK 77, ¶ 29, 428 P.3d at 890. Appellate review of a termination of parental rights must show that the record contains clear and convincing evidence to support the district court's decision. *Id.* Therefore, we review *de novo. See id.*; *In re S.B.C.*, 2002 OK 83, ¶ 7, 64 P.3d at 1083.

¶20 The district court terminated Mother's parental rights under Title 10A, Section 1-4-904(B)(15). At that time, the section provided:

> (B) The court may terminate the rights of a parent to a child based upon the following legal grounds:
>
> . . . .
>
> 15. A finding that a child has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition for termination of parental rights. For purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of:
>
> a. the adjudication date, or
>
> b. the date that is sixty (60) days after the date on which the child is removed from the home.

10A O.S.Supp. 2013, § 1-4-904(B)(15). Children were removed from Mother's home on August 27, 2013, and were adjudicated deprived on January 21, 2014. Therefore, Children "entered foster care" sixty (60) days after removal from the home, on October 26, 2013. Children had been in foster care for fifteen (15) of the past twenty-two (22) months when the original Motion to Terminate parental rights was filed. By the time the Second Amended Motion to Terminate was filed, Children had been in foster care for twenty-four (24) months straight. At the time of trial, Children had been in foster care for three (3) years.

¶21 Mother argues that the State failed to prove by clear and convincing evidence that termination of her parental rights was in the best interest of Children. She asserts that the State failed to show that she was responsible for Children being in foster care for the full length of time, as the State did not allow her visitation with the Children in order to eventually be reunited. As previously addressed, we find Mother's argument regarding visitation unpersuasive.

¶22 Our primary goal in reviewing a statute is to ascertain the legislative intent. *Glasco v. State ex rel. Okla. Dep't of Corr.*, 2008 OK 65, ¶ 16, 188 P.3d 177, 184. Where the plain language of the statute does not make known the legislative intent, this Court employs rules of statutory interpretation. *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 18, 415 P.3d 521, 528. We will determine legislative intent by reviewing the whole act in light of its general purpose and objective, considering relevant provisions together in order to give full force and effect to each. *Id.* Therefore, we must read the relevant portions of Title 10A, Sections 1-4-904,[1] 1-1-102,[2] and 1-4-902[3] together in order to deduce the applicable legislative intent.

¶23 Where reasonable efforts to return deprived children to the parents prove fruitless and result in prolonged foster care placement, the Legislature clearly views such extended State custody without possibility of reunification to be so detrimental to the children's best interest as to justify termination of parental rights. *See In re M.J. & J.J.*, 2000 OK CIV APP 75, ¶ 10, 8 P.3d 936, 939. The jury heard extensive testimony regarding the State's efforts towards reunification which enabled them to make an informed determination on whether termination was in the best interest of Children. The State presented evidence that Mother made significant efforts toward correcting the conditions on her ISP, but that she now denied the allegations of abuse to which she had originally stipulated. Compliance with the ISP alone is not sufficient to regain custody. *In re B.C.*, 2010 OK CIV APP 103, ¶ 9, 242 P.3d 589, 592.

¶24 The State presented evidence that Mother sent pictures, letters, a video, presents, and homemade food for Children with essentially no impact on Children's expressed wishes not to see Mother. Further evidence showed that Children remained adamant in their refusal to see – or for the youngest to even discuss – Mother due to Children's continued fear of Mother, stemming from her behavior prior to removal. The State's evidence was clear that Children made consistent, continuing disclosures of other abuse by Mother and had strong feelings regarding Mother's continued denial of her harmful actions and the events that led to their removal.

¶25 We find that the State presented clear and convincing evidence to prove the grounds for termination. Based on that evidence, the jury found termination to be in Children's best interest and recommended the termination of Mother's parental rights. Therefore, we find the district court did not err by terminating Mother's parental rights to Children.

C. Effective Assistance of Counsel

¶26 Lastly, Mother claims ineffective assistance of trial counsel. We perform a *de novo*

review on procedural due process claims from a termination of parental rights. *In re J.L.O.*, 2018 OK 77, ¶ 35, 428 P.3d at 891; *In re A.M. & R.W.*, 2000 OK 82, ¶ 6, 13 P.3d 484, 487. Parents and children have the right to effective assistance of counsel in proceedings terminating parental rights. 10A O.S.2011, § 1-4-306(A); *In re J.L.O.*, 2018 OK 77, ¶ 35, 428 P.3d at 891; *In re T.M.H.,* 1980 OK 92, ¶ 7, 613 P.2d 468, 471; *In re D.D.F. & S.D.F.*, 1990 OK 89, ¶ 15, 801 P.2d 703, 707. We review claims for ineffective assistance of counsel in termination proceedings under the same standard used in criminal trials. *In re J.L.O.*, 2018 OK 77, ¶ 35, 428 P.3d at 891.

¶27 To warrant reversal, the claimant must show that 1) the attorney's performance was deficient, and 2) there is a reasonable probability that, but for the deficient performance, the result would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 694, 104 S.Ct. 2052 (1984). The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688; *In re J.L.O.*, 2018 OK 77, ¶ 36, 428 P.3d at 891. Judicial scrutiny of trial counsel's performance is highly deferential; every effort must be made to avoid hindsight, and the Court must indulge a strong presumption that counsel's conduct falls within the range of reasonable assistance. *Strickland*, 466 U.S. at 689; *In re J.L.O.,* 2018 OK 77, ¶ 36, 428 P.3d at 891. The claimant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689; *In re J.L.O.*, 2018 OK 77, ¶ 36, 428 P.3d at 891. If the claimant shows that counsel erred unreasonably, the claimant must next show that there is a reasonable probability that the result of the proceeding would have been different without the error. *Strickland*, 466 U.S. at 694.

¶28 Mother claims she received deficient assistance, citing a lack of objections by trial counsel. Mother claims that trial counsel failed to object to inadmissable hearsay regarding statements made by Children to others, irrelevant information in the form of allegations of abuse that occurred prior to adjudication, and improper opinions and speculations by R.M. that his siblings would not be safe with Mother.

¶29 It has been recognized that if a party's counsel takes no action, the result is a constructive denial of effective assistance of counsel. *In re N.L.*, 2015 OK CIV APP 24, ¶ 19, 347 P.3d 301, 304 (citing *Young v. State,* 1994 OK CR 84, ¶ 9, 902 P.2d 1089, 1090-91). Mother argues that "[w]hat is said of inactive counsel is similarly true of low-action counsel, especially where substantial prejudice ensues as in the present case." Mother's claim that her trial counsel was low-action, however, improperly characterizes her counsel's performance. The record shows counsel was extremely active in her efforts, thoroughly questioning all of the State's witnesses and objecting on Mother's behalf.

¶30 For her allegation of lack of objections to hearsay statements, especially concerning statements Children made to others, Mother cites generally to the trial transcript. This general citation to the *entire 807 page transcript* cannot meet the requirement that the claimant affirmatively prove prejudice. *See Strickland*, 466 U.S. at 693. *Strickland* recognized that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* Without more specific ineffectiveness claims, we cannot find counsel erred, let alone that the result of the proceeding would have likely been different.

¶31 Mother's claim that trial counsel failed to object to the admission of irrelevant evidence is without merit. Mother also makes this claim with a citation to the entire trial transcript, but specifically points to the admission of allegations of abuse which occurred prior to adjudication. This information was clearly relevant to the jury's determination of Children's best interest because it demonstrated the reasons for Children's fear and anxiety – thus why no visitation occurred. *In re B.T.W.*, 2010 OK 69, ¶¶ 18, 20, 241 P.3d at 207, 209.

¶32 Finally, for her claim of lack of objections to improper opinions and speculations of witnesses, Mother cites generally to the trial transcript and gives one specific citation to R.M.'s testimony. We find R.M.'s referenced testimony[4] was proper under Title 12, Section 2701[5] as it was rationally based on his perception, helpful to determination of the best interests of Children, and not based on any scientific, technical, or other specialized knowledge.

¶33 Even assuming this testimony was inadmissable, the choice to not object excessively, or to not object to testimony by a vulnerable child, "might be considered sound trial strategy." Mother also fails to articulate a reasonable probability that, but for this testimony from R.M., the result of the termination proceedings would have been different. There was significant evidence in the record to show that R.M.

and the other children all were afraid of Mother, due to her prior actions, such that they refused to ever consent to visitation in the three years before trial.

¶34 Mother fails to show how trial counsel's actions were not reasonable or that trial counsel's performance prejudiced her, such that but for the alleged errors the result would have been different. *Strickland*, 466 U.S. at 694. Counsel's strategic choices were within the range of professionally reasonable judgment. Mother's failure to show deficient performance and sufficient prejudice defeats her ineffectiveness claim. *Id.* at 700.

III. CONCLUSION

¶35 We find DHS made reasonable efforts to reunite Mother and Children. Children, however, were adamant in their desire not to participate in visitation with Mother. While Mother made efforts to correct conditions, despite her prior stipulation, afterwards she would *not* admit the abuse for which Children were removed. That Children would somehow be relieved of their extreme fear of Mother when Mother would not admit the abuse she inflicted defies understanding. The evidence was clear and convincing that it was in Children's best interest to terminate Mother's parental rights. Finally, trial counsel for Mother was effective. We find the district court did not err in its judgment granting the State's Motion to Terminate Parental Rights and hereby affirm. We remand to the district court for permanency proceedings.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

Concur: Combs, C.J., Kauger, Winchester, Edmondson, Colbert, Reif, Wyrick, and Darby, JJ.

Concur in Result: Gurich, V.C.J.

DARBY, J.:

1. A. A court shall not terminate the rights of a parent to a child *unless*:
1. The child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and
2. Termination of parental rights is in the best interests of the child.
B. The court *may terminate the rights of a parent to a child based* upon the following legal grounds:
. . . .
5. A finding that:
a. the parent has failed to correct the condition which led to the deprived adjudication of the child, and
b. the parent has been given at least three (3) months to correct the condition;
. . . .
7. A finding that a parent who does not have custody of the child has, for at least six (6) out of the twelve (12) months immediately preceding the filing of the petition for termination of parental rights, willfully failed or refused or has neglected to contribute to the support of the child:
. . . .
15. A *finding that a child has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition for termination of parental rights*.

10A O.S.Supp. 2013, § 1-4-904 (emphasis added).

2. 2. A child has a right to be raised by the mother and father of the child as well as a right to be raised free from physical and emotional abuse or neglect. *When it is necessary to remove a child from a parent, the child is entitled to a permanent home* and to be placed in the least restrictive environment to meet the needs of the child; and
. . . .
B. It is the intent of the Legislature that the Oklahoma Children's Code provide the foundation and process for state intervention into the parent-child relationship whenever the circumstances of a family threaten the safety of a child and to properly balance the interests of the parties stated herein. To this end, it is the purpose of the laws relating to children alleged or found to be deprived to:
. . . .
3. Preserve, unify, and strengthen the family ties of the child whenever possible when in the best interests of the child to do so;
4. Recognize that the right to family integrity, preservation or reunification is limited by the right of the child to be protected from abuse and neglect;
5. Make reasonable efforts to prevent or eliminate the need for the removal of a child from the home and make reasonable efforts to return the child to the home unless otherwise prescribed by the Oklahoma Children's Code;
6. Recognize that *permanency is in the best interests of the child;*
7. Ensure that *when family rehabilitation and reunification are not possible, the child will be placed in an adoptive home or other permanent living arrangement in a timely fashion*; and
8. *Secure for each child the permanency, care, education, and guidance as will best serve the spiritual, emotional, mental and physical health, safety, and welfare of the child*.

10A O.S.2011, § 1-1-102(A), (B) (emphasis added).

3. A. The district attorney *shall file a petition or motion for termination* of the parent-child relationship and parental rights with respect to a child or shall join in the petition or motion, if filed by the child's attorney, in any of the following circumstances:
1. Prior to the end of the fifteenth month when a child has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months.

10A O.S.2011, § 1-4-902(A)(1) (emphasis added).

4. [State]: Do you feel like that if you were to go back to your mom that you would be safe?
[R.M.]: No.
[State]: Do you feel like if your siblings were to go back to your mother that they would be safe?
[R.M.]: No.
[State]: Why not?
[R.M.]: Because I don't really trust her.

Trial Tr. 408:6-13, *In re C.M., E.M. & R.M.*, No. JD-2013-0342 (Tulsa Cty. Dist. Ct. Nov. 17, 2016).

5. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is *limited to* those opinions or inferences which are:
1. Rationally based on the perception of the witness;
2. Helpful to a clear understanding of his testimony or the determination of a fact in issue; and
3. Not based on scientific, technical or other specialized knowledge within the scope of Section 2702 of this title.

12 O.S.2011, § 2701 (emphasis added).

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.

2018 OK CR 36

G.W., Appellant, v. THE STATE OF OKLAHOMA, Appellee.

No. J-2018-511. November 29, 2018

SUMMARY OPINION

ROWLAND, JUDGE:

¶1 Appellant G.W. appeals to this Court from an order entered by the Honorable Stephen R. Pazzo, Associate District Judge, adjudicating him delinquent in Case No. JDL-2017-44 in the District Court of Rogers County.

¶2 On May 8, 2017, G.W. was charged by juvenile delinquency petition with one count of Sexual Battery. The crime was alleged to have occurred on or about April 11, 2017, when G.W. was 14 years and 10 months old. On March 9, 2018, a bench trial on the juvenile delinquency petition was held before Judge Pazzo. After considering the evidence and arguments, Judge Pazzo found G.W. had committed the offense of Sexual Battery and adjudicated him delinquent. G.W. appeals this adjudication as-serting four propositions of error:

(1) whether the record is insufficient to demonstrate that G.W. knowingly and intelligently waived his right to jury trial;

(2) whether error occurred when no election was made with regard to the specific act relied upon as the basis for the offense charged in the petition and the trial court failed to require the same prior to issuing its ruling, resulting in a general verdict;

(3) whether the evidence presented by the State was insufficient to prove that G.W. intentionally acted in a lewd and lascivious manner; and

(4) whether trial counsel was constitutionally ineffective.

¶3 Pursuant to Rule 11.2(A)(3), *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 were presented to this Court in oral argument on August 16, 2018, pursuant to Rule 11.2(E). After hearing oral argument and considering the briefs and record in this case, this Court found that the order of the District Court adjudicating G.W. delinquent should be **REVERSED** and **REMANDED** for further proceedings.[1]

ANALYSIS

¶4 In his first proposition G.W. claims that the appeal record is insufficient to demonstrate that he knowingly and intelligently waived his right to a trial by jury in the juvenile delinquency proceeding. In Oklahoma the right to a jury trial in a juvenile delinquency proceeding is granted by statute. Title 10A O.S.2011, § 2-2-401 provides that:

> In adjudicatory hearings to determine if a child is delinquent or in need of supervision, any person entitled to service of summons or the state shall have the right to demand a trial by jury, which shall be granted as in other cases, unless waived ….

To be sure, Section 2-2-401 presents something of a conundrum: a juvenile only has a right to jury trial in a juvenile delinquency proceeding if he demands it, unless he waives it. And to make matters worse, a literal reading of the statute could yield a situation where a defendant fails to demand, and fails to waive, leaving him or her in a sort of legal limbo.

¶5 In *D.M.H. v. State*, 2006 OK CR 22, ¶ 3, 136 P.3d 1054, 1055, this Court considered whether a juvenile's failure to demand a jury trial in a delinquency proceeding constitutes a valid waiver of that right or whether, as in adult cases, the record must reflect a knowing and intelligent waiver of the right to a jury trial. Because the right to a jury trial in a juvenile delinquency proceeding is conferred by statute and not required by either the United States Constitution or by the Oklahoma Constitution, the Court in *D.M.H.* found that a juvenile has no substantive due process right to a jury trial in this proceeding. *D.M.H.*, 2006 OK CR 22, ¶ 6, 136 P.3d at 1056 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647 (1971) (plurality) (while the states may grant juveniles the right to jury trial, such

is not constitutionally required under the federal constitution)). Rather, the Court held, the focus of a claim regarding the denial of the statutory right to jury trial is on whether the State complied with the requirements of procedural due process. *Id.* 2006 OK CR 22, ¶ 8, 136 P.3d at 1056 ("a state law may create a liberty interest that cannot be denied without offending due process principles"). Thus, the Court reasoned that although the statute requires the juvenile demand a jury trial before one will be granted, procedural due process requires that "[b]efore a right may be demanded . . . the person upon whom the right is conferred must know that he has such a right to demand." *Id.* 2006 OK CR 22, ¶ 9, 136 P.3d at 1056.

¶6 The *D.M.H.* Court went on, however, to find that a valid waiver of the right to a jury trial in a juvenile delinquency proceeding may not be presumed from the juvenile's silence even after the juvenile has been advised of his or her right to a jury trial. The Court noted that if D.M.H. had been charged as an adult, "the lack of an affirmative waiver of his right to a jury trial would constitute reversible error." *Id.* 2006 OK CR 22, ¶ 10, 136 P.3d at 1057. The Court held:

> It is incumbent upon the juvenile court judge to make a record of a waiver of a juvenile's right to trial by jury. The juvenile court judge shall not accept a waiver unless the juvenile, after being advised by the court of his right to a trial by jury and consulting with counsel, personally waives his right to trial by jury in open court on the record. For a waiver to be valid, there must be a clear showing that the juvenile waived his right competently, knowingly and intelligently.

Id. 2006 OK CR 22, ¶ 11, 136 P.3d at 1057. The problem with this reasoning is that it places the statutory right to demand a jury trial in a juvenile delinquency proceeding on par with an adult's constitutional right to jury trial, requiring the same showing of waiver and thereby elevating the statutory right to a constitutional right. *See Id.* 2006 OK CR 22, ¶ 10, 136 P.3d at 1057.

¶7 We take this opportunity to revisit the minimum requirements for a valid waiver of this statutory right to demand a jury trial. "What suffices for waiver depends on the nature of the right at issue." *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 664, 145 L.Ed.2d 560 (2000). It is well settled that, "[a] record showing an intelligent, competent and knowing waiver of a fundamental right is mandatory. Anything less is not a waiver." *Hinsley v. State,* 2012 OK CR 11, ¶ 5, 280 P.3d 354, 355, (quoting *Valega v. State*, 1988 OK CR 101, ¶ 5, 755 P.2d 118, 119). While under the best circumstances, a waiver of a statutory right would also be knowing and voluntary as evinced by the record, such is not required. *See United States v. Gomez,* 67 F.3d 1515, 1520 (10th Cir. 1995) ("while the mere failure to timely assert a constitutional right does not constitute a waiver of that right, . . . a waiver of a statutory right may be valid even if it is not knowingly made") (internal citations omitted).

¶8 The rules of statutory construction are well settled. Statutes are to be construed to determine the intent of the Legislature, "reconciling provisions, rendering them consistent and giving intelligent effect to each." *Lozoya v. State*, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28. This Court avoids statutory constructions that render any part of a statute superfluous or useless. *Wells v. State*, 2016 OK CR 28, ¶ 6, 387 P.3d 966, 968.

¶9 The right at stake in this case is a statutory right created by the Legislature to benefit the juvenile. It is clear that the Legislature assumed knowledge of the statutory right by the juvenile; otherwise, it could neither be demanded nor waived. Thus, as in *D.M.H.*, we interpret the statutory language to require that the juvenile be advised on the record that he or she has a right to demand a jury trial. Any waiver of this right, however, need not be made affirmatively on the record because neither the statute nor constitutional procedural due process principles require it.

¶10 Deciding this case based on statutory interpretation is consistent with clear legislative intent, avoids unnecessarily deciding a constitutional issue, and comports with an oft-cited maxim for judicial restraint: "If it is not necessary to decide more, it is necessary not to decide more." *United States v. Hebert*, 888 F.3d 470, 476 (10th Cir. 2018)(citation omitted). We hold, therefore, that by the language of Section 2-2-401, the juvenile's failure to demand a jury trial after being advised of his or her right to one and his or her acquiescence to a bench trial operates as an adequate and valid waiver of this right. *D.M.H. v. State*, 2006 OK CR 22, 136 P.3d 1054 is overruled to the extent it is inconsistent with this opinion.

¶11 The appeal record contains no evidence that G.W. was advised of his right to a jury trial at the juvenile delinquency proceeding. Absent this showing on the record, we find that relief is required.

DECISION

¶12 The order of the District Court of Rogers County adjudicating G.W. delinquent in Case No. JDL-2017-44 should be, and is hereby, **REVERSED** and **REMANDED** for further proceedings. 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 ROGERS COUNTY
THE HONORABLE STEPHEN R. PAZZO,
ASSOCIATE DISTRICT JUDGE

APPEARANCES IN THE DISTRICT COURT

Mark Schantz, Attorney at Law, 201 W. 5th St., Ste. 501, Tulsa, OK 74103, Counsel for Appellant

Zachary Cabell, Assistant District Attorney, Rogers County, 200 S. Lynn Riggs Blvd., Claremore, OK 74017, Counsel for the State

APPEARANCES ON APPEAL

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

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

¶1 I agree with the majority that not every waiver of rights granted by statute requires the same formality as a waiver of constitutional rights. Indeed, conduct by a party which is inconsistent with the purpose to exercise a particular right, even a constitutional one, is often sufficient reason to say that the right has been waived. *Randolph v. State*, 2010 OK CR 2, ¶ 27, 231 P.3d 672, 681 (finding right to confrontation waived by failure to exercise it when opportunity was available).

¶2 However, when a statute *extends* a protection *equivalent* to a fundamental right protected by the Constitution (such as a right to jury trial, speedy and public trial, privilege against self-incrimination, or assistance of counsel), the better rule is that any purported waiver requires a knowing and intentional, personal relinquishment of the right on the record.

¶3 *D.M.H.* correctly required this level of formality for a purported waiver of jury trial on a charge of juvenile delinquency. Legislation granting legal rights ordinarily protected *only* by the Constitution represents a profound policy judgment about the accuracy and fundamental fairness of the proceedings or governmental actions with which those rights are concerned. Formalized judicial procedures that protect such rights from inadvertent waiver or forfeiture by those they are designed to protect are entirely consistent with legislative intent.

¶4 The Court today correctly requires that trial courts give explicit advice to juveniles on the record about the right to demand a jury trial on a charge of delinquency; and nothing in the majority opinion prevents those courts, as a matter of practical and wise judicial practice, from adopting the kind of formalized waiver procedures traditionally observed for equivalent constitutional rights.[1]

KUEHN, J., CONCURRING IN PART AND DISSENTING IN PART:

¶1 I agree that this case must be remanded for further proceedings, but I respectfully disagree with some aspects of the Majority's analysis, and with overruling *D.M.H. v. State,* 2006 OK CR 22, 136 P.3d 1054.

¶2 The Majority believes this Court went too far in *D.M.H.* by requiring that a juvenile personally waive his right to a jury at an adjudication hearing "in open court on the record." *Id.* at ¶ 11, 136 P.3d at 1057. The Majority believes that in doing so, this Court erred by "elevating" the juvenile's statutory right to a jury trial to a constitutional right. Majority at 6. I take a different view. I believe *D.M.H.* accords the appropriate level of inquiry for what is clearly an important right, even if it is "only" statutory in origin. The Majority disregards the Legislature's clear intention to treat the juvenile's right to a jury with utmost respect.

¶3 The federal Constitution does not require states to provide juries in juvenile-delinquency proceedings. That question was answered – although not until the early 1970's – in *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). But *McKeiver* is not particularly relevant here, because for over a century – since the inception of our own juvenile-court system – Oklahoma law has protected the right of juveniles to have their adjudication hearings determined by a jury. *See Alford v. Carter*, 1972 OK CR 344, ¶ 8, 504 P.2d 436, 439 ("Oklahoma is one of only ten states which provides, by statute, greater safeguards for the rights of juveniles than are required by the United States Constitution").

¶4 The current version of the applicable statute reads (with emphasis added):

> In adjudicatory hearings to determine if a child is delinquent or in need of supervision, any person entitled to service of summons or the state shall have *the right to demand a trial by jury, which shall be granted as in other cases, unless waived,* or the judge on the judge's own motion may call a jury to try any such case. Such jury shall consist of six persons.

10A O.S.2011, § 2-2-401. The juvenile (and the State, and certain others as well) have (1) the "right to demand" a jury trial, (2) "as in other cases," (3) unless that right is "waived." In my view, the Majority's analysis selectively focuses on only part of this provision.[1]

¶5 When interpreting a statute, each part should be given intelligent effect. *State ex rel. Pruitt v. Steidley*, 2015 OK CR 6, ¶ 12, 349 P.3d 554, 557-58. We should presume each word in a statute was intended for some useful purpose, and we should strive to give effect to each. *Ex parte Higgs*, 97 Okl.Cr. 338, 341, 263 P.2d 752, 756 (1953). The Majority focuses solely on the juvenile's "right to demand" a jury trial, and ignores the rest of the sentence where that right is mentioned. It was not this Court in *D.M.H.* which "elevated" the importance of the juvenile's right to a jury trial; rather, it was the Legislature which, over a century ago, guaranteed the right "as in other cases," unless "waived" (as in other cases). What "other cases" could the Legislature be talking about? The only possible answer: Those cases where the right to jury trial is constitutionally protected. When it comes to due process – which is guaranteed to every litigant – legislatures are certainly authorized to prescribe just what process is due in a particular situation.

¶6 The Majority stops short of requiring a record waiver of the juvenile's right, and would accept forfeiture of the right by silence. That conclusion doesn't just overrule *D.M.H.*; it is contrary to the plain language of § 2-2-401, which requires that the right be "waived"; forfeiture by silence is not sufficient. The concepts of "waiver" and "forfeiture" are often confused,[2] but they are not the same:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "*intentional* relinquishment or abandonment of a known right." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) ... . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) (emphasis added). *See also United States v. Ruiz,* 536 U.S. 622, 629, 122 S.Ct. 2450, 2455, 153 L.Ed.2d 586 (2002) ("[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances" (emphasis in original)); *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007) ("waiver is accomplished by intent, [but] forfeiture comes about through neglect"(citation omitted)).

¶7 What rights require a knowing waiver, and what rights can be forfeited by mere silence? As always in the law, it depends. Some rights are more important than others. The Majority cites *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 664, 145 L.Ed.2d 560 (2000) (which, in turn, cited *United States v. Olano*) for the principle that the nature of the right at stake determines whether, and to what extent, a litigant must acknowledge his choice regarding that right. This sliding-scale approach is one fashioned, in *ad hoc* fashion, by courts themselves.[3] The Majority recognizes a distinction between constitutional rights and statutory ones, and that distinction is a legitimate starting point for many purposes. But it does not always end the inquiry. Whether an "on the

record" waiver makes sense depends on more than just whether the subject is explicitly contained in constitutional language. It depends, again, on the right at stake. It also depends on relevant legislative direction. Neither the federal nor the Oklahoma constitution includes explicit language on what is necessary to waive a right contained therein; the statute at issue here does. Even if this Court believes such a procedure is somehow burdensome or archaic, the Legislature has the authority to require courts to treat the juvenile's right to a jury trial with the same procedural care and respect as if it were protected by the constitution. And I believe it has done so.

¶8 We are dealing here with a special category of litigants – juveniles. They are treated differently from adults "for their own good," and in keeping with modern society's perceived moral obligations. We give them certain rights in this process. Those who fall under the jurisdiction of the juvenile courts are not allowed to or have limits on their ability to vote, drink, smoke, drive, work, attend school, stay out past a curfew, contract, own a weapon, sue, leave home, and disobey adults of authority. They are entitled by law to be given shelter, clothing, food and education by adults, because it is presumed they cannot provide those basic needs for themselves. We should remember the immaturity of these litigants when we seek to apply rules of procedural default against them. The Majority does not even construe § 2-2-401 to require that the juvenile have the assistance of counsel when he is advised of the right to trial by jury. Thus, the immature litigant may be found to have forfeited this important right (through silence) without any advice of counsel. I would require, at the very least, that the record show the right to trial by jury was explained at a proceeding where counsel was present to acknowledge that fact.[4]

¶9 This Court's duty is to follow and apply the law. Considering the nature of the right at stake, and the special concerns that gave birth to the juvenile justice system in the first place, I would require that before the juvenile's right to a jury trial can be extinguished, the juvenile must, at the very least, be advised of the consequences of not demanding same, with counsel present.

ROWLAND, JUDGE:

1. Because we find that error raised in Proposition 1 warrants relief, no other propositions will be addressed.

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

1. Adhering to formal protections against waiver for the statutory right to jury trial also avoids the necessity of determining whether some of the modern, adult consequences of delinquency adjudications have undermined prior decisions holding that the Constitution does not require jury trials in these ostensibly therapeutic, but increasingly punitive, proceedings.

KUEHN, J., CONCURRING IN PART AND DISSENTING IN PART:

1. The 1910 codification contained the same operative language (emphasis added):

> The county courts of the several counties in this State shall have jurisdiction in all cases coming within the terms and provisions of this article. In trials, under this article, the child informed against, or any person interested in such child, shall have *the right to demand a trial by jury, which shall be granted as in other cases unless waived*; or the judge of his own motion may call a jury to try any such case.

R.L. 1910, § 4413; Laws 1909, p. 186.

2. *See e.g.* Rule 3.4(F)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018) (claims advanced for the first time in a reply brief shall be deemed "waived and forfeited for consideration").

3. "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777. *Olano*'s citation to authority for this principle is not a constitutional or statutory provision, or even a prior Supreme Court case, but a treatise on criminal procedure and a law-review article. In *Hill*, the Court cited instances showing that not even all *constitutional* rights require the same kind of record to extinguish them. *Hill*, 528 U.S. at 114-15, 120 S.Ct. at 664.

4. One might argue that since the juvenile does have a "constitutional" right to counsel, his ability to confer with counsel about the jury-trial option is sufficient to ensure the latter right is protected. In fact, in his dissent to *D.M.H.*, Judge Lumpkin suggested that the issue of waiver would perhaps be better phrased as a question of counsel's effectiveness. *See D.M.H.*, 2006 OK CR 22, ¶ 6, 136 P.3d at 1058-59 (Lumpkin, V.P.J., dissenting).

2018 OK CR 37

HOWARD SHELTON MASON, JR., Appellant, v. THE STATE OF OKLAHOMA, Appellee

Case No. F-2017-650. November 29, 2018

OPINION

ROWLAND, JUDGE:

¶1 Appellant Howard Shelton Mason, Jr., appeals his Judgment and Sentence from the District Court of McClain County, Case No. CF-2015-180, for Murder in the First Degree, in violation of 21 O.S.Supp.2011, § 701.7(A). The Honorable Thad Balkman, District Judge, presided over Mason's jury trial and sentenced Mason, in accordance with the jury's verdict, to life imprisonment without the possibility of parole. Mason appeals raising the following issues:

(1) whether the evidence presented at trial was insufficient to sustain his conviction

for First Degree Malice Aforethought Murder;

(2) whether the trial court erred in failing to suppress his statement;

(3) whether the trial court erred in allowing the State to bolster a witness's extrajudicial identification with third-party testimony;

(4) whether the trial court erred by failing to give a cautionary jury instruction on eyewitness identification;

(5) whether his trial was rendered fundamentally unfair by the admission of improper opinion testimony;

(6) whether an enhancement statute resulted in a violation of the *ex post facto* clauses; and

(7) whether ineffective assistance of counsel deprived him of a fair trial.

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

Background

¶3 On October 15, 2006, Lowry Ewing, went to see his friend, Burney Ray Bounds, at Bounds' house located south of Dibble off of Highway 76 in McClain County. When he arrived, Ewing noticed that Bounds' car, a blue Subaru wagon, was gone and the front door of the house was ajar. He was alarmed because this was out of the ordinary; Bounds never left his house unlocked. Ewing entered the house and noticed that the front room was torn up; furniture was turned upside down and papers were strewn about the floor. Ewing knew Bounds to keep a tidy house so he assumed that Bounds' home had been broken in to and burgled. Ewing walked toward the telephone in the bedroom to call Bounds and tell him about the condition in which he discovered his house. When he approached the bedroom door Ewing saw Bounds face down on the floor with his hands and feet tied behind him. Ewing knew that Bounds was dead. He backed up and went to the kitchen where he located Bounds' cell phone and called 911. Ewing waited outside for the police to arrive. When the authorities arrived it was confirmed that Bounds was dead. It was subsequently determined that the manner of death was homicide and that Bounds had died from traumatic asphyxia.

¶4 During the subsequent investigation it was discovered that in the late afternoon the day before Bounds' body was discovered, Bounds stopped at DJ's convenience store to fill up with gas and purchase gum as was his custom about once or twice a week. When Bounds went inside the store he spoke with his friend, Clara Rogers. Bounds told Rogers that he had picked someone up at the casino. When Rogers looked toward Bounds' car she noticed a man with long, black, curly hair and a bandana around his head. He was standing by Bounds' car waiting for him to exit the store. Rogers could not stop looking at the man because he was standing with his arms crossed glaring at her.

¶5 On the night of October 14, 2006, at around 10:00 to 11:00 p.m., Amanda Mayhew was driving with her mother on Highway 76 when they saw a skinny man, about fifty-eight or fifty-nine years old, beside a small blue station wagon that was up on jacks with a flat tire. A few days later when Mayhew drove past the area again, she noted that the blue station wagon was gone but a tire and jack had been left behind. By then she had heard about the homicide and that the police were looking for a blue station wagon so she notified the authorities.

¶6 On October 14, 2006, at around 10:00 to 10:30 p.m., Dibble Reserve Police Officer Ricky Lee Peterman was driving a marked patrol unit traveling north on Highway 76 when he saw a man on the side of the road changing a tire on a small car like a Subaru. Peterman noted that the man was about five foot nine or ten and weighed approximately 155 or 160 pounds. He looked a little scruffy with long hair and a beard. Peterman pulled in behind the disabled vehicle and asked the man if he needed help. The man declined and Peterman left. Peterman learned the following day that there had been a homicide a block south of where he saw the man changing the tire.

¶7 On the morning of October 15, 2006, Terry Joe McDonald and his wife were driving north near Southwest 3rd and MacArthur in Oklahoma City when they noticed a light blue Subaru wagon in a vacant lot. They noticed the car because they drove a Subaru and at the time there were very few Subarus in the state. The car was parked about a hundred yards from the interstate. Although it was a misty,

rainy day, its windows were rolled down and there was no one inside the vehicle. The following day, MacDonald saw on the news that police were looking for a Subaru that had been involved in a crime. The news story gave a description of the car and the tag number. MacDonald went back to where he had seen the abandoned Subaru which was still there and confirmed that it was the car the police were looking for. He called and reported the missing vehicle.

¶8 The OSBI was involved in the investigation of the crime and processed items found in Bounds' house and car. Duct tape had been used extensively to bind Bounds and was found on his hands, feet, neck, and mouth. It was also used to secure him to the bed. This duct tape was collected and examined as were several hairs found at the crime scene. OSBI Criminalist Chris Davis, certified as a latent fingerprint examiner, found usable latent prints not belonging to Bounds on pieces of duct tape stretching from Bounds' hands to the bed, on the partial roll of unused tape on the bed, and on a piece of tape attached to the headboard of the bed.

¶9 OSBI Criminalist Wendy Duke, who specialized in forensic biology, evaluated hairs found at the crime scene for the potential to conduct DNA analysis. Of twelve hairs deemed potentially capable of producing a DNA profile, one collected from a shirt found underneath Bounds' body produced enough DNA to develop a partial profile. This partial profile was submitted to the Combined DNA Index System (CODIS) which houses DNA profiles from other forensic cases as well as convicted offender samples.

¶10 Although the case went cold for a while, it was subsequently discovered that Howard Shelton Mason, Jr., was a possible match to the forensic evidence. A DNA profile was developed from a known buccal swab taken from Mason and this profile was compared to the partial DNA profile developed from the hair found at the scene of the homicide. OSBI Criminalist, Antji Stambaugh, with the forensic biology unit, determined that Mason could not be excluded as a donor for the DNA profile from the hair collected from the scene; the statistical probability of the same profile belonging to a random person in the population was 1 in 4.66 million. Mason's fingerprint cards were also compared to the latent prints taken from duct tape found at the crime scene. Four of the latent prints matched Mason's known prints.

¶11 After Mason was identified as a suspect in the case Clara Rogers was approached by the police and asked to view photographs to see if she could identify the person she saw outside the convenience store waiting for Bounds. Despite the fact that Rogers was asked to view the pictures in 2015, some eight years after Bounds had been killed, Rogers identified a photograph of Mason as the man who she saw with Bounds the day before he was found dead.

¶12 Mason was located and questioned by OSBI Agents David Gatlin and Josh Dean. During the audiotaped interview Mason admitted that he had been in Oklahoma hitchhiking along I-40 around the time Bounds was killed. Mason told the agents that an older fellow driving a station wagon picked him up. The man had work for him to do; he cleaned out the man's chicken coop and washed his dog. Mason said he stayed a couple of hours and the man took him back to the interstate. Mason said that he "didn't hurt nobody." He was subsequently arrested.

1.

¶13 Mason argues that the evidence presented at trial was insufficient to sustain his conviction for first degree malice murder. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. "The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts." *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. We do not "second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the jury's verdict." *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682. "Pieces of evidence must be viewed not in isolation but in conjunction, and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt." *Davis v. State*, 2004 OK CR 36, ¶

22, 103 P.3d 70, 78 (quoting *Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919-20). Additionally, this Court has held that "the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction." *Mitchell*, 2018 OK CR 24, ¶ 11, 424 P.3d at 682.

¶14 Mason concedes that there is no dispute that Bounds died or that his death was unlawful. Rather, Mason asserts that upon close examination of the trial testimony and evidence, no rational trier of fact could have found beyond a reasonable doubt that the State proved he caused Bounds' death. As Mason points out, the evidence presented at trial, when viewed in the light most favorable to the State, established that he was at Bounds' home shortly before Bounds was found dead on October 15, 2006. He acknowledges that the State presented evidence that he was seen with Bounds and his vehicle on the afternoon of October 14, 2006 and that two witnesses saw a man fitting his description changing a tire on a vehicle matching the description of Bounds' Subaru later that same day. Mason argues, however, that this evidence merely placed him with Bounds prior to his death. He goes on to acknowledge that the fingerprints and DNA profile obtained from a hair tie him to the crime scene but do nothing other than raise a suspicion of guilt because there was no additional evidence showing anything more than his presence at the scene. Mason notes that unidentified fingerprints were found on other objects in the house and the evidence presented at trial is insufficient to support his conviction because the State did not prove beyond a reasonable doubt that he was the only person who could have committed the crime. He argues that the State's case against him was based entirely upon conjecture and speculation.

¶15 Mason's argument is unpersuasive. His fingerprints and the hair from which the DNA profile was extracted were found in close proximity to Bounds' body and on items used to restrain Bounds during the fatal attack. The forensic evidence connecting Mason to the attack must be considered along with the other evidence placing Mason with Bounds the day before Bounds' body was discovered. Considered in the aggregate and in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged offense, beyond a reasonable doubt.

2.

¶16 When Mason was identified as a suspect in this case he was located at the El Paso Transitional Center in El Paso, Texas. OSBI Agent David Gatlin secured a warrant for Mason's arrest and on May 5, 2015, Gatlin went with OSBI Agent Josh Dean to the transitional center and interviewed Mason. Mason subsequently filed a motion to suppress his statement arguing that it was inadmissible because it was made during a custodial interrogation before he was advised of his rights pursuant to *Miranda v. Arizona*.[1] Prior to trial the court held a *Jackson v. Denno*[2] hearing to address the admissibility of Mason's statement. The trial court denied his motion to suppress and Mason argues on appeal that this ruling was error. Mason did not renew his objection to the introduction of his statement at trial. He has therefore, waived review of this issue on appeal for all but plain error. *Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235, 237. "Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial." *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. *See also Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶17 We review the trial court's ruling on a motion to suppress for an abuse of discretion. *Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793 (citing *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287). We defer to the trial court's findings of fact unless they are clearly erroneous and we review the trial court's legal conclusions derived from those facts *de novo*. *Bramlett*, 2018 OK CR 19, ¶ 10, 422 P.3d at 793 (citing *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42).

¶18 It is well established that "police officers are not required to administer *Miranda* warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Rather, *Miranda* warnings are only required when a person is subject to a custodial interrogation which occurs where questioning is initiated by law enforcement officers after a person has been taken into custody or is otherwise deprived of his freedom in any significant way. *Miranda*, 384 U.S. at 467, 86 S.Ct. at 1624. *See also Little v. State*, 1981 OK CR 46, ¶ 4, 627 P.2d 445, 447. A person is in custody for purposes of *Miranda* when there is "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal

arrest." *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994) (*per curiam*) (quoting *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per curiam*)). The relevant inquiry as to whether a suspect is in custody is how a reasonable person in the suspect's position would have understood the situation. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

¶19 Custody, for purposes of *Miranda* warnings, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields,* 565 U.S. 499, 508-09, 132 S.Ct. 1181, 1189, 182 L.Ed.2d 17 (2012). The fact that Mason was in a transitional center pursuant to an unrelated conviction at the time he was interviewed about his involvement in Bounds' death does not, however, mean that he was presumptively "in custody" for purposes of *Miranda. See Fields,* 565 U.S. at 508, 132 S.Ct. at 1188-89 (a prisoner who is taken from his cell to be interviewed in a conference room on a matter unrelated to the crime under which he was being held is not presumptively in custody for purposes of *Miranda).*

¶20 It is also of little consequence that the OSBI agents had secured an arrest warrant and had the intent to arrest Mason at the end of the interview because they did not convey this information and intent to Mason. "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Stansbury,* 511 U.S. at 325, 114 S.Ct. at 1530 ("an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave"). *See also Berkemer,* 468 U.S. at 442, 104 S.Ct. at 3151 (The suspect was not "in custody" for purposes of *Miranda* where the officer decided as soon as the suspect stepped out of his car to arrest him at the conclusion of the encounter but did not convey that intent to the suspect. The Court held that "a policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time . . ."). Other relevant factors to consider include: (1) the location of the questioning; (2) the duration of the questioning; (3) statements made during the questioning; (4) the presence or absence of physical restraints during the questioning; and (5) the release of the interviewee at the end of the questioning. *Fields*, 565 U.S. at 509, 132 S.Ct. at 1189.

¶21 Testimony at the *Jackson v. Denno* hearing indicates that at the time of the interview Mason was in a transitional center where his freedom of movement was not restrained at all times; he was free to leave at least some of the time when he went to work outside the facility. The extent to which he could freely move about the facility was unclear. Although a Texas Ranger was in the conference room during the interview, the record does not show whether Mason was escorted to the conference room by the Texas Ranger or whether he went to the room unaccompanied. The interview lasted only fifteen to twenty minutes and there is no indication from the record that Mason was restrained during the questioning. Although Mason was not released at the end of the interview and it is clear that Agents Gatlin and Dean intended to arrest him, there is no indication that they conveyed this information to Mason before or during the interview. Mason was unaware of the extent to which his freedom of movement was actually limited. Mason has provided no evidence suggesting that a reasonable person in his circumstances would have believed he was not free to terminate the interview and leave before he specifically asked if he could leave. On the record before this Court, considering the totality of the circumstances surrounding the interview, we find that Mason has failed to show that the agents were required to advise him of his *Miranda* rights prior to the interview and that the trial court's ruling denying his motion to suppress was error. Relief is not required.

3.

¶22 Rogers testified at trial that she saw Mason at the convenience store with Bounds the day before Bounds was found dead and she identified Mason at trial as the person she saw. Rogers also testified that she made two extra-judicial identifications of Mason; she identified him before trial from a photographic lineup presented to her by OSBI Agent David Gatlin and also at preliminary hearing. In addition, Agent Gatlin testified at trial about Rogers' extra-judicial identification of Mason from the

photographic lineup. Mason argues on appeal that the trial court erred in allowing Agent Gatlin to bolster Rogers' testimony about the extrajudicial identification. Mason concedes, however, that he did not raise this objection below, thus waiving all but plain error. *See Lamar v. State*, 2018 OK CR 8, ¶ 43, 419 P.3d 283, 295. "Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial." *Mitchell,* 2016 OK CR 21, ¶ 24, 387 P.3d at 943.

¶23 This Court recently held that 12 O.S.2011, §§ 2801(B)(1)(c) & 2802 permit the introduction of extrajudicial identification testimony as substantive evidence – both by the identifier and third parties present at the prior identification – as long as the declarant testifies at trial and is subject to cross-examination concerning the statement of identification. *Davis v. State*, 2018 OK CR 7, ¶¶ 26-27, 419 P.3d 271, 280-81 (overruling prior decisions to the contrary). Agent Gatlin's testimony concerning Rogers' extrajudicial identifications of Mason was permissible because Rogers testified at trial and was subject to cross-examination about the out-of-court identifications. There was no plain error and relief is not required.

4.

¶24 Mason argues that the trial court erred in failing to give the jury, *sua sponte*, a cautionary instruction about the reliability of eyewitness identification. The failure to request an instruction on the hazards of eyewitness testimony or object to the instructions given waives review on appeal for all but plain error. *Mitchell,* 2016 OK CR 21, ¶ 24, 387 P.3d at 943.

¶25 The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Cipriano v. State,* 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. This Court has held that, "[i]n cases in which the eyewitness identification is a critical element of the prosecution's case *and* serious questions exist concerning the reliability of that identification, a cautionary instruction should be given which advises the jury regarding the factors to be considered." *McDoulett v. State*, 1984 OK CR 81, ¶ 9, 685 P.2d 978, 980 (emphasis added). *See also Robinson v. State*, 1995 OK CR 25, ¶ 56, 900 P.2d 389, 404 ("a cautionary eyewitness identification instruction is not necessary where no serious question exists concerning the reliability of the identification"). This Court has held that:

> [A] cautionary instruction is not necessary if the following conditions are met: (1) If there was a good opportunity for positive identification; (2) if the witness is positive in his identification; (3) if the identification is not weakened by prior failure to identify; and (4) if the witness remains positive as to the identification, even after cross-examination.

Langley v. State, 1991 OK CR 66, ¶ 17, 813 P.2d 526, 530.

¶26 Although Rogers' initial identification of Mason occurred a significant time prior to trial, she had good opportunity for positive identification and she remained consistent and positive in her identification, even after cross-examination. Thus, no cautionary instruction was required. There was no error here.

5.

¶27 Mason argues that his trial was rendered fundamentally unfair by the admission of improper opinion testimony that invaded the province of the jury and violated his constitutional right to a fair trial. He challenges OSBI Criminalist Chris Davis' testimony that he compared Mason's known fingerprints and palm prints with latent prints found at the scene of the homicide and he concluded that Mason's known prints matched four latent prints found at the scene. Mason does not challenge the admissibility of fingerprint evidence. Nor does he argue that Davis should not have been allowed to testify about his observations regarding the latent and known prints and the similarities he observed. Rather, Mason argues that Davis' testimony suggesting that it was an absolute fact that the latent prints were made by him exceeded the bounds of science and invaded the province of the jury.

¶28 Mason acknowledges that he failed to object to this testimony at trial on the same grounds and has therefore waived review of this issue on appeal for all but plain error. *See Grissom v. State,* 2011 OK CR 3, ¶ 64, 253 P.3d 969, 991. Therefore, we review Mason's claim pursuant to the test for plain error, set forth above, and determine whether he has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Mitchell,* 2016 OK CR 21, ¶ 24, 387 P.3d at 943.

¶29 Mason notes that fingerprint evidence has "long been recognized as the strongest kind of circumstantial evidence and the surest

form of identification." *Stacy v. State*, 49 Okl.Cr. 154, 157, 292 P. 885, 887 (1930). However, he asserts that in the last decade serious questions have been raised about the validity of these expressions of absolute certainty. He avers that "[s]cholars have concluded that fingerprint examiners' claims to be able to individualize, that is to determine the source of an unknown print to the exclusion of all other possible sources in the universe, are not supported by empirical evidence." In support of his argument Mason cites to scholarly and scientific articles which call into question the ability of fingerprint examiners to state with absolute certainty that a particular latent print matches a known print. He also cites to two cases from Massachusetts which caution that testimony individualizing latent fingerprints to known fingerprints should be offered as opinion rather than as infallible fact.[3]

¶30 A similar argument was set forth in W*ebster v. State*, 2011 OK CR 14, ¶¶ 65-68, 252 P.3d 259, 277-78. The Court noted in *Webster* that the appellant failed to cite to any jurisdiction which had ruled in support of his position. The Court also noted that Webster could have used the scholarly materials which raised questions about the validity and admissibility of fingerprint analysis to cross-examine the fingerprint experts at trial but he did not do so. The Court further found that Webster had failed to follow the proper procedure for supplementing the record in this Court with this kind of evidence. It was also noted that the fingerprint identification testimony could not plausibly have resulted in a mistaken identification or a wrongful conviction since Webster was also implicated in the commission of the crime by DNA evidence. Consequently, the Court did not address the claim further but declined to find plain error in the admission of the testimony about the latent prints.

¶31 We reach the same conclusion here. While Mason cited to two cases from Massachusetts in support of his argument, those cases are merely persuasive authority and not particularly so. As in *Webster,* the scholarly and scientific articles could have been, but were not, used at trial to cross-examine the fingerprint expert about the reliability of his conclusions regarding the comparison of fingerprints and palm prints. Also, as in *Webster*, Mason was not connected to the crime scene by fingerprint evidence alone; he was also placed at the scene of the homicide by DNA evidence and a person fitting his description was placed by eyewitnesses with the victim and near the victim's home around the time of the homicide. Additionally, his own statement to the OSI agents placed him with the victim and at the victim's home around the time of the homicide. The introduction of testimony about the latent prints was not actual error and did not affect Mason's substantial rights. We find no error and relief is not required.

6.

¶32 Mason killed Bounds in 2006. At the time the crime was committed, first degree murder trials where the death penalty was not sought were held in a single stage proceeding and the punishment was not subject to enhancement by evidence of prior felony convictions. In 2013, the Legislature enacted 21 O.S. § 701.10-1(A) which provided that:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is not seeking the death penalty but has alleged that the defendant has prior felony convictions, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment, wherein the state shall be given the opportunity to prove any prior felony convictions beyond a reasonable doubt. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

Pursuant to Section 701.10-1(A), the State filed an Enhancement Page along with the Information alleging that Mason had three prior felony convictions. Mason argues in his sixth proposition that the application of this enhancement statute to his case violated the prohibitions against *ex post facto* laws.

¶33 The United States Constitution and Oklahoma Constitution expressly prohibit states from enacting *ex post facto* laws. U.S. Const. art. I, § 10; Okla. Const. art. II, § 15. This Court interprets the *ex post facto* provisions in the Oklahoma Constitution consistent with federal jurisprudence. *Murphy v. State*, 2012 OK CR 8, ¶ 42, 281 P.3d 1283, 1294 (citing *Maghe v. State,* 1967 OK CR 98, ¶¶ 33–34, 429 P.2d 535, 540). An *ex post facto* law is one which:

> (1) criminalizes an act after the act has been committed, (2) increases the severity of a

crime after it has been committed; (3) increases the punishment for a crime after it has been committed; or (4) alters the rules of evidence, allowing conviction on less or different testimony than the law required at the time the act was committed.

James v. State, 2009 OK CR 8, ¶ 5, 204 P.3d 793, 795 (citing *Carmell v. Texas*, 529 U.S. 513, 522–25, 120 S.Ct. 1620, 1627–29, 146 L.Ed.2d 577 (2000)). This Court has held that, "[t]he mere fact that a retroactively-applied change in evidentiary rules works to a defendant's disadvantage does not mean the law is *ex post facto.* The issue is whether the change affected the quantum of evidence necessary to support a conviction." *James*, 2009 OK CR 8, ¶ 6, 204 P.3d at 795 (citing *Carmell,* 529 U.S. at 546–47, 120 S.Ct. at 1640). Legislative enactments which "merely permit the jury to consider certain kinds of evidence for certain purposes, and are applied to conduct committed before enactment, do not raise *ex post facto* concerns." *Id*.

¶34 In *James,* this Court found no *ex post facto* violation where a statute allowing the jury to consider certain other crimes evidence was applied to the defendant's trial although it was enacted after commission of the crime. *Id.* at ¶¶ 2-6, 204 P.3d at 794-96. *See also Hogan v. State,* 2006 OK CR 27, ¶¶ 60-61, 139 P.3d 907, 930 (Oklahoma statutory amendment allowing admission of "appropriate" "in-life" photograph of the victim in a homicide prosecution, applied to homicide committed before amendment, did not violate defendant's rights under the *ex post facto* clause); *Neill v. Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001) (Oklahoma statute permitting jury to consider victim-impact evidence in a capital sentencing proceeding, applied to murders committed before enactment, did not violate the *ex post facto* prohibition because it neither changed the quantum of proof nor otherwise subverted the presumption of innocence).

¶35 The statute at issue in this case did not criminalize an act done before the passing of the law, make the crime greater than it was when committed, inflict a greater punishment than when it was committed, or receive less, or different, testimony than required at the time of the offense to convict Mason. There is no *ex post facto* violation and this proposition is denied.

7.

¶36 Mason argues defense counsel rendered constitutionally ineffective assistance at trial. This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State,* 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Mason must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head,* 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Head,* at ¶ 23, 146 P.3d at 1148. Rather, Mason must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

¶37 Mason specifically argues defense counsel was ineffective for (1) failing to renew the objection at trial to the admission of the statement made during his interview with OSBI agents; (2) failing to object at trial to Agent Gatlin's improper bolstering of the extrajudicial eyewitness identification; (3) failing to object to improper opinion testimony; and (4) failing to object to sentence enhancement procedure. The merits of each of these claims have been addressed and rejected. Mason's ineffective assistance of counsel claim fails on these alleged deficiencies based on lack of prejudice.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF McCLAIN COUNTY

THE HONORABLE THAD BALKMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

1. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
2. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).
3. *Commonwealth v. Gambora*, 933 N.E.2d 50, 56-58 (Mass. 2010); *Commonwealth v. Joyner*, 4 N.E.3d 282, 286-90 (Mass. 2014).

2018 OK CR 38

PHILLIP ERIC WINBUSH, III, Appellant, -vs- THE STATE OF OKLAHOMA, Appellee.

No. RE-2016-995. November 29, 2018

OPINION

HUDSON, JUDGE:

¶1 Appellant, Phillip Eric Winbush, III, appeals from the revocation of his five (5) year suspended sentence in Case No. CF-2012-478 in the District Court of Comanche County, by the Honorable Mark R. Smith, District Judge. On April 16, 2013, Appellant entered a plea of guilty to Count 1: Unlawful Possession of Controlled Drug With Intent to Distribute, felony; Count 2: Attempting to Elude Police Officer, misdemeanor; and Count 3: Driving With License Cancelled/Suspended/Revoked, misde-meanor. He was sentenced to a term of eight (8) years with all but the first three (3) years suspended, plus fines, costs and fees of $3,336.00 on Count 1; to a term of one (1) year, plus fines, costs and fees of $726.00 on Count 2; and to a term of one (1) year, plus fines, costs and fees of $736.50 on Count 3, with all sentences ordered to run concurrently.

¶2 On May 18, 2014, Appellant signed a *Notice of Court Hearing for Payment of Fines and Costs* and agreed to appear within ten days of his release to determine his ability to pay fines and costs.[1] On July 24, 2014, Appellant appeared and agreed to a scheduled payment of $150.00 on or before August 30, 2014, and every month thereafter until paid in full. On May 22, 2015, the State filed a motion to revoke Appellant's suspended sentence alleging he violated probation by (1) failing to pay all fines, costs, assessments, restitution and supervision fees; and (2) by committing the new crimes of Count 1: Possession of Controlled Dangerous Substance, Methamphetamine, felony; and Count 2: Domestic Assault and Battery, misdemeanor. On May 28, 2015, Appellant waived his right to a revocation hearing within twenty days. On October 1, 2015, Appellant appeared and the revocation hearing was continued until November 12, 2015. Appellant agreed to a scheduled payment of $100.00 on or before November 9, 2015, and every month thereafter until paid in full. On November 13, 2015, Judge Smith entered a Minute Order noting Appellant failed to appear on November 12, 2015; Appellant's bond was revoked and reset and a bench warrant was issued. On December 2, 2015, Appellant appeared and the revocation hearing was continued several times.

¶3 On September 20, 2016, the revocation hearing was conducted before Judge Smith. The State first called Kelly Blasengame ("Blasengame"). Blasengame worked in the Comanche County District Court Clerk's office and was responsible for tracking people who had been ordered to pay fines and costs. Blasengame testified Appellant had not paid any money towards his fines and costs. Blasengame testified a first payment schedule had been set up for Appellant and he made no scheduled payments on fines and costs. Blasengame testified a second payment schedule was set up for Appellant and he again made no payments on fines, costs or assessments. The State then called John Crouse ("Crouse") with the Comanche County District Attorney's Office. Crouse testified he was responsible for tracking individuals ordered to pay DA supervision fees. Crouse testified Appellant had come in to set up a payment schedule, but had never paid any money toward his fees. On cross-examination, Crouse testified that Appellant had never contacted him concerning any difficulty Appellant was having in making his payments. The State's final witness was Keli Ireland ("Ireland") with the Comanche County District Attorney's Office. Ireland testified Appellant kind of had an attitude when he filled out his intake form, so she let Crouse handle the case. After Ireland's testimony, the State rested.

¶4 Appellant demurred to the evidence, which was denied by Judge Smith. Appellant did not present any testimony or evidence at the revocation hearing. Judge Smith found by a preponderance of the evidence that Appellant had violated probation by failing to make required payments. Judge Smith ordered a presentence investigation report and continued the sentencing hearing. On October 20, 2016, Judge Smith heard arguments and revoked Appellant's five (5) years suspended sentence in full. Appellant now appeals.

¶5 In his first proposition, Appellant contends that Judge Smith's order revoking his suspended sentence was an abuse of discretion "because the law, as applied to the facts, failed to prove the alleged violations were willful." Appellant's brief at 3. Appellant argues that there was no evidence presented in this case that he willfully did not pay fines and costs, and therefore this Court should reverse Judge Smith's order revoking his suspended sentence. Appellant also argues that it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods for punishing the defendant are available. The dissent in this appeal contends that because Judge Smith "did not inquire of Appellant the reasons for not paying the assessments" the revocation of Appellant's suspended sentence was an abuse of discretion.

¶6 These arguments resurrect the issue of where the burden of proof should be placed when a probationer has failed to make required payments. Specifically, which party bears the burden of demonstrating whether such violation was willful or not. Appellant and the dissent both rely heavily on specific language within *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) to support their contentions that the burden is on the sentencing court to inquire into and establish whether the probationer's failure to pay was not willful, or whether the probationer has made sufficient bona fide efforts to pay.

¶7 *Bearden* is not a beacon of clarity as is evidenced by the struggle numerous courts exhibited in their early attempts to decipher the decision. This Court's own decisions issued within a relatively short time after *Bearden* reflect those struggles.[2] However, this Court and numerous other courts ultimately put *Bearden* to bed and established the standard still in effect – i.e., once the State proves that the probationer has failed to make restitution payments, the burden shifts to the probationer to prove that his failure to pay was not willful or that he has made sufficient bona fide efforts to pay. *McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837. If the probationer presents evidence to show non-payment was not willful, the hearing court must consider such evidence and make a finding of fact regarding the probationer's ability to pay. *Id.; see also e.g. Tilden v. State*, 2013 OK CR 10, ¶ 7, 306 P.3d 554, 557; *Reese v. Arkansas*, 759 S.W.2d 576, 577 (Ark Ct. App.1988); *Illinois v. Walsh*, 652 N.E.2d 1102, 1106 (Ill. Ct. App 1995); *Turner v. Maryland,* 516 A.2d 579, 583 (Md. Ct. App. 1986); *New Hampshire v. Fowlie,* 636 A.2d 1037, 1039 (N.H. 1994); *New Mexico v. Parsons*, 717 P.2d 99, 104 (N.M. Ct. App. 1986); *North Dakota v. Jacobsen*, 746 N.W.2d 405, 408 (N.D. 2008); *Ohio v. Hamann,* 630 N.E.2d 384, 395 (Ohio Ct. App. 1993); *Miller v. Penn. Bd. Of Prob. & Parole,* 784 A.2d 246, 248 (Pa. Cmmw. Ct. 2001); *Rhode Island v. LaRoche,* 883 A.2d 1151, 1155 (R.I. 1994); *Wike v. Texas,* 725 S.W.2d 465, 468 (Tex. Ct. App. 1987); *Washington v. Bower,* 823 P.2d 1171, 1174-75 (Wash. Ct. App. 1992); *Ramsdell v. Wyoming*, 149 P.3d 459, 464 (Wyo. 2006).

¶8 Despite the nearly thirty (30) year precedent of *McCaskey,* Appellant and the dissent argue that *McCaskey, Tilden* and the other above cited authority misinterprets and misapplies *Bearden.* Their argument is unfounded. A careful and correct reading of Bearden gives proper perspective to the case and controversy actually addressed and the holdings actually made therein. We take this opportunity to weed the garden of revocation law concerning the willfulness of probation violations, and the burdens of proof and persuasion, particularly regarding a probationer's indigence and the failure to make required probation payments.

¶9 In *Bearden*, the State of Georgia filed a petition to revoke Bearden's probation because he had not paid the $550 balance of fines and restitution as ordered. Bearden was notified of the petition and was given the opportunity to be heard at a hearing on the petition. Bearden and his wife both testified about their lack of income and assets and of his repeated efforts to obtain work. Without considering the testimony of Bearden and his wife, the Georgia court automatically revoked Bearden's probation strictly based on Bearden's failure to pay as ordered the balance owed. On appeal, the United States Supreme Court held that fundamental fairness prohibited Georgia from sen-

tencing Bearden to imprisonment simply because he failed to pay, without considering the reasons Bearden provided for his inability to pay, and determining that he had not made sufficient bona fide efforts to pay. *Bearden*, 461 U.S. at 673, 674, 103 S. Ct. at 2073, 2074. The Supreme Court accordingly reversed the revocation of Bearden's probation and remanded for a new sentencing hearing. *Id.*, 461 U.S. at 662, 673-74, 103 S. Ct. at 2067, 2073-74. The decision in *Bearden* was therefore based upon the sentencing court's failure/refusal to consider evidence presented – not upon the State's failure to prove the alleged violations were willful, as Appellant argues in this matter.

¶10 The following sentence in *Bearden* continues to be taken out of context and misconstrued: "We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Bearden,* 461 U.S. at 672, 103 S. Ct. at 2073. Too often we see defendants on appeal erroneously read this sentence as placing the burden of proof or persuasion on the sentencing court to *inquire* and determine the reasons for the probationer's failure to pay. However, the sentence must be read in the context of the entire opinion. At his revocation hearing, Bearden presented evidence that he had made bona fide efforts to pay the $550 balance of his fines and restitution. Therefore, the Court had no reason to require the sentencing court to further inquire into the reasons for Bearden's failure to pay. Again, the Supreme Court reversed Bearden's probation because the sentencing court had not considered Bearden's reasons for his inability to pay, and from this evidence determined whether Bearden made sufficient bona fide efforts to pay. *Bearden,* 461 U.S. at 673, 674, 103 S. Ct. at 2073, 2074. Thus, read in the proper context of the entire opinion, the troubling statement provides that a sentencing court must consider the explanatory reasons offered by a defendant for their failure to pay. *Id.*, 461 U.S. at 672, 103 S. Ct. at 2073.

¶11 Moreover, the *Bearden* decision had little to do with the question of which party had the burden to prove whether Bearden's failure to pay was willful,[3] or whether he had made sufficient bona fide efforts to pay. Bearden took advantage of the notice and opportunity to be heard that he was given and presented evidence, in the form of his and his wife's testimony, about their lack of income and assets and of his repeated efforts to obtain work. *Bearden*, 461 U.S. at 662-63, 673, 103 S. Ct. at 2067, 2073. When the *Bearden* Court does touch on the subject, it places the burden on the probationer to "demonstrate" sufficient bona fide efforts to make required payments. *Bearden,* 461 U.S. at 660-61 (syllabus b), 670, 671, 673 (fn.12), 103 S. Ct. at 2066 (syllabus b), 2071-72, 2072, 2073 (fn.12). The *Bearden* decision thus cannot be read as placing the burden of proof on the sentencing court. Indeed, as this Court recognized in *Tollett v. State*, 2016 OK CR 15, 387 P.3d 915, it is not "inequitable, oppressive, or substantially prejudicial" to place the burden of proof on the defendant when the State cannot viably bear the burden because, if such facts exist, they are "peculiarly within [the defendant's] knowledge, and could be easily susceptible of proof by him." *Id.* 2016 OK CR 15, ¶ 8, 387 P.3d at 917 (quoting *Coleman v. Territory,* 1897 OK 15, ¶¶ 38-39, 5 Okla. 201, 47 P. 1079, 1083).[4]

¶12 This Court has long held that a suspended sentence is a matter of grace and revocation of a suspended sentence is within the sound discretion of the trial court. *See e.g. Demry v. State*, 1999 OK CR 31, ¶ 12, 986 P.2d 1145, 1147; *Mesmer v. Raines,* 1960 OK CR 38, ¶ 7, 351 P.2d 1018, 1020; *Allen v. Burford*, 1950 OK CR 7, 214 P.2d 455, 457, 90 Okl. Cr. 302, 305; *In re Hall,* 1943 OK CR 128, 143 P.2d 833, 833-84, 78 Okl. Cr. 83, 84. Before a defendant is given probation, he or she acknowledges the terms and conditions of probation and agrees that he or she can and will abide by those terms and conditions. Thereafter, if a violation is alleged by the State, a probationer is given notice and has an opportunity to present evidence that a probation violation should be excused, which can be considered along with other evidence at the revocation hearing. Any proven violation of probation negates the original determination that probation is appropriate. To prove a "failure to pay" violation, as is clearly set forth in *McCaskey*, the State bears the initial burden to prove that the probationer has failed to make restitution payments. *McCaskey*, 1989 OK CR 63, ¶ 4, 781 P.2d at 837. Thereafter, the burden shifts to the probationer to prove that his failure to pay was not willful or that he has made sufficient bona fide efforts to pay. *Id.* And, in accord with *Bearden*, if the probationer presents evidence to show non-payment was not willful, the hearing court must consider such evidence and make a finding of fact regarding the probationer's ability to pay. *Id.*

¶13 In this case, Appellant did not present any testimony or evidence at the revocation hearing. He thus made no showing that his failure to pay all fines, costs, assessments, restitution and supervision fees was not willful; or that he made some good faith efforts to make payments. *McCaskey*, 1989 OK CR 63, ¶ 4, 781 P.2d at 837; *Tilden*, 2013 OK CR 10, ¶ 7, 306 P.3d at 557. In fact, the record shows that Appellant and his counsel were parties to the proceedings when installment payment schedules were twice established for Appellant. *See* Section VIII, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). Appellant never made any payments even after the schedules were made. Appellant has not established that Judge Smith erred or abused his discretion by revoking Appellant's suspended sentence. Proposition I is denied.

¶14 In his second proposition, Appellant correctly notes that the District Court did not impose post-imprisonment supervision either when Appellant was found to have violated terms and conditions of his suspended sentence on September 20, 2016, or when his five year suspended sentence was revoked in full on October 20, 2016. Appellant complains because the *Judgment and Sentence After Revocation Proceedings* includes a provision that he is to be under post-imprisonment supervision for one year after his release from custody, which will be supervised by a probation officer at $40.00 a month.

¶15 The State notes that the post-imprisonment supervision provision in the *Judgment and Sentence After Revocation Proceedings* is a scrivener's error. This Court has noted that a request to correct a scrivener's error should first be presented to the District Court by motion for order *nunc pro tunc. Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d 749, 755. Appellant has not made such a request to the District Court; therefore his second proposition should be denied.

DECISION

¶16 The order of the District Court of Comanche County revoking Appellant's five year suspended sentence in Case No. CF-2012-478 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, THE HONORABLE MARK R. SMITH, DISTRICT JUDGE

DISTRICT COURT APPEARANCES

Teressa H. Williams, Attorney at Law, P.O. Box 2095, Lawton, OK 73502, Counsel for Appellant

Kyle A. Cabelka, Asst. District Attorney, Comanche County Courthouse, 315 SW 5th St., Rm. 502, Lawton, OK 73501, Counsel for the State

APPEARANCES ON APPEAL

Jeremy Stillwell, OIDS General Appeals, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Okla. Attorney General, Sheri M. Johnson, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

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

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

¶1 I would simply affirm based on this Court's holding in *McCaskey v. State*, 1989 OK CR 63, 781 P.2d 836, and its reading of *Bearden v. Georgia*, 461 U.S. 660, 103. S.Ct. 2064, 76 L. Ed.2d 221 (1983). I conclude that the trial court in this case properly applied *McCaskey* and its correct interpretation of the *Bearden* standard. All else is tilting at windmills. There were no constitutional violations in this case.[1]

KUEHN, JUDGE, DISSENTING:

¶1 Revoking Appellant's suspended sentence in full for failure to pay fines, costs, assessments and supervision fees was an abuse of discretion, as the trial court did not make inquiry and did not make a finding on the Appellant's inability to pay, the propriety of reducing the fine or extending the time for payments, or the possibility of making alternative orders. I dissent.

¶2 In *Bearden v. Georgia*, 461 U.S. 660,103 S. Ct. 2064, 76 L.Ed.2d 221 (1983), the Supreme Court held a defendant's probation cannot be revoked (and thus converted into a jail term) for his failure to pay a court-imposed fine or restitution absent evidence and a finding the "defendant was somehow responsible for the failure or that alternative forms of punishment

were inadequate." 461 U.S. at 665. The Court further held:

> [A] sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his, he cannot pay the fine.

Id. at 672-73. The state court imprisoned Bearden "because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders." *Id.* at 674. In this way, "the court automatically turned a fine into a prison sentence." and deprived the "probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 673-74. *See also, Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 180 L.Ed.2d 452 (2011).

¶3 Under *Bearden* and *Turner,* the trial judge must inquire into Appellant's ability to pay before imprisonment. This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an inquiry into the ability to pay and any refusal to pay. If an individual is unable to pay, then the sentencing judge must consider alternative measures before imprisoning the individual. The Majority relies on *Tilden v. State*, 2013 OK CR 10, 306 P.3d 554, to say Appellant has the burden to show that he was unable to pay. *Tilden* is unconstitutional only in its holding regarding willfulness and should be overruled because it misinterprets *Bearden* and misapplies our previous law.

¶4 The State presented three witnesses to testify that Appellant was assessed the fines, costs, fees, and that he had not made a payment. The trial court did not inquire of Appellant the reasons for not paying the assessments. For some unknown reason, Appellant's counsel sat by and failed to present any argument regarding willfulness or an inability to pay on behalf of the Appellant. Interestingly, the State alleged newly committed offenses in violation of the probated sentence along with failure to pay; however the State failed to introduce any evidence of the new violations, and the trial court's decision to revoke was solely based on failure to pay. To revoke an Appellant at a revocation proceeding by presenting only evidence of failure to pay without any evidence of willfulness, instead of presenting evidence in support of the more serious violation of committing new crimes, is a dangerous and inappropriate procedure to adopt.

¶5 The Majority's holding that a defendant must present evidence at a revocation proceeding is faulty because it ignores the language of the Supreme Court's holding in *Bearden*. In *Bearden*, the Court explicitly directed all courts to conduct a hearing of a defendant's ability to pay because it is unconstitutional to revoke an indigent person's probation simply based on his inability to pay a fine or restitution. 461 U.S. at 665, 103 S.Ct. at 2069. Although the Supreme Court could easily place the onus on the defendant to request the hearing, the Court declared that "a sentencing court must inquire into the reasons for failing to pay." 461 U.S. at 673, 103 S.Ct. at 2073.

¶6 The Majority misses the mark completely. Focusing on which party in the revocation proceedings must present evidence regarding a willful failure to pay, the Majority happily places the burden solely on the defendant. *Bearden* does not stand for the proposition that defendants must prove through the presentation of evidence that they are poor or unable to pay.

¶7 The Supreme Court mandates, before putting a person in prison for debts alone, that a trial court must inquire into the willfulness of the violation.[1] Why? It is simple. Society agrees willful non-payment should be punished. Society understands the financial irresponsibility of spending taxpayer money to house persons for not paying fines and cost. Society will not imprison people for being poor, as we no longer live in colonial America and promote debtor's prison.

¶8 The Oklahoma Legislature, understanding our State prison crisis, enacted 22 O.S.Supp 2018, § 991b(D)(3), which went into effect No-

vember 1, 2018, and states: "Absent a finding of willful nonpayment by the offender, the failure of an offender to pay fines and costs may not serve as a basis for revocation, excluding restitution." The *Bearden* mandate will be codified in Oklahoma, mooting the Majority opinion in this case. A trial court must make inquiry and a finding regarding willfulness if the court is placing a person in prison for failure to pay.

¶9 The State in a revocation proceeding bears the burden of proof. If the State simply puts on evidence of non-payment and rests, they have not offered any evidence for the judge to make the required findings under the statute for willful failure to pay. If the defendant chooses to present evidence of non-willfulness, then the judge must consider that evidence in making a finding under 22 O.S. § 991b(3). The new statute and *Bearden*, do not establish a presumption of willfulness. A defendant is not required to present a defense.[2] Argument can be made that the State does not have to present evidence of a willful failure to pay, but without any evidence of willfulness, the trial Court is without a basis for a revocation.

¶10 However, this is not the end of the procedural aspects of a revocation solely for debt collection, as the judge is the gatekeeper. The judge is the last person to protect the process, as it should be. Putting someone in prison for failure to pay must be rare. As in every instance prior to incarcerating a person for failure to pay a debt, the judge must inquire of the defendant as to the reasons for the *inability* to pay. The Supreme Court recognized this important procedural step, stating "We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Bearden v. Georgia*, 461 U.S. at 672–73, 103 S. Ct. at 2073. How does the mandate of "the sentencing court must inquire" morph into "the defendant must prove it was not willful" in any logical interpretation? With the Court's ruling today, it is advancing a despicable practice, imprisoning people for being poor.

¶11 Without findings of fact that Appellant willfully failed to pay the assessments, costs, and fees through judicial inquiry, the decision to revoke the Appellant in full for five years in the Department of Corrections was an abuse of discretion and a violation of Appellant's right to due process. I would reverse the decision of the trial court.

HUDSON, JUDGE

1. The DOC website shows Appellant was released from his three year term of incarceration on July 18, 2014.

2. This Court first found that the State failed to meet its burden, as defined by *Bearden*, to prove that the defendant was responsible for the failure make restitution payments as ordered. *Stuard v. State*, 1984 OK CR 67, 681 P.2d 1120. This Court then found that the defendant had met the burden of proving good faith efforts to pay restitution and court costs. *Sparks v. State*, 1987 OK CR 247, 745 P.2d 751. Next, this Court found that the State is not required to prove that the defendant deliberately failed to pay restitution. *Patterson v. State*, 1987 OK CR 255, 745 P.2d 1198.

3. The Supreme Court notes that if there is proof the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. *Bearden*, 461 U.S. at 660 (syllabus a), 668, 668, 672, 103 S. Ct. at 2066 (syllabus a), 2070, 2070, 2073.

4. Counsel for Appellant also cites a statement made by the United States Supreme Court in *Minnesota v. Murphy* that the sentencing "court must find that [the probationer] violated a specific condition, that the violation was intentional or inexcusable, and that the need for confinement outweighs the policies favoring probation." *Murphy*, 465 U.S. 420, 438, 104 S. Ct. 1136, 1148, 79 L. Ed. 2d 409 (1984). That passage in Murphy is merely stating what the statutory and case law of Minnesota requires in a revocation proceeding. *Id.* Minnesota's statutory and case law is not applicable to revocation proceedings in Oklahoma. Other states also have statutory and/or case law, not found in Oklahoma, that provide a violation must be inexcusable or willful before probation can be revoked. *See Del Valle v. Florida*, 80 So.3d 999, 1011 (Fla. 2011) (Florida law requires a specific finding of willfulness in a revocation proceeding).

LEWIS, V.P.J., CONCURRING IN RESULTS

1. I note that Appellant committed numerous violations of the rules and conditions of his suspended sentence, including committing new felony crimes, yet the State, inexplicably, did not allege these violations in the revocation proceedings.

KUEHN, J., DISSENTING

1. The Equal Protection and Due Process Clauses of the United States Constitution ensure that an indigent probationer is not incarcerated based solely upon inability to pay a monetary obligation. *See Bearden v. Georgia*, 461 U.S. 660, 664, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); U.S. Const. amends. V, XIV. *Del Valle v. State*, 80 So. 3d 999, 1005 (Fla. 2011).

2. The Majority cites cases from other jurisdictions to support their interpretation of *Bearden* requiring the burden to shift to a defendant after the State simply proves non-payment. However, numerous other jurisdictions (including federal courts) have found that my interpretation of *Bearden* is correct. No matter the burden or the evidence presented, there must be a judicial inquiry. *See State ex rel. Fleming v. Missouri Bd. of Prob. & Parole*, 515 S.W.3d 224 (Mo. 2017); *Snipes v. State*, 521 So. 2d 89, 90 (Ala. Crim. App. 1986); *State v. Wilson*, 150 Ariz. 602, 604, 724 P.2d 1271, 1273 (1986); *Hanna v. State*, 2009 Ark. App. 809, 372 S.W.3d 375, 379(2009)(burden shifts to defendant, but only after State presents evidence of non-payment plus other evidence to show willful nonpayment); *People v. Roletto*, 2015 COA 41, ¶ 19, 370 P.3d 190, 194 (The statute in Colorado, unlike Oklahoma's statute, establishes a burden and makes proof of non-payment prima facie evidence.); *State v. Martinik*, 1 Conn. App. 70, 71-2, 467 A.2d 1247, 1248 (1983); *Del Valle v. State*, 80 So.3d 999, 1005 (Fla. 2011); *Brown v. United States*, 900 A.2d 184, 190-94(D.C. 2006); *State v. Street*, 28 Kan. App.2d 291, 293-94, 16 P.3d 333, 335-36 (2000); *State v. Myles*, 2004-264 (La.App. 3 Cir. 9/29/ 04), 882 So. 2d 1254, 1257; *Berdin v. State*, 648 So. 2d 73, 78 (Miss. 1994), overruled on other grounds by *Smith v. State*, 742 So. 2d 1146 (Miss. 1999); *State v. Fowlie*, 138 N.H. 234, 237, 636 A.2d 1037, 1039 (1994)(finding that the trial court must inquire into the reasons for failure to pay); *Medlock v. State*, 688 S.W.2d 664, 665, (Tex. Crim. App. 1985) (The Texas statute mandates, unlike Oklahoma's statute, that the defendant has to present an affirmative defense to prove not a willful violation.); *State v. Dockery*, 2010-Ohio-2365, 187 Ohio App. 3d 798, 803, 933 N.E.2d 1155, 1159; *State v. Spare*, 374 S.C. 264, 269-70, 647 S.E.2d 706, 709 (Ct. App. 2007); *Com. v. Dorsey*, 328 Pa. Super. 241, 248-49, 476 A.2d 1308, 1312 (1984); *State v. Haught*, 179 W. Va. 557, 561, 371 S.E.2d 54, 58 (1988); *De Luna v. Hidalgo Cty., Tex.*, 853 F. Supp. 2d 623, 645 (S.D. Tex. 2012); *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 645-49 (E.D. La. 2017).

Calendar of Events

December

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

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

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

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

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

24-25 **OBA Closed** – Christmas

January

1 **OBA Closed** – New Year's Day

3 **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

4 **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 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

OBA Board of Editors meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Melissa DeLacerda 405-624-8383

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

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

18 **OBA Juvenile Law Section meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tsinena Thompson 405-232-4453

2018 OK CIV APP 68

IN RE THE MARRIAGE OF GREGORY ROBERT JONES AND SAMANTHA LYNN WHITE: GREGORY ROBERT JONES, Petitioner/Appellee, vs. SAMANTHA LYNNE WHITE, Respondent/Appellant.

Case No. 115,481. October 29, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD OGDEN, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS

Steven E. Ferguson, CRABB, FERGUSON & RIESEN, Oklahoma City, Oklahoma, for Petitioner/Appellee,

Andrew R. Swartzberg, THE SWARTZBERG LAW GROUP, P.L.L.C., Oklahoma City, Oklahoma, for Respondent/Appellant.

Barbara G. Swinton, Presiding Judge:

¶1 Samantha White (Mother) appeals a trial court order finding Oklahoma has jurisdiction, dissolves the marriage between her and Gregory Jones (Father), and awards the parents joint custody of their two minor children with Fa-ther as primary custodian. We conclude jurisdiction in this child custody proceeding is contrary to Oklahoma's Uniform Child Custody Jurisdiction and Enforcement Act (OUCCJEA), 43 O.S. 2011 §§ 551-101 et seq. as applied to the record evidence. The dissolution of the marriage is affirmed but in all other respects, the order is reversed.

Facts Relevant to Jurisdiction

¶2 Mother and Father were married on February 14, 2012 in Las Vegas, Nevada. During their relationship two children were born, M.R.J and J.R.J. (the children). The family lived in Massachusetts with Father's adopted father between 2010-2012, then moved to New Hampshire for six months, and returned to the grandfather's home in Massachusetts where they resided until early 2015. Because Father wanted to find better work as a welder and to come back to his roots, the parties agreed to move to Oklahoma. The family arrived in Oklahoma City on or about March 2, 2015, where they resided with Father's aunt for six weeks and then moved into their own home in Del City, Oklahoma.

¶3 On or about May 19, 2015, the family traveled to New Hampshire for the funeral of Mother's grandfather. During their visit Mother told Father she wanted a divorce. She and the minor children remained at her mother's house, and Father returned to Oklahoma alone.

History of the Case

¶4 On May 27, 2015, Father filed a petition for separate maintenance alleging incompatibility, seeking a decree and equitable distribution of the parties' property. He also filed an application for temporary order, seeking an automatic temporary injunction and custody of the parties' two children, almost 4 and 3 years old at that time. Neither the petition nor the application includes the current location and addresses for the last five years for the minor children as required by § 551-209(A).[1]

¶5 The hearing on Father's temporary custody order was held July 16, 2015. The court minute reflects Mother did not appear, Father was awarded custody of the minor children, Mother was awarded standard visitation, and child support was reserved. The "Court Order" filed July 29, 2015, repeats the court minute findings. There is no indication in the order or anywhere in the record that Father informed the trial court that the next weekday after Mother was served in New Hampshire, she filed for and obtained a Victims Protection Order (VPO) based on allegations of domestic abuse by Father, that he appeared at the scheduled hearing, or its status of the VPO at the time of the temporary order hearing.

¶6 On August 25, 2015, Father applied for and the trial court approved an Order Nunc Pro Tunc, which amended the July 29, 2015, Order by correcting the initials of one of the minor children. The Order Nunc Pro Tunc was filed August 25, 2015.

¶7 The record demonstrates Father obtained the children from Mother in mid-September,

2015, after help from his relatives and the local sheriff. It is undisputed that Mother had no prior notice of the temporary custody order until she was given a copy the day the minor children were removed from her custody.

¶8 On October 21, 2015, Mother filed a Motion to Vacate Custody and Support Order, contending "Oklahoma lacks jurisdiction pursuant to 43 O.S. § 551-201," because "the minor children were not residents of Oklahoma for six months before the commencement of the proceeding" and "Massachusetts has jurisdiction over the children." No response was filed.

¶9 By order filed December 21, 2015, the trial court granted Mother visitation over the Christmas holiday from 6 p.m. December 27, 2015 until January 4, 2016. On January 8, 2016, Mother filed a Motion to Modify Temporary Order filed July 29, 2015, alleging "substantial and material changes"[2] since the order was "entered by default." Mother further alleged "at the time Father knew [she] was living out of state and would be unable to exercise standard visitation with the minor children." The Certificate of Delivery states the notice of the motion hearing was faxed to Father's counsel on January 8, 2016.

¶10 The hearing on Mother's motion to modify the temporary custody order was held January 13, 2016. As noted therein, counsel announced and the trial court approved the parties' agreement for joint custody with rotating 6-week periods (first rotation scheduled to begin January 15 and last rotation would end August 12, 2016). The parties also agreed that "the receiving party shall pay transportation expenses" and "shall have a 1 day window for transportation w[ith] 7 days notice."

¶11 On January 29, 2016, Father filed an "Amended Petition for Divorce" based on the parties' incompatibility.[3] He alleged the facts of his marriage to Mother, birth of their two minor children in Massachusetts, and that "[b]oth parties have resided in Oklahoma for more than six consecutive months immediately preceding the filing hereof." In a separate paragraph, Father alleged the court has jurisdiction "to hear and determine all issues pertaining to the [parties'] minor children" because "Oklahoma is the 'home state'... as that phrase is defined by [OUCCJEA]."[4] The paragraph intended for the minor children's residences for the past five years was left blank. Father requested, inter alia, an order for Mother to pay child support and for equitable division of the marital estate and debts.

¶12 On Feb. 23, 2016, the Journal Entry that details the parties' temporary joint custody agreement with the rotating 6-week schedule was filed. An order for appointment of a Guardian ad Litem (GAL) for the children was filed March 16, 2016.

¶13 On June 30, 2016, Mother filed a "Response and Cross-Claim" (Answer and Cross-Petition). Her Answer admits Father's jurisdictional allegations, i.e., "both parties have resided in Oklahoma for six consecutive months" and "Oklahoma is the home state under the [OUCCJEA]...," which same allegations she re-alleges in her Cross-Petition.

Hearing on Jurisdiction

¶14 At the one-day hearing on August 16, 2016, the trial judge requested counsel to announce what had first been brought to his attention that morning in chambers — "a jurisdictional issue." Mother's counsel stated no response had been filed to her motion to vacate the temporary custody order, but he thought the issue had been waived based on the parties' court-approved, temporary joint custody agreement and their subsequent pleadings that admitted Oklahoma has home state jurisdiction. The trial court asked to explain her admission, to which Mother's counsel responded, "my client would like to get this wrapped up today, would like to get it wrapped up in Oklahoma."

¶15 After asking if a hearing on his client's motion to vacate had been set and learning the reasons why there had been no hearing on the motion to determine jurisdiction,[5] the trial judge voiced his concern that Father "has yet had the opportunity to respond to the jurisdictional challenge." Father's counsel responded, "quite frankly, we thought it was waived because we entered an agreement and then I filed my amended ... petition for divorce ... they agreed it's home state ... [in] a counter request for divorce in this Court."

¶16 After reminding counsel of his conversation with them in his chambers that morning,[6] the trial judge stated "the UCCJEA governs these jurisdictional disputes." He inquired specifically about and was then told by Mother's counsel that "Nothing has been filed in any other jurisdiction." Through direct questions to Father, the trial judge next established that he

still resides in Oklahoma and that Mother resides in Massachusetts.

¶17 The trial judge asked Mother about how long she had lived in that state, to which she replied, "about a year." After swearing in both parties, the judge's questions to Mother established that on May 27, 2015, she "was staying with her mother in New Hampshire" where she had been "about a month," and three months before that, Mother and the children were in Oklahoma, and before that, they were in Massachusetts for about five years.

¶18 The judge's questions to Father established the parties had lived together in Oklahoma and that they moved here "on March 1st, 2015, we lived [here] from March 1st until we went to her grandfather's funeral on May 19th where she did not return back to Oklahoma." The judge asked, "where was the child?" Father responded, "With her."

¶19 At the same hearing, the GAL reminded the court that subject matter jurisdiction cannot be waived, and the trial judge responded "even if it cannot be waived, there still has to be determination as to what state has jurisdiction." Counsel for the parties and the GAL agreed with the trial court's conclusion that "this matter has not been properly presented to the Court" and "the motion challenging jurisdiction should have been heard well before today."

¶20 The judge next asked Mother "Tell me how it is that you signed a verified petition swearing that the allegations contained therein on June 30, 2016, paragraph 3-A, which you state Oklahoma is the home state." She replied, "I tried to file in Massachusetts." The trial judge stated, "No you need to answer my question. Why did you do that?" Mother replied, "I thought it was the home state, sir." The trial judge stated, "This is Court's Exhibit No. 1. All right. We're ready to proceed."[7]

¶21 Father testified that Mother "was served the petition and application for temporary order" in New Hampshire after 5 pm. on Friday, May 29, 2015.[8] He further testified the next full work day she applied for a VPO which was granted in his absence.[9] Father testified the reasons Mother gave for the VPO was "he beat her and played Russian roulette with her." He also testified he hired an attorney in New Hampshire and they both attended the VPO hearing at which the question was raised about court proceedings in Oklahoma. Without objection, Father testified the trial judge in New Hampshire asked Mother why she filed the VPO, her only response was she did not want to go back to Oklahoma, and the trial judge informed Mother she had to appear in Oklahoma regardless of the VPO. Father further testified the trial judge continued the hearing "to read further into the evidence" and at the second hearing, Mother dismissed the VPO.

¶22 "Without having the opportunity to review the case law," the trial court announced his findings, as follows: 1) "there is a distinction between not waiving jurisdiction and affirmatively asserting that Oklahoma has jurisdiction and seeking affirmative relief from [this] Court"; 2) it has jurisdiction "both based on the pleadings, but in particular the Cross-Petition," in which Mother verified that "Oklahoma has home state jurisdiction"; 3) "the fact it seems that there was an amended petition that was filed that would, at that point in time more clearly then perhaps even at that time that the separate maintenance petition was filed, jurisdiction would be in the State of Oklahoma"; and 4) "because no other state was exercising jurisdiction and no other state has any other type of action filed, Oklahoma has jurisdiction."

¶23 At the September 30, 2016 hearing scheduled to review the proposed journal entry, the first issue presented was what jurisdictional findings should be included in the order. The trial court approved both his preliminary findings and final ruling on jurisdiction.

¶24 The "Order" filed October 7, 2016, includes the trial court's jurisdictional findings, as announced, and adjudges, orders and decrees "Oklahoma has proper jurisdiction, Oklahoma County [has] proper venue, either by virtue of amended petition for divorce or the cross-petition filed by [Mother]." In separate sections of the same order the court grants the dissolution of the parties' marriage, awards joint custody of the minor children to the parties with Father as primary custodian, determines child support, and provides for tax exemptions. Mother's appeal followed.

Standard of Review

¶25 Mother's Brief in Chief includes a single proposition alleging legal error with the trial court's joint custody award. However, "[q]uestions of jurisdiction may be raised at any time, either in the trial court or on appeal; and even in the absence of an inquiry by the litigants,

[this] court may examine jurisdiction." *Woods Petroleum Corp. v. Sledge,* 1981 OK 89, ¶ 1, 632 P.2d 393. Appellate courts "are not bound by the trial court's [jurisdictional] findings but must independently judge the basis for exercising jurisdiction." *Joliff v. Joliff*, 1992 OK 38, ¶ 7, 829 P.2d 34, 37 (finding trial court lacked subject matter jurisdiction under the UCCJA [repealed 1998]).

Analysis

¶26 The trial court's oral finding that "the UCCJEA" governs this custody dispute is not included in the appealed order, and there are no statutory citations to the OUCCJEA. The Act applies to a "child custody proceeding," defined by § 551-102(4) as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." The term "includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear." *Id.* Mother's testimony that the children resided with both parents in Massachusetts and Oklahoma before Father filed his petition supports that his initial action for separate maintenance and custody is a "child custody proceeding" under the OUCCJEA.

¶27 We assume from the appealed order's single reference to "home state" and the marital dissolution itself that the court's finding Oklahoma has jurisdiction refers to initial child custody jurisdiction under § 551-201 of the OUCCJEA.[10] Section 551-201(A) "is the exclusive jurisdictional basis for making a child custody determination by a court of this state." § 551-201(B) of the OUCCJEA.[11] As defined therein, "'child custody determination' means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child" and "includes a permanent, temporary, initial, and modification order." § 551-102(3).

¶28 Like the UCCJA,[12] adherence to and satisfaction of the OUCCJEA's mandatory prerequisites allow a court of this State to exercise subject matter jurisdiction, i.e., the power and authority to consider and determine the issue of child custody. *See Joliff*, 1992 OK 38, ¶ 7, 829 P.2d at 36-37. Parties can neither waive subject matter jurisdiction nor confer such jurisdiction by consent. *Id.*; *see also Matter of C.A.D.*, 1992 OK 89, n. 36, 839 P.2d 165.

¶29 Since *Joliff*, Oklahoma courts have recognized that parties may consent to subject matter jurisdiction only if authorized by statute. *See Bazilewich v. Bazilewich*, 2014 OK CIV APP 77, ¶ 12, 334 P.3d 958, 960 (citing *Knowlton v. Knowlton*, 2005 OK CIV APP 22, ¶ 5, 110 P.3d 578, 579, and its authority, *Barrett v. Barrett,* 1994 OK 92, 878 P.2d 1051, 1054). We find no published Oklahoma opinions interpreting § 551-201(A) to determine if it authorizes such consent to initial child custody jurisdiction, as the trial court basically found in this case.

¶30 Statutory interpretation presents a question of law. *Fanning v. Brown*, 2004 OK 7, 85 P.3d 841. The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, which is first sought in the language of a statute. *Id.* When the language of a statute is plain and unambiguous, no occasion exists for application of rules of construction, and the statute will be accorded meaning as expressed by the language employed. *City of Durant v. Cicio*, 2002 OK 52, 50 P.3d 218. We do not limit our consideration to a single word or phrase, but shall construe together the various provisions of relevant enactments, in light of their underlying general purpose and objective, to ascertain legislative intent. *World Publishing Co. v. Miller,* 2001 OK 49, ¶ 7, 32 P.3d 829, 832.

¶31 Like the UCCJA, the purpose of the OUCCJEA is to "avoid jurisdictional competition and conflict with courts of other states." *See* § 551-101, official comment. Another purpose is to "promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child." *Id.*

¶32 We first acknowledge two OUCCJEA statutes do plainly and unambiguously provide for judicial consideration of the parties' agreement and/or acquiescence to jurisdiction. *See* §§ 551-207(B)(5) and 551-208(A)(1). However, consideration of such an agreement is applicable only when "a court of this State which has jurisdiction under [the OUCCJEA]" is deciding whether to decline to exercise its jurisdiction because "it is an inconvenient forum" (§ 551-207) or "a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." § 551-208. The only issue raised and decided at the hearing on the merits was whether the trial court had jurisdiction, and there is no indication at that same hearing that

§§ 551-207 or § 551-208 was raised or considered by the trial court.

¶33 Section 551-201(A) expressly refers to §§ 551-207 and § 551-208 several times in its body:[13]

> A. Except as otherwise provided in [§ 551-204] of this act, a court of this state has jurisdiction to make an initial child custody determination only if:
>
> 1. This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state, but a parent or person acting as a parent continues to live in this state;
>
> 2. A court of another state does not have jurisdiction under paragraph 1 of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [§ 551-207 or § 551-208] of this act, and:
>
> a. the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence, and
>
> b. substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
>
> 3. All courts having jurisdiction under paragraph 1 or 2 of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under [§ 551-207 or § 551-208] of this act; or
>
> 4. No court of any other state would have jurisdiction under the criteria specified in paragraph 1, 2, or 3 of this subsection.

¶34 Interpreting § 551-201(A) as a whole, its subsections plainly and unambiguously refer to application of §§ 551-207 and 551-208 by a court of another state to determine whether to decline to exercise its jurisdiction of the children because Oklahoma is the more appropriate forum to determine custody. Consideration, if any, to the parties' agreement or acquiescence to jurisdiction is therefore limited to that determination by the other state court. Based on the plain and unambiguous language, we conclude § 551-201(A) does not authorize the parties to agree, consent, acquiesce or stipulate to subject matter jurisdiction for purposes of initial child custody jurisdiction under the OUCCJEA. To interpret otherwise, would clearly ignore its purposes.

§ 551-201(A) - Initial Child Custody Jurisdiction

¶35 Unlike the UCCJA section by which a court of this State could assume jurisdiction if any one of four independent circumstances existed, the OUCCJEA gives priority to "home state" jurisdiction in § 551-201(A)(1), with the goal of preventing simultaneous child custody proceedings in different states.[14] Two OUCCJEA definitions establish the critical time for determining home state status. First, "home state" means "the state in which a child lived with a parent ... for at least six (6) consecutive months immediately before the commencement of a child custody proceeding." § 551-102(7). The term "commencement" means "filing of the first pleading in a proceeding." § 551-102(5).

¶36 Applying these definitions to § 551-201(A)(1), we conclude Oklahoma is not the "home state." Father commenced this child custody proceeding when he filed the "first pleading" on May 27, 2015, i.e., his petition for separate maintenance and application for temporary order. The undisputed facts demonstrate the children had not resided in Oklahoma with their parents for six consecutive months immediately preceding that date. To the extent the trial court relied on Father's Amended Petition for Divorce in deciding jurisdiction of the children, we conclude such finding is contrary to the OUCCJEA and its purposes.

¶37 The first requirement for Oklahoma's jurisdiction under subsection (A)(2) is satisfied only if "a court of another state does not have home state jurisdiction or the home state has declined to exercise jurisdiction." Under the facts of this case, New Hampshire does not have home state jurisdiction because the children were there for less than a week when Father filed his separate maintenance petition. Massachusetts is not the home state because the children lived there only the first 3½ months out of the six consecutive months immediately preceding the date Father filed his separate maintenance petition, May 27, 2015.[15]

¶38 Since a court of another state does not have home state jurisdiction, Oklahoma may have jurisdiction if the next two requirements for jurisdiction under (A)(2) are met: (1) the child and at least one parent ... have a significant connection with Oklahoma other than mere physical presence; and (2) there is available in Oklahoma substantial evidence concerning the child's care, protection, training and personal relationships.

¶39 Our review of the record reveals Father was born in Oklahoma, and his biological father, uncles, aunts, cousins and grandfather still live in this state. Having lived here only 2 1/2 months, there is neither record evidence of the minor children's "significant connection" to Oklahoma nor "substantial evidence" available here of the children's past and future care, protection, training and personal relationships. *See Wood v. Redwine*, 2001 OK CIV APP 115, ¶ 10, 33 P.3d 53 (citing *Joliff v. Joliff*, 1992 OK 38, ¶ 9, 829 P.2d 34, 37-38). In comparison, the minor children lived with their parents in Massachusetts the majority of time since their birth, where Mother and the children moved after staying in New Hampshire with Mother's mother. Father's biological father and his wife also live in Massachusetts. Considering Mother and the minor children's significant connection with Massachusetts and lack of significant connections with Oklahoma, we find this State does not have jurisdiction under § 551-201(A)(2).

¶40 For a court in Oklahoma to have jurisdiction under § 551-201(A)(3), "all states that would have jurisdiction under (A)(1) or (A)(2) are required to decline to exercise jurisdiction under either § 551-207 or § 551-208." There is no home state under the facts of this case, and Massachusetts is the only state with significant connections. The lack of any record evidence that a court of Massachusetts has declined to exercise its jurisdiction pursuant to either § 551-207 or § 551-208 eliminates Oklahoma's jurisdiction of the subject minor children under § 551-201(A)(3).

¶41 Pursuant to § 551-201(A)(4), a court of this state would have jurisdiction only if "no court of any other state would have jurisdiction under the criteria specified in paragraphs 1, 2, or 3." Because Massachusetts is the only state with significant connection jurisdiction under § 551-201(A)(2) and there is no evidence that state has declined to exercise its jurisdiction pursuant to either § 551-207 or § 551-208, the default provision does not apply to this case.

¶42 Based on application of the undisputed facts to § 551-201(A), the trial court's finding of jurisdiction of the minor children is contrary to law. Without initial jurisdiction under the OUCCJEA, the trial court's order, which in part, awards joint custody to the parties, is void for lack of subject matter jurisdiction. As a consequence, all of the prior custody orders filed in the proceeding are also void. The award of joint custody and related issues are vacated.

Jurisdiction of the Parties' Action for Marital Dissolution

¶43 Title 43 O.S. 2011 § 102, which was not specifically addressed at the hearing, requires "the petitioner or the respondent in an action for divorce or annulment of a marriage must have been an actual resident, in good faith, of the state for six (6) months immediately preceding the filing of the petition." Father's petition for separate maintenance alleges he "is now and has been for more than six (6) months an actual resident, in good faith, of [Oklahoma]," but the word "six" and numeral "6" is crossed out with no identifying initials.

¶44 It has long been held that Oklahoma's "statutory residency requirements are, of course, jurisdictional and establishment of a domicile for a statutory period of time is a prerequisite to the court's power to render a divorce." *Matter of Adoption of B.R.H.*, 1991 OK CIV APP 125, ¶ 18, 823 P.2d 383 (citing *Meyers v. Meyers*, 1948 OK 246, 199 P.2d 819 and *Burnworth v. Burnworth*, 1977 OK CIV APP 52, 572 P.2d 301) (emphasis added).

¶45 "The phrase 'actual resident' and the word 'resident' as used in Title 12 O.S. 1951 § 1272 [now 43 O.S.2011 § 102][16] ... contemplate an actual residence with substantially the same attributes as are intended when the word 'domicile' is used." *Bixby v. Bixby*, 1961 OK 100, ¶ 0, 361 P.2d 1075 (syllabus 1). *See also Chapman v. Parr*, 1974 OK 46, ¶ 23, 521 P.2d 799, 802; *Clark v. Clark*, 1961 OK 80, ¶ 0, 361 P.2d 207 (Syllabus 2). "The question of domicile in an action for divorce is one of fact, to be determined from the evidence in the case." *Bixby*, ¶ 15 (quoting *Pope v. Pope*, 1926 OK 19, ¶ 0, 243 P. 962 (Syllabus 4)). "The controlling fact to be considered is the fact of intention and to determine this fact the trial court, and this court on appeal, may take into consideration all the movements, transactions, and attending circumstances of the party or parties involved in

the question." *Id.* Such consideration includes "the actions or conduct of a person after arriving at a given place" which is asserted to be that person's new residence. *Id.*, ¶ 13. "To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and ... a new domicile acquired by actual residence in another place with intention of making it a permanent home." *Id.*, ¶ 13.

¶46 We agree with the trial court's finding that jurisdiction was more appropriate under the amended petition for divorce than at the time he filed his petition for separate maintenance pursuant to 43 O.S. § 102. On this record, the undisputed testimony establishes Father came to Oklahoma with the intent not to return to Massachusetts and to make his home in Del City, Oklahoma his permanent home. The court's finding of jurisdiction over the parties' action for marital dissolution is affirmed.

Custody

¶47 Mother argues that the trial court misapplied the statutes relevant to custody and domestic violence. To prevent further delay and potential harm to the minor children and to provide guidance in this initial child custody determination involving domestic violence, this Court is compelled to explain that even if the trial court had subject matter jurisdiction of the children, its joint custody award would nevertheless have been vacated based on legal error, i.e. incorrect interpretation and improper application of Oklahoma statutes requiring courts to consider evidence of domestic violence, stalking or harassment.

¶48 At the hearing on August 16, 2016, Father testified during direct examination that he was involved in his children's lives, attended church regularly, and had a job as a welder. Father described how DHS was called to his house on November 29th, 2015 when allegations were made against him about loose firearms in the house, weapons in the window sills, no food in the house, dog urine and feces throughout the house, and the children sleeping in urine soaked bed sheets. DHS inspected his house for approximately an hour, and thereafter made no finding of neglect, concluding that the children were safe. The record does not have the DHS report or conclusion.

¶49 Father was cross examined about numerous threatening social media posts.[17] The father denied: 1) this custody case was about revenge; 2) he was using the kids as a control mechanism; 3) his Snapchat posts were directed towards the Mother; 4) kicking the toy out from under their son; 5) ever physically abusing Mother; 6) ever verbally abusing her; and also 7) having any guns at his house because he had sold them.[18] He did admit however that some of his Snapchat posts were directed at the Mother's boyfriend.

¶50 Mother testified to the multiple episodes of domestic abuse. She recalled: 1) physical abuse, starting in July 2010 when he slapped her; 2) he strangled her at his aunt's house in Oklahoma when he came up behind her while she was hanging clothes; 3) demeaning her by telling her that nobody wanted her; and 4) his family thought she was crazy. Mother further testified that Father sought revenge on her for leaving him, by taking their kids from her, and using this as a way to control her. Also, she believed that he filed this action as a way of getting back at her for not doing things like he wanted, or failing to return all of his phone calls.

¶51 GAL reported that the Mother stated Father had thrown her against a door and slapped her, and that he kept her from leaving by holding on to her keys and phone. The GAL report described a sexual assault during the marriage, when the Mother confronted him about her suspicions of him cheating.[19] Father's version was different; he admitted to them having an argument about his fidelity, but indicated that they later made up and he made this statement during voluntary sexual contact. The GAL report determined Mother's version was more credible.

¶52 The GAL included in her report that the children both love their parents and they have no complaints about how they are being treated at either house. However, one reported concern was how Father spoke negatively about Mother's boyfriend to the children, which she felt was damaging. Significantly, the GAL found Father harbors a lot of anger. The focuses of the GAL's concerns are Father's social media posts, about which she stated, "At best they are very immature; at worst they are overtly aggressive. And I think that tells you who Mr. Jones is and it is because of those reasons I am recommending that custody be with Mom and that we have long distance visitation with Dad."

¶53 After the GAL concluded her report, the court inquired how the children were returned

to Oklahoma from Massachusetts in September. The parties were unsure if this was enforced by a writ from Oklahoma, but believed there was a court order and an affidavit from Father giving his parents permission to execute the court order and obtain the children. The court addressed concerns regarding "parental alienation" by Mother against Father. These concerns related to the children not being returned to Father when his six week rotation began a week before the trial, and the children not returning from Massachusetts to Oklahoma at the time of trial. Mother explained there was confusion between the attorneys regarding transporting the kids as cost-effectively as possible, because it was the start of the school year in Massachusetts. Mother denied intent to violate a court order. Mother testified that the text communication with Father had established a need for the attorneys to discuss the children's presence.

¶54 Additionally, the court inquired of the GAL about the basis of the Civil Protection Order in New Hampshire. She noted that "there might be some indication that Mr. Jones has been inappropriate with Ms. White in my report." The court was concerned with the judge in New Hampshire not granting the VPO, and whether Mother filed it so that she wouldn't have to return to Oklahoma. The GAL explained that the mother's testimony was that she filed it because she was afraid to come back to Oklahoma and that Mother asked the judge to dismiss the VPO, because she did not think it was in the best interest of her children.

¶55 The court was concerned the children were not at trial. Mother explained that her current employment does not afford her the expense of bringing her children with her. The trial court voiced his concern with alienation of the children by Mother, with which the GAL specifically disagreed. The trial court did not accept the GAL report, instead finding there was alienation, and awarded custody to Father as the primary custodian and final decision maker.[20]

¶56 At the court's ruling, Mother's counsel requested the Court "to elaborate on [43 O.S. 2011] § 109.3 ... whether or not it found a preponderance [of the evidence]?" The Court responded:

> There's no finding of that nature. In fact, the way that Statute reads if there has been a determination. There was no determination by any other Court, there's been no evidence presented that there was ever a filing of a domestic abuse complaint, other than the one in New Hampshire, which it was dismissed. And the testimony by [Mother] on the stand was that, the Court finds that she stated that, if not the reason that she did it, filed the VPO action, was so she wouldn't have to return to Oklahoma.

The court added "But there's no such finding. If there were such finding, then of course I would have to take that into consideration."

¶57 The court next asked Mother's counsel, "you particularly mentioned 43 O.S. § 113, is that correct?" Mother's counsel responded, "43 O.S. § 109.3." The trial court announced "Okay. Court has also read 113, particularly 113. The Court makes no such findings after having read [§] 113.[21] With regard to 109.3, Court makes no such findings there has been a preponderance of the evidence and therefore 109.3 has no bearing on this order." These announced findings are found in the last three paragraphs of the appealed order.

¶58 The statute about which Mother's counsel specifically questioned the trial court, 43 O.S. 2011 § 109.3, is titled "Custody, guardianship, or visitation cases - Evidence of Domestic Abuse" and provides as follows:

> In every case involving the custody of, guardianship of or visitation with a child, the court shall consider evidence of domestic abuse, stalking and/or harassing behavior properly brought before it. If the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence, there shall be a rebuttable presumption that it is not be in the best interest of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established.

The Legislature's intent that a trial court may not ignore evidence of domestic abuse and related conduct is clearly evident from § 109.3's plain and unambiguous language that "the court shall consider evidence of domestic abuse, stalking and/or harassing behavior properly brought before it" (emphasis added). The elevated status of such evidence is also clear from the Legislature's enactment of § 109.3's "rebuttable presumption" that any type of custody or shared parenting plan, including

residence with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not in the best interest of the child."[22] Pursuant to § 109.3, the rebuttable presumption is raised "[i]f the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence."

¶59 In Oklahoma, a "rebuttable presumption operates to impose upon the opposing party the duty to offer evidence to the contrary." *Conaghan v. Riverfield Country Day School*, 2007 OK 60, ¶ 13, 163 P.3d 557. When such evidence is introduced, "the presumption disappears, leaving in evidence the basic facts which are to be weighed." *Id.*, ¶ 13.[23]

¶60 The request by Mother's counsel for the trial judge "to elaborate on the preponderance of the evidence" basically posed two questions: 1) did her evidence of domestic abuse and related behaviors fail to meet § 109.3's standard, or 2) if her evidence established the occurrence of such behavior so that the rebuttable presumption arose, did Father's evidence to the contrary result in overcoming the presumption against custody to Father? As the trial court's response and finding in his appealed order demonstrate, neither question was answered based on his interpretation that § 109.3 applies only if there has been a prior "determination" of domestic abuse or related behavior by another court.

¶61 Section 109.3, however, does not include the term "determination" on which the trial court's interpretation relied. Instead, that term is found in 43 O.S. 2011 § 109(I)(1), one of several Oklahoma family law statutes, which, like § 109.3, specifically direct judicial consideration of evidence of domestic abuse and related behaviors in child custody disputes. Pursuant to § 109(I)(1):

> In every proceeding in which there is a dispute as to the custody of a minor child, a determination by the court that domestic violence, stalking, or harassment has occurred raises a rebuttable presumption that sole custody, joint legal or physical custody, or any shared parenting plan with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not in the best interest of the child, and it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, harassing or stalking behavior.

(Emphasis added.) Section 109(I)(2) includes the definition of the terms "domestic violence" and other related conduct, "stalking" and "harassment," for purposes of § 109(I). Sections 109(I)(3) - (I)(5) include additional mandates for the trial court when domestic violence is alleged in custody disputes.[24]

¶62 There is no definition of "determination" in § 109(I)(2) or other related statutes, but its common meaning is "the act of making or arriving at a decision" or "the act of settling a dispute...esp[ecially] by a judicial body." Webster's II New College Dictionary, 3rd Ed. (2005), p. 315. Based on § 109(I)(1)'s plain and unambiguous language, a "determination by the court" refers to the decision made in the pending custody dispute "that domestic violence, stalking, or harassment has occurred" between the perpetrator and non-perpetrator. No prior determination of such occurrence by another court in a domestic abuse case or otherwise is required for application of either § 109.3 or § 109(I)(1).

¶63 In this child custody proceeding, we conclude the trial court erred as a matter of law by misinterpreting the term "determination" in § 109(I)(1) as requiring a prior determination of domestic violence, stalking or harassment by another court and by failing to apply § 109.3's presumption based on that same misinterpretation.

CONCLUSION

¶64 As to the custody of the minor children, the order on appeal is reversed for lack of subject matter jurisdiction under the OUCCJEA, and all custody and child support orders are therefore vacated and void. The custody of the children must be adjudicated in Massachusetts, unless residency changes of the parties have since changed and now allow jurisdiction to be proper in Oklahoma. If Oklahoma becomes the proper forum, domestic violence findings should be made. The order dissolving the marriage of the parties is affirmed.

¶65 REVERSED IN PART, AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

GOREE, V.C.J., and MITCHELL, J., concur.

Barbara G. Swinton, Presiding Judge:

1. Except in cases where temporary emergency jurisdiction is sought, "[a] court of this state ... before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to [§ 551-209]." § 551-206(B). Section 209(A) also requires "each party, in its first pleading or in an attached affidavit" to provide "the names and present addresses of the persons with whom the child has lived during that period." For additional requirements, *see* § 551-209(1)-(3). No affidavit is attached to Father's petition or application in the appellate record. As here, when such omissions in the pleadings exist, trial judges are authorized on "its own motion, [to] stay proceedings until the information is furnished." § 551-209(B).

2. The alleged changes included: "Father currently lives in a home that is not suitable for the minor children," the refrigerator has "very little or ... rotting food," the children were sleeping on mattresses on the floor with his girlfriend's two children, the dog in the home is malnourished, and Father "continues to harass Mother with picture messages not conducive to him having custody." The attached Exhibit A includes eleven pictures of these conditions.

3. There is no petition for divorce or for marital dissolution in appellate record and the certified court appearance docket has no entry for the filing of the same.

4. For the definition of "home state," Father also cited the federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A, and Oklahoma"s Uniform Interstate Family Support Act, 43 O.S. § 601-101 et seq. Mother relied on the same authorities in her Cross-Petition.

5. Mother's counsel explained a hearing had been set, there was a problem with service with counsel, and it was reset to January 13, 2016, before which hearing the parties agreed to temporary joint custody.

6. The trial judge "directed the parties to be here... because of the seriousness of the issues with regard to the minor child ... enrolled [in kindergarten] in both Massachusetts and in Oklahoma and that a determination perhaps needs to be made" and he had "suspended a trial that was continuing so that this matter could be taken up."

7. There is no Court's Exhibit No. 1 listed in the August 16, 2016 Transcript, but considering prior questions the judge could only be referring to a copy of Mother's "Response and Counterclaim" filed June 30, 2016.

8. The appellate record and certified court appearance docket both lack an entry for return of service for the petition and application on Mother. The record does include the Court Minute from the July 16, 2016 temporary order hearing & July 29, 2015 "Court Order," both of which expressly state "Mother was served May 29, 2015." At the August 16, 2016 hearing, Mother replied "yes" to the cross examination question, "you filed for a VPO in New Hamphire and ironically you filed that the next working day after you got served Oklahoma papers, didn't you?" Tr., p. 90, LL 2-5.

9. Neither Mother's VPO application nor any other documentation from that out of state proceeding is in the record. Under the OUCCJEA"each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding." § 551-209(D). "Child custody proceeding" includes a proceeding for protection from domestic violence, § 551-102(4), which Father's admission confirms was Mother's stated reason for obtaining it. Therefore, Father breached his continuing duty to inform the trial court about the VPO in New Hampshire which was granted only 2-3 days after Father's petition.

10. Pursuant to the Official Comment for § 551-201, "this section provides mandatory jurisdictional rules for the original child custody proceeding."

11. All citations to statutes in this memorandum opinion are to the 2011 version of OUCCJEA, unless otherwise identified.

12. In 1998, the Legislature repealed the UCCJA and enacted the OUCCJEA.

13. Section 551-201(A) expressly refers to one other UCCJEA statute, § 551-204, which it designates as an exception to initial child custody jurisdiction. Section 551-204 permits "a court of this state to assume temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." There are no supporting record facts for this type of jurisdiction under the OUCCJEA.

14. Except for temporary emergency jurisdiction, § 551-206(a) provides a court in Oklahoma "may not exercise its jurisdiction" if a child custody proceeding has already been commenced in another state's court that has "jurisdiction substantially in conformity with [OUCCJEA] unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under [§ 551-207] of this act."

15. The result is the same whether applying the OUCCJEA, or the UCCJA, which Massachusetts applies. Under the UCCJA, "home state" means "the state in which the child immediately preceding the date of commencement of the custody proceeding resided with his parents ... for at least 6 consecutive months." M.G.L.A. 209B § 1. This definition is basically identical to the OUCCJEA. Although Massachusetts "had been the children's home state within six months before the date of the commencement of the proceeding" and the children "were absent from [Massachusetts]," its exercise of extended home state jurisdiction requires "a parent ... continues to reside in [Massachusetts]." M.G.L.A. 209B § 2. That requirement is missing in this case, since both parents moved to Oklahoma.

16. Except for its application to "the plaintiff in an action for divorce" and inclusion of county residency requirements, § 1272's terms are substantively identical to § 102.

17. We do not detail Father's social media posts to Mother, the majority of which contain obscene and offensive language or gestures. *See* Respondent's Exhibits 1-4, 7.

18. Contrary to Father's testimony, Charles Jones, Father's adopted father, testified they had planned to go shooting the day before trial, but "it didn't happen." Mr. Jones confirmed they would have used Father's guns to go shooting and that he still owns guns.

19. *See* Court's Exhibit 1, "Guardian Ad Litem Report," Facts, ¶ 2. For the record, we note the GAL admitted at the September 30, 2016 hearing that she forgot to admit her report at the hearing. Tr. p. 9. All of the parties agreed to supplement the trial record to incorporate her report, after it was admitted as marked by Mother's Counsel, "Court's Exhibit 1." Tr. p. 10-11.

20. "Parental alienation" is not a recognized factor for custody determination when domestic violence is at issue. 43 O.S. § 111.4.

21. Title 43 O.S. 2011 § 113 addresses when a court may consider a child's preference for custody or visitation, and in subsection (C) provides "[t]here shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference." It is unclear why the trial court also considered this statute because the subject minor children were only 5 and 3 years old when the matter was heard.

22. The Supreme Court of North Dakota, in applying a similar statute to Oklahoma's section 109, in *Helbing v. Helbing*, 532 N.W.2d 650 (N.D. 1995), held that "[t]he trial court must give paramount consideration to evidence of domestic violence and make specific findings to consider its effect on custodial placement." *Id.* at 652.

23. "A presumption is a procedural tool." *Conaghan*, 2007 OK 60, ¶ 11. Errors in practice and procedure that do not affect a party's substantial rights are, on appeal, considered harmless. *Teague v. United Truck Service*, 1972 OK 97, ¶ 14, 499 P.2d 380. Contrary to § 109.3, the trial court did not consider Mother's evidence of domestic abuse and/or harassment based on his statutory misinterpretation and failed to apply the presumption, which prevented it from properly weighing the evidence relevant to § 109.3. *See Norman v. Mercy Memorial Health Center, Inc.*, 2009 OK CIV APP 55, ¶ 19, 215 P.3d 841, 845. A parent has a fundamental right to the care and custody of his or her child that is protected by the United States and Oklahoma Constitutions. Such error is not harmless.

24. Pursuant to § 109(I)(3), "[i]f a parent is absent or relocates as a result of an act of domestic violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation." Pursuant to § 109(I)(4), "[t]he court shall consider as a primary factor, the safety and well-being of the child and of the parent who is the victim of domestic violence or stalking behavior, in addition to other facts regarding the best interest of the child." Pursuant to § 109(I)(5), "[t]he court shall consider the history of the parent causing physical harm, bodily injury, assault, verbal threats, stalking, or harassing behavior, or the fear of physical harm, bodily injury, or assault to another person, including the minor child, in determining issues regarding custody and visitation."

2018 OK CIV APP 69

SOUTHWEST ORTHOPAEDIC SPECIALISTS, P.L.L.C., a domestic professional limited liability company, Plaintiff/Appellee, vs. IRA WAYNE ALLISON, an individual; and ALLISON LEGAL, PLLC, a domestic professional

limited liability company, Defendants/ Appellants.

Case No. 116,348. October 30, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Riane T. Fern, M. Richard Mullins, Ronald T. Shinn, Jr., MCAFEE & TAFT, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma for Plaintiff/Appellee

Gaylon C. Hayes, HAYES LEGAL GROUP, P.C., Oklahoma City, Oklahoma and Mary P. Tate Westman, MARY WESTMAN LAW, Norman, Oklahoma for Defendants/Appellants

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Ira Wayne Allison and Allison Legal, PLLC (collectively Allison), appeal the district court's denial in part of a motion to dismiss the lawsuit of Southwest Orthopaedic Specialists, P.L.L.C. (SOS), pursuant to the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §§ 1430 through 1440 (OCPA or the Act). On review, we find that SOS failed to make the prima facie showing of damages required by the Act and failed to show that the computers in question were subject to the jurisdiction of the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2008). We therefore reverse the decision of the district court and remand. Because this opinion clarifies a previously opaque point of law, however, we make our ruling on the need to bring evidence of damages prospective only, and remand this matter for a new OCPA hearing, at which SOS should be given the opportunity to demonstrate by "clear and specific evidence" the required damage element of its remaining claims.

BACKGROUND

¶2 Allison was employed by SOS in a legal/administrative capacity. This relationship ended in January 2017. Upon leaving, Allison kept two computers, a "Microsoft Surface" and an iPad ("the laptops"). In March, 2017, a rumor allegedly began circulating at SOS that an SOS employee had been contacted by the FBI, and that this contact had occurred because Allison had turned over files/data from the laptops to the U.S. Department of Justice. Allegedly, the data was turned over as part of a "False Claims Act" procedure or investigation.

¶3 On May 2, 2017, SOS sued Allison, alleging misappropriation of trade secrets, breach of contract, breach of fiduciary duty, conversion, and "computer fraud and abuse." SOS also sought a temporary and permanent restraining order preventing Allison from the use or manipulation of any files on the laptops, and granting access to, or the return of, the laptops. The court granted a temporary restraining order the next day. On May 15, 2017, Allison filed a motion to dismiss pursuant to the OCPA § 1432, arguing that SOS's suit was based on, related to, or was in response to Allison's "communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding."

¶4 The district court dismissed SOS's misappropriation of trade secrets claim pursuant to the Act, but allowed SOS's other claims to continue. Allison now appeals the district court's decision not to dismiss the remaining claims.

STANDARD OF REVIEW

¶5 There is currently no precedential standard of review for an OCPA case. In *Krimbill v. Talarico,* 2018 OK CIV APP 37, ¶ 4, 417 P.3d 1240 (*cert. denied* April 10, 2018; mandate issued May 9, 2018), this Court held:

> It is clear that the OCPA provides a new summary process/dismissal procedure in certain cases, however, and that, traditionally, Oklahoma appellate courts have re-viewed decisions pursuant to such procedures by a *de novo* standard. The OCPA also requires dismissal if a plaintiff fails to show a prima facie case, and is hence similar to a motion for directed verdict. Directed verdict challenges also are reviewed *de novo.* Finally, Texas, which has an almost identical act, has adopted a *de novo* standard of review. Hence, we find a *de novo* standard indicated by existing precedent and persuasive authority, and we adopt that standard here (footnote omitted).

We will apply this standard in the current case. "Issues of law are reviewable by a *de novo* standard. An appellate court claims for itself plenary, independent and non-deferential authority to re-examine a trial court's legal rulings." *Neil*

Acquisition, L.L.C. v. Wingrod Inv. Corp., 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

I. THE OCPA

¶6 This case is one of a number of recent appeals involving the OCPA. The Legislature enacted the OCPA "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of [persons] to file meritorious lawsuits for demonstrable injury." 12 O.S. Supp. 2014 § 1430. The OCPA is an example of "anti-SLAPP" (Strategic Lawsuit Against Public Participation) legislation, the purpose of which is to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). Anti-SLAPP legislation appears to be the result of an increasing tendency by parties with substantial resources to file meritless lawsuits against critics or opponents, with the intent of discouraging or silencing those critics by burdening them with the time, stress, and cost of a legal action. To carry out this purpose, anti-SLAPP acts typically provide an accelerated dismissal procedure, available immediately after a suit is filed, in order to weed out meritless suits early in the litigation process.

¶7 The OCPA contains several unusual procedures that have no precedent in Oklahoma law. In an OCPA proceeding, the initial burden is on the defendant seeking dismissal to show that the plaintiff's claim "is based on, relates to or is in response to the [defendant's] exercise of" (1) the right of free speech, (2) the right to petition, or (3) the right of association." 12 O.S. Supp. 2014 § 1434(B). The burden then shifts to the plaintiff to show, "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 1434(C). If § 1434(C) is satisfied, the Act states, the burden shifts back to the defendant to show "by a preponderance of the evidence" a defense to the plaintiff's claims. *Id.* § 1434(D).

¶8 This Court analyzed the Act in *Krimbill v. Talarico*, 2018 OK CIV APP 37, where we found that the legislative purpose of the OCPA is to weed out meritless suits while protecting "the rights of persons to file meritorious lawsuits for demonstrable injury." *Id.* ¶ 13 (quoting OCPA § 1430). At the same time, the Act states that it will not "abrogate or lessen any other defense, remedy, immunity or privilege available under other constitutional, statutory, case or common law or rule provisions." OCPA § 1440. Based on these restrictions, in *Krimbill* we found that the third stage of proceeding implied by the Act — which appears to allow a defendant to obtain dismissal by showing a defense "by a preponderance of the evidence" per § 1434(D) — is inconsistent with the restrictions of §§ 1430 and 1440. The law of Oklahoma has never provided for mandatory bench trials on the merits to be held pre-answer and pre-discovery. We held, therefore, that dismissal based on a defense may be obtained only if the defense is one of law, not one requiring the court to decide disputed facts. *Krimbill* at ¶ 32.

II. THE FIRST STAGE

¶9 The district court dismissed SOS's claim for misappropriation of trade secrets and left pending its claims for breach of contract, breach of fiduciary duty, conversion, and "computer fraud and abuse." We must examine each claim pursuant to the standards set out in the OCPA. The initial burden is on the defendant seeking dismissal to show that the plaintiff's claim "is based on, relates to, or is in response" to the defendant's exercise of the right of free speech, the right to petition, or the right of association. OCPA § 1434(B).

¶10 Pursuant to OCPA § 1431(3), "'Exercise of the right of free speech' means a communication made in connection with a matter of public concern." Section 1431(4)(c) also places "communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding" within the protections of the Act. The defendant must show that the action "is based on, relates to or is in response to" one of the forms of speech enumerated in § 1431, in order to invoke the protection of the Act. OCPA § 1432.

¶11 This "based on, relates to or is in response to" test is one of several OCPA requirements that are not defined. The plaintiff in such a case will normally have some legal rationale of at least minimal validity, and therefore will argue that the suit is one not "related" to speech as defined in § 1431 but instead is based on some other legitimate harm.[1] The second stage inqui-

ry of the OCPA examines the legitimacy of the plaintiff's claims by requiring a prima facie showing of each element of the claimed cause(s) of action. OCPA § 1434(C). The existence of a legitimate rationale for suit is examined in the second stage, however, and is thus not a likely question in the first-stage inquiry. The first-stage inquiry is simply whether the defendant can make a plausible showing that the plaintiff's lawsuit was driven, at least in part, by one of the forms of speech enumerated in § 1431.

¶12 Texas courts, interpreting the substantially identical Texas Citizens Participation Act (TCPA), have reached a similar conclusion. In *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017), the Texas Supreme Court rejected the argument that a matter must involve constitutionally protected speech, or have more than a "tangential relationship" to speech protected by the TCPA before a defendant may invoke it. "[R]ather, TCPA applicability requires only that the defendant's statements are in connection with issue[s] related to health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature." *Id.* (internal quotation marks omitted). In *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 201 (Tex. Ct. App. 2017)(*reh'g denied* May 25, 2017, review dismissed Jan. 19, 2018), the Texas Court indicated that the defendant has to show only that the "legal action" is within a "suspect class presumptively subject to dismissal" under the provisions of the TCPA. *Elite Auto* is clear that, although the TCPA protects "speech," the category of speech protected by the TCPA is considerably wider than the category of speech protected by the First Amendment. *Id.* at 204.

¶13 The best current analogy to this procedure under the OCPA is, possibly, the burden shifting procedure used to screen claims under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et. seq. In the first stage of an ADA proceeding, the employee establishes that he or she is a "disabled person" and has suffered an adverse action "relating" to that disability. In the second stage, the employer may present an alternate, non-discriminatory reason for its action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). In the third stage, the employee may attack the stated legitimate rationale as a pretext put forth to justify discrimination.

¶14 Similarly, in an OCPA proceeding, the defendant first establishes the possibility that he or she has been involved in one of the broad forms of speech protected by the Act, and that the plaintiff's lawsuit is somehow connected or related to that speech. In the second stage, the plaintiff must establish that a legitimate basis for suit — other than suppression of the protected speech — exists by showing a prima facie case. The question of whether this stated rationale is simply a pretext for attacking the defendant for his or her underlying speech, and whether the OCPA addresses this situation, is a more complex issue, and we need not address it here.

¶15 In this case, Allison's alleged conduct does appear to be "related" to the right of free speech or the right to petition as defined by the OCPA, particularly § 1431(4)(c), i.e., "a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding," and Allison further makes a circumstantial case that SOS's suit was "in response" to such speech.[2] We therefore find that the first stage inquiry is satisfied, and the burden then shifted to SOS to show a prima facie case for each of its claims.

III. THE SECOND STAGE

A. Establishing a Prima Facie Case

¶16 In the second stage, SOS is required to show a prima facie case for each of its claims: breach of contract, breach of fiduciary duty, conversion, and "computer fraud and abuse." A party establishes a prima facie case by producing competent evidence to support each material element of its cause(s) of action. *See Jackson v. Jones,* 1995 OK 131, ¶ 4, 907 P.2d 1067.

¶17 SOS appears to have relied largely on its verified petition as supplying the evidence needed to establish its prima facie case.[3] The OCPA does appear to contemplate primary, although not exclusive, reliance on pleadings and affidavits as evidence. On the other hand, this same principle might allow the purpose of the OCPA to be obstructed simply by returning to code pleading and verifying the resulting petition. This would be inconsistent with the aims of the Act.

¶18 Texas courts, interpreting the earlier Texas act (the TCPA), which is practically identical to the OCPA, caution that "pleadings that might suffice in a case that does not implicate the TCPA may not be sufficient to satisfy the

TCPA's 'clear and specific evidence' requirement." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). Additionally, "[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA." *Id.* at 592.[4]

¶19 The latter standard appears appropriate. Something more fact-intensive than general allegations that the required elements exist should be necessary to show a prima facie case pursuant to the OCPA. Although the OCPA procedure is styled as a "motion to dismiss," the standard of evidence required is somewhat more specific than that required to resist a traditional motion to dismiss, in that something more than formulaic recitals of elements and a simple claim of damages is necessary. Pleadings that would be sufficient to withstand a traditional motion to dismiss will not always withstand a dismissal motion under the OCPA. Texas appears to have placed particular emphasis on the damages element, probably because this is an element that a plaintiff has the capability of proving and is a strong indicator of merit. *See* Section C below. We will analyze this case pursuant to the rules set out by the Texas Supreme Court in *In re Lipsky*.

B. SOS's Prima Facie Case

¶20 The elements of a breach of contract cause of action are (1) the formation of a contract; (2) breach of the contract; and (3) damages as a result of that breach. *Cates v. Integris Health, Inc.*, 2018 OK 9, ¶ 11, 412 P.3d 98 (citing *Dig. Design Grp., Inc. v. Info. Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834). To recover on a claim of breach of fiduciary duty, a plaintiff must prove "(1) the existence of a fiduciary relationship; (2) a breach of a fiduciary duty; and (3) the breach of a fiduciary duty was the direct cause of damages." *Graves v. Johnson*, 2015 OK CIV APP 81, ¶ 15, 359 P.3d 1151. The tort of conversion is committed by one who wrongfully exercises temporary or permanent dominion over property owned by another. *Griffith v. McBride*, 1940 OK 483, ¶ 0, 108 P.2d 109 (Court syllabus); *Davidson v. First State Bank & Trust Co.*, 1976 OK 160, ¶ 10, 559 P.2d 1228. One seeking damages for conversion must plead and prove (1) he owns or has a right to possess the property in question; (2) the defendant wrongfully interfered with such property right; and (3) the extent of his damages. *White v. Webber-Workman Co.*, 1979 OK CIV APP 6, ¶ 4, 591 P.2d 348.

C. Damages

¶21 SOS's pleadings and submissions establish a prime facie case of the initial elements of each of these claims. The weakness is in the final element — the showing and extent of damages. Taking the operation of the substantially identical Texas act as a template, the need to show specific evidence of damages appears to be the most critical factor in OCPA proceedings

¶22 Because the existence of damages is a key determinant in a TCPA procedure, the Texas courts have adopted a relatively strict requirement for the showing of damages. "[A] plaintiff must provide enough detail to show the factual basis for its claim," including how the "defendants damaged the plaintiff." *Lipsky,* 460 S.W.3d at 591.[5] "Bare, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA." *Id.* at 592. "Without more, allegations contained in an affidavit stating that a plaintiff suffered 'direct economic losses' and 'lost profits' are only conclusory and do not constitute evidence." *Whisenhunt v. Lippincott*, 474 S.W.3d 30, 45 (Tex. Ct. App. 2015)(concluding that plaintiff filed no affidavit or pleading that provided the detail required by the TCPA, as discussed in *Lipsky,* to show how defendants damaged him).

¶23 SOS's statements of damages regarding its first three claims are entirely generic, and clearly do not meet the specificity required by the Texas courts in interpreting the TCPA. The petition makes only the generic jurisdictional statement that SOS had been "damaged in excess of $75,000." It also raises the possibility that SOS "may be damaged in the future" because, if the data is released, such a release could violate HIPAA regulations. The court has, however, already enjoined such release. The rest of the pleadings do little or nothing to expand on the damages argument. SOS does not even explicitly state that the copies of documents taken by Allison are the only copies in existence or that SOS does not already have copies of the same documents. SOS appears to have assumed that evidence of breach acts as evidence of damage.

¶24 We appreciate that the OCPA is a new statute and that its Texas counterpart has required an extraordinary number of appellate decisions to define the exact requirements and processes for defending against a dismissal

motion under the act.[6] It is difficult for any counsel to currently prepare for an OCPA proceeding because it presents an entirely new procedure for which there is little precedential guidance. That said, we find the Texas case law on this matter sound and that a showing of damage to the specificity required by In re Lipsky and *Whisenhunt v. Lippincott is necessary*.[7] SOS did not make such a showing and, hence, failed to make a prima facie case for its claims of breach of contract, breach of fiduciary duty, and conversion.

D. "Computer Fraud and Abuse"

¶25 SOS does appear to have sufficiently shown damages pursuant to the federal Computer Fraud and Abuse Act (CFAA), primarily because CFAA allows a plaintiff to count the cost of investigating a case of unauthorized access as a "loss" caused by the unauthorized access, which can be recompensed as damages. 18 U.S.C. § 1030(e)(11). SOS states that it was required to hire forensic computer investigators in this matter and that its costs exceed the $5,000 jurisdictional limit of the CFAA. 18 U.S.C. §1030(c)(4)(A)(i).

¶26 SOS bases its prima facie case for "computer fraud and abuse" on the case of *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009). The elements stated in LVRC Holdings are:

> . . . to bring an action successfully under 18 U.S.C. § 1030(g) based on a violation of 18 U.S.C. § 1030(a)(2), LVRC must show that [defendant]: (1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that he (3) thereby obtained information (4) from any protected computer (if the conduct involved an interstate or foreign communication), and that (5) there was loss to one or more persons during any one-year period aggregating at least $5,000 in value.

Id. at 1132. LVRC Holdings defines neither "protected computer" nor "unauthorized access." A precise definition of both terms is necessary because of the facts of this case.

1. Protected Computer

¶27 Pursuant to the CFAA, a "protected computer" is defined as a computer

> [W]hich is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States[.]

18 U.S.C. § 1030(e)(2)(B).

¶28 This statement appears to be more of an assertion of basis for federal jurisdiction, i.e., it defines when a computer is "protected by the CFAA" rather than defining when it is physically or electronically "protected from unauthorized access." Further interpretive case law on this issue is sparse. S*immonds Equip., LLC v. GGR Int'l, Inc.*, 126 F. SupP.3d 855, 863 (S.D. Tex. 2015), indicates that a computer is "protected" if it is connected to the internet at the time of access. Similar formulations are found in other courts, as shown by our discussion below of *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007).

¶29 This detour into the workings of the CFAA is necessary because of the following facts:

> 1. Allison allegedly took two company laptops home at the end of his employment with SOS.
>
> 2. SOS alleges the data was accessed after Allison's employment terminated, and hence was unauthorized.[8]

¶30 The first element of unauthorized access is therefore demonstrated. Such access, however, occurred after Allison took the laptops home. The latter fact raises the second question: Did the laptops remain in use in interstate commerce after Allison took them home and ceased his employment? This question is forced upon us by the U.S. Congress's decision to use "commerce" as a basis to regulate computer access without providing a useable guideline as to when an individual computer is "used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States."

¶31 The Eighth Circuit is the highest court that has attempted to define when a computer is "involved in interstate commerce." *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007), states:

> [Defendant] admitted the computers were connected to the Internet. "The Internet is an international network of interconnected computers," *Reno v. ACLU*, 521 U.S. 844,

850, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and is comparable to "a sprawling mall offering goods and services." *Id.* at 853, 117 S. Ct. 2329. As both the means to engage in commerce and the method by which transactions occur, "the Internet is an instrumentality and channel of interstate commerce." *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir.2006); *see also United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Congress clearly has the power to regulate the [I]nternet, as it does other instrumentalities and channels of interstate commerce . . . ."). With a connection to the Internet, the Salvation Army's computers were part of "a system that is inexorably intertwined with interstate commerce" and thus properly within the realm of Congress's Commerce Clause power. *Mac-Ewan*, 445 F.3d at 245.

¶32 All of the cases in this passage, however, appear to involve computers that were actively connected to the Internet and actively in use in interstate commerce at the time of the unauthorized access.[9] We find no decision declaring a computer that was not actively in use on the Internet or otherwise engaged in interstate commerce **proximate to the time of access** to be subject to the CFAA. Indeed, to hold otherwise would be to recognize continuing federal jurisdiction over access to any computer that has at any time been connected to the Internet, or has at any time been used in interstate commerce.[10] This is too much weight for such a slender jurisdictional "hook" even given the often elastic use of the commerce clause as a basis for federal jurisdiction.

¶33 It is difficult to craft an exact line for when a computer is "used in or affecting interstate or foreign commerce or communication." The existing federal circuit court opinion indicates that a computer is inherently involved in interstate commerce when it is connected to the internet. Even accepting these broad claims of jurisdiction, however, the question of whether the CFAA regulates access to a computer that is not connected to the Internet at the time of access still appears undecided.

¶34 On the one hand, to concede continuing federal jurisdiction over any machine that has ever been connected to the Internet at any time offends the constitutionally limited nature of federal power. On the other hand, to allow the CFAA to be circumvented simply by disconnecting a machine from the Internet immediately before access, and re-connecting immediately afterwards, would undermine the purpose of the statute. We therefore hold that, for the CFAA to apply in this case, the computer must be actively used in interstate commerce reasonably proximate to the time of unauthorized access.

¶35 We find no evidence in the record before us that the two laptops in this case were connected to the Internet or were otherwise active in interstate commerce proximate to the time of the alleged unauthorized access. Hence, we find that SOS has failed to show that the involved laptops were subject to the CFAA.

¶36 A dismissal motion under the Oklahoma Citizens Participation Act is a new procedure that has no real analogue in any existing Oklahoma statute, and is not precisely defined in every element by the Act itself. As such, it presents something of a procedural minefield for practitioners until some uniform standards and procedures can be determined. The Act is functionally identical to its Texas counterpart, and we have relied on the gradual evolution of these standards within the Texas courts (some of which took place before the OCPA was adopted in Oklahoma) as persuasive in this case. To resist a motion to dismiss under the Act, a plaintiff must make a prima face showing of each required element of each claim. This showing, particularly on the issue of damages, is more detailed than that required to resist a traditional motion to dismiss.[11] "Without more, allegations contained in an affidavit stating that a plaintiff suffered 'direct economic losses' and 'lost profits' are only conclusory and do not constitute evidence." *Whisenhunt v. Lippincott*, 474 S.W.3d 30, 45 (Tex. Ct. App. 2015).

¶37 In this case, SOS relied largely on its verified pleadings, which provided only a jurisdictional statement of damages, and did not provide the detail required by the Texas cases we have cited. SOS's claim pursuant to the CFAA did provide the required detail as to damages, but did not show federal jurisdiction over the computer at the time of the alleged unauthorized action. We find that the district court was required to dismiss SOS's petition under these circumstances.

IV. DISMISSAL PURSUANT TO THE OCPA

¶38 The drafting of the Act raises a further question, however. OCPA § 1434 describes the required judicial remedy as "dismissal," without stating whether such dismissal is with or without prejudice, or possibly with leave to

amend. Pursuant to § 2012(G), leave to amend should be given if a pleading fails to adequately state a claim and the defect can be corrected. The pleadings in this case were, however, adequate pursuant to the pleading code. An OCPA dismissal is based not on a failure to plead correctly, but on a failure to demonstrate a prima facie case. The failure is not, therefore, in the allegations of the pleadings, but in the evidence presented at hearing. Given that the pleading was not defective in the first instance, there is nothing to amend. Dismissal with leave to amend or without prejudice would likely be a grant of a second OCPA dismissal hearing after the plaintiff has failed at the first hearing.

¶39 Although the Texas Supreme Court has not made a definitive statement on the matter, Texas courts appear to regard a dismissal pursuant to the TCPA as a dismissal on the merits.[12] Texas courts have also published some 250 opinions mentioning the textually identical TCPA, but only four of those opinions appear to involve a dismissal without prejudice, and none do so in the context we have here.[13]

¶40 It should further be noted that the Legislature made the granting or denial of an OCPA motion immediately appealable. This is consistent with the decision being a final order. If not, a party dismissed without prejudice or with leave to amend would apparently have the choice of either appealing the trial court's decision, or simply filing a new case/petition and seeking a second decision at the trial court level. Such a procedure is both unprecedented and at odds with the concept that an OCPA decision is on the merits and immediately appealable.

¶41 We therefore find it reasonably clear that the Legislature intended a dismissal pursuant to the OCPA to be treated as a final order similar to a full summary judgment or directed verdict. That said, pursuant to *Gomes v. Hameed*, 2008 OK 3, n. 16, 184 P.3d 479:

> Generally, when a newly announced rule of law appears obscure, prospective effect will be given to the pronouncement to protect those who would otherwise suffer from the law's abstruse or obscure contours. *McDaneld v. Lynn Hickey Dodge, Inc.*, 1999 OK 30, ¶ 12, 979 P.2d 252, 257; *Isbell v. State, Etc.*, 1979 OK 156, ¶ 1, 603 P.2d 758, 760-61 (Opala, J., concurring). Prospective application of a decision is not reserved solely for situations that deal with conflicting statutes nor with interpretation of a legislative ambiguity. It is equally commended to those situations where issues of first impression are not clearly foreshadowed by decisional law and where it serves to protect the public's reasonable expectation of reliance on prior judicial decisions. *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 1986 OK 16, ¶¶ 19-22, 732 P.2d 438, 446-49.

¶42 The situation here clearly fits the parameters of *Gomes*. At the time the parties prepared for this hearing, it was not even established that a plaintiff was required to show a prima face case to avoid an OCPA dismissal. As this Court noted in *Krimbill v. Talarico,* 2018 OK CIV APP 37, ¶ 14, 417 P.3d 1240, the Act uses only the phrase "clear and specific evidence" to demonstrate the evidentiary burden, and that phrase had not previously appeared in published Oklahoma appellate case law. It was only by a process of deduction and reference to persuasive Texas case law that we determined in *Krimbill* that a showing of a prima facie case was required. Likewise, it is only by a considerable process of examination and reference to persuasive Texas case law that we have determined the need to bring specific evidence of damages.

¶43 The operation of the OCPA in the area was clearly obscure, and, pursuant to *Gomes,* "prospective effect will be given to our pronouncement to protect those who would otherwise suffer from the law's abstruse or obscure contours."

CONCLUSION

¶44 We find that SOS could not bring a claim pursuant to the federal Computer Fraud and Abuse Act (CFAA) because there was no proximate nexus between the access and the computer's use in interstate commerce. That claim is dismissed. We find that SOS did not make a showing of damages sufficient to establish a prima facie case for its claims of breach of contract, breach of fiduciary duty, and conversion. However, because this point of law was obscure in the drafting of the Act, we give prospective effect to this requirement and remand this matter to the district court with instructions to hold a second OCPA hearing addressing SOS's claims of breach of contract, breach of fiduciary duty, and conversion.

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

WISEMAN, P.J., and FISCHER, J., concur.

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. For example, the question of whether a breach of contract suit is truly brought because of a minimal breach of contractual rights or is brought with the broader purpose of using the litigation to punish or silence a defendant from exercising protected speech rights, appears to be individual to each suit, and implies substantial discretion on the part of the district court.

2. Allison alleges that SOS did not take any action when Allison failed to surrender the laptops at the conclusion of his employment, and took action when rumors started to surface that a federal agency may have obtained data on the laptops from Allison as part of a FCA investigation.

3. Although the matter has not been widely discussed, existing case law indicates that a verified petition is considered to be the equivalent of evidence and testimony. *See e.g., Kennedy v. Builders Warehouse, Inc.*, 2009 OK CIV APP 32, ¶ 14, 208 P.3d 474; *Beard v. Love*, 2007 OK CIV APP 118, ¶ 13, 173 P.3d 796; *Roberson v. Jeffrey M. Waltner, M.D., Inc.*, 2005 OK CIV APP 15, ¶ 8, 108 P.3d 567.

4. SOS cites extensively to California case law in this matter, but the Texas TCPA is almost identical to the OCPA, and the California act is not. California appears to apply more of a traditional "motion to dismiss" standard, taking the facts stated in the pleadings "as true" without any heightened requirement. Texas requires a more particularized showing of facts.

5. This is consistent with the OCPA intent to "protect the rights of a person to file meritorious lawsuits for demonstrable injury." OCPA § 1430 (emphasis added).

6. Indeed, this process is ongoing. Texas courts have published some 33 appellate opinions regarding the TCPA in the first six months of 2018. This activity is occurring some seven years after the TCPA was first enacted. In total, Texas courts have published over 200 decisions involving the TCPA. It is evident that the full reach and procedure of the Texas Act is not yet fully settled. Oklahoma's Act is fundamentally identical, and may require the same degree of scrutiny before its operation is routinely understood.

7. The statement of damages deemed insufficient in *Lipsky* was that "Lipsky's statements caused Range to suffer 'direct pecuniary and economic losses and costs, lost profits, loss of its reputation, and loss of goodwill in the communities in which it operates . . . in excess of three million dollars.'" The Court held:

> We accordingly disagree with the court of appeals that general averments of direct economic losses and lost profits, without more, satisfy the minimum requirements of the TCPA. Although the affidavit states that Range "suffered direct pecuniary and economic losses," it is devoid of any specific facts illustrating how Lipsky's alleged remarks about Range's activities actually caused such losses.

In re Lipsky, 460 S.W. 3d at 593.

8. The federal courts have split over what is included in the scope of "unauthorized access." The Fourth and the Ninth Circuits interpret the statutory text to mean what it says, i.e., access is unauthorized if it occurs at a time when the accessor is not allowed such a privilege but the CFAA does not cover any subsequent "unauthorized use" of the information once it is obtained. The First, Fifth, Seventh, and Eleventh Circuits, however, follow "retroactive de-authorization" logic, holding that subsequent unauthorized use of data renders the initial access "unauthorized" even if it was authorized at the time it occurred. *See Teva Pharm. USA, Inc. v. Sandhu*, 291 F. SupP.3d 659, 668-671 (E.D. Pa. 2018), for a discussion these approaches.

9. *See also Cont'l Grp., Inc. v. KW Prop. Mgmt.*, LLC, 622 F. SupP.2d 1357, 1370 (S.D. Fla. 2009)(holding, "A connection to the internet is 'affecting interstate commerce or communication.'"); *Becker v. Toca*, No. 07–7202, 2008 WL 4443050, at *5 (E.D.La. Sept. 26, 2008) (computer was connected to Internet and used in law firm business); *Nordstrom Consulting, Inc. v. M & S Tech., Inc.*, No. 06 C 3234, 2008 WL 623660, at *12 (N.D.Ill. March 4, 2008) *776 (computers used in day-to-day business which included selling products across state lines); *Modis, Inc. v. Bardelli*, 531 F.Supp.2d 314, 318-19 (D.Conn.2008) (computer was used in plaintiff's business and plaintiff had offices in two different states).

10. Given the American source of most major operating systems, and the practice of frequently updating these systems "online," the vast majority of computers in the world are, at all times, under federal jurisdiction and subject to the CFAA pursuant to this definition.

11. A recent Texas case indicated that the quantum and form of proof required to demonstrate a case under the TCPA are closer (but not quite as great) as that required in summary judgment cases: "While we are not inclined to apply wholesale the summary judgment affidavit cases here, we are confident that the 'clear and specific' standard in the TCPA at least requires us to reject conclusory claims made by an affiant." *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W. 3d 180, 192 (Tex. Ct. App. 2017).

12. *See Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 500 S.W.3d 26, 40 (Tex. Ct. App. 2016)("A dismissal with prejudice under the TCPA constitutes a final determination on the merits for res judicata purposes"); *Holcomb v. Waller Cty.*, 546 S.W.3d 833, 841 (Tex. Ct. App. 2018)(A motion to dismiss under the TCPA tests the potential merits of claims implicating free-expression rights at the outset of a suit); *Diogu Kalu Diogu II, Appellant v. Yaowapa Ratana Aporn, Appellee*, 01-17-00392-CV, 2018 WL 3233596, at *4 (Tex. Ct. App. July 3, 2018) (stating that dismissal under the TCPA "constitutes a final determination on the merits").

13. Three of these cases, *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *2 (Tex. Ct. App. June 26, 2018); *Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 WL 5109341, at *2 (Tex. Ct. App. Nov. 6, 2017); and *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14-00299-CV, 2015 WL 1519667, at *1 (Tex. Ct. App. Apr. 1, 2015) involve plaintiffs' attempts to avoid a TCPA decision by dismissing their own suit without prejudice before the court could rule on the TCPA motion. The fourth case, *James v. Calkins*, 446 S.W.3d 135, 142 (Tex. Ct. App. 2014), involved an attempt to divest the appellate court of jurisdiction by dismissing two appealing parties from the suit without prejudice.

2018 OK CIV APP 70

MARK WEATHERS, Petitioner/Appellee, vs. THE STATE OF OKLAHOMA ex rel. DEPARTMENT OF PUBLIC SAFETY, Respondent/Appellant.

Case No. 116,995. October 30, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE APRIL SEIBERT, TRIAL JUDGE

REVERSED

E. Zach Smith, Tulsa, Oklahoma, for Petitioner/Appellee

Mark Edward Bright, ASSISTANT GENERAL COUNSEL, OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Oklahoma City, Oklahoma, for Respondent/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Following an administrative hearing, the State of Oklahoma ex rel. Department of Public Safety (the Department) entered an order revoking for one year the driving privileges of Mark Weathers. Weathers then sought review in the district court. The district court found Weathers' constitutional right to a speedy trial was violated, and therefore entered an order setting aside the Department's order. Based on our review, we reverse the district court's order setting aside the order of revocation.

¶2 The Oklahoma Constitution provides that "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every

injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Okla. Const. art. 2, § 6. The Oklahoma Supreme Court has explained that "[t]he right to a speedy and certain remedy without delay, in a civil proceeding, is one of the rights enjoyed by Oklahoma citizens, including drivers having a recognized property interest in the license that allows them to travel freely through the utilization of an automotive vehicle." *Pierce v. State ex rel. Dep't of Pub. Safety,* 2014 OK 37, ¶ 8, 327 P.3d 530 (footnotes omitted). Thus, in *Pierce*, and "under the unique facts presented" in that case involving, among other things, a total of twenty months of delay by the Department "in scheduling a revocation proceeding," including intentional dilatory conduct on the part of the Department to prevent the driver in question from being heard on the merits prior to his deployment "to serve his country," the Supreme Court concluded the driver's right to a speedy trial in that case was violated. *Id.* ¶¶ 2, 9-11.

¶3 Similarly, in *Nichols v. State ex. rel. Department of Public Safety*, 2017 OK 20, 392 P.3d 692, the driver in question first requested an administrative hearing on May 20, 2013, but, as a result of delay on the part of the Department, the hearing was not held until September of the following year. The Supreme Court explained that the Department "ha[d] no sound basis for its delay," and also explained that "the correct date from which to calculate" the driver's "right to a speedy trial [argument is] . . . from his first request for a hearing." *Nichols*, ¶ 12.

¶4 In the present case, by contrast, Weathers, who was arrested on September 8, 2017, requested an administrative hearing on September 14, 2017, and the hearing was held just two-and-a-half months later, on November 29, 2017. The hearing was originally scheduled to occur on November 2, 2017, within sixty days of Weathers' request, but was rescheduled to later that same month as a result of a witness — i.e., the arresting officer who authored the accident report relevant to the revocation of Weathers' driver's license — being on duty and responding to an emergency call at the time the hearing was originally scheduled to occur. As stated by the district court at the trial *de novo* hearing,

> clearly something happened in this scenario with [the highway patrol officer] where he was responding to an accident [i.e., at the time the hearing was originally scheduled to occur]. I don't know much about that accident [i.e., that the officer was responding to], other than the fact that his lights and sirens are going. And I can presume that from that that he was traveling as it was an emergency. I understand that that is an extenuating circumstance.

¶5 However, the district court expressed concern at the hearing that the date of the original hearing was scheduled "52 days out," which rendered it impracticable to reschedule the hearing, when it became necessary to do so, to a date "within the 60-day period" delineated in Nichols, discussed below. The district court was also concerned that the hearing "could have been heard within at least 20 days" of the originally scheduled hearing date "if [the Department was] following [its] own notice requirements," but the hearing was instead rescheduled for November 29, a date which landed 27 days after the originally scheduled hearing date.

¶6 Thus, in the district court's order from which the Department now appeals, the district court set aside the order of revocation. Although the precise basis of the district court's determination is not set forth in its order, the parties agree in their appellate briefs, and the transcript of the hearing below reveals, that the district court based its decision on a finding of a violation of Weathers' constitutional right to a speedy trial.[1] "[C]onstitutional issues are reviewed *de novo*, requiring an independent, non-deferential re-examination[.]" *Nichols*, ¶ 10.

¶7 The 60-day period to which the district court referred at the hearing is a reference to the time frame set forth by the Oklahoma Supreme Court in *Nichols*. In *Nichols*, the Court stated that, in addition to other time parameters, "if the driver requests a hearing, the proceeding should be held within sixty (60) days of the Department's receipt of notice." *Nichols*, ¶ 29. However, the *Nichols* Court clarified that this timeline was intended as "some guidance to the Department to assist it in determining a time frame in which it can avoid being subject to claims of violating the constitutional right to a speedy jury trial," and stated further that "[i]t is also impossible for strict rules to exist which will govern the issue in all causes, as facts will vary largely." *Id.* ¶ 28 (emphasis added). The *Nichols* Court stated that, "[w]here these time frames are followed," any delay which is the result of extenuating circumstanc-

es "should not be found to weigh against the Department." *Id.* ¶ 29.

¶8 In the present case, it appears that the Department followed the guidance set forth in *Nichols*. The hearing was scheduled within 60 days of the request for a hearing, and it was rescheduled to a date later that same month (i.e., from November 2 to November 29, as set forth above) only as a result of extenuating circumstances.

¶9 Moreover, even assuming the time frame set forth in *Nichols* was not adhered to strictly in the present case, it is clear that the *Nichols* Court did not intend for the breach of its guidelines to result in automatic findings of constitutional violations. Instead, the *Nichols* Court reaffirmed the applicability of the factors set forth in *Pierce*, stating: "Pierce is determinative of . . . the factors used to determine whether the State has met its burden to provide a speedy trial." *Nichols*, ¶ 9.

¶10 In *Pierce*, the Supreme Court set out a four-factor test to determine whether the Department has violated a driver's constitutional right to a speedy trial: "1) the length of the delay; 2) the reason for the delay; 3) the party's assertion of the right; and 4) the prejudice to the party occasioned by the delay." 2014 OK 37, ¶ 8 (footnote omitted). Application of these factors to the circumstances of this case, especially when compared with the application of these factors by the Oklahoma Supreme Court to the circumstances presented in *Pierce* and *Nichols*, shows that a violation of Weathers' constitutional right to a speedy trial did not occur. *See also Fernandez v. State*, 2016 OK CIV APP 82, ¶ 9, 389 P.3d 393 (The right to a speedy trial was found to be violated "by the nearly fourteen (14) month delay in conducting [the driver's] administrative hearing."); *Ryan v. Comm'r of the Dep't of Pub. Safety*, 2016 OK CIV APP 49, ¶¶ 9-10, 377 P.3d 1255 (A ten-month delay "was not minimal and the evidence does not support a reasonable reason for the delay that did result in prejudice to [the driver]"; thus, a violation of the right to a speedy trial occurred.). Among other things, the length of delay in the present case was relatively minimal — just 27 days after the originally scheduled hearing date, which in turn was scheduled within 60 days of Weathers' request — and the cause of the delay was not the fault of the Department.

¶11 For these reasons, we conclude Weathers' right to a speedy trial was not violated in this case. Consequently, we reverse the district court's order setting aside the order of revocation.

¶12 **REVERSED**.

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Although Weathers appears to have set forth additional bases in his "Appeal Petition" filed in the district court, including a due process argument based on the brevity of the administrative hearing, these additional bases are not discussed in the parties' appellate briefs, nor were they pursued at the district court hearing. We also note that Weathers did not file a response to the petition in error on appeal. *See* Okla. Sup. Ct. R. 1.25(c), 12 O.S. Supp. 2013, ch. 15, app. 1.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, November 15, 2018

F-2017-1030 — Polo Carrillo, Appellant, was tried by jury for the crime of Kidnapping (Count 1), First Degree Rape (Count 2), Assault and Battery with a Dangerous Weapon (Count 4), Each After Former Conviction of Two or More Felonies, and Domestic Assault and Battery in Presence of a Minor (Count 3), in Case No. CF-2016-96 in the District Court of Jackson County. The jury returned verdicts of guilty and set punishment at life imprisonment on each of Counts 1, 2, and 4, and one year on Count 3. The Honorable Clark E. Huey, Associate District Judge, sentenced him in accordance with the jury's verdicts, ordering the sentences imposed on Counts 1, 2, and 3, be served concurrently and the sentence imposed on Count 4 be served consecutively to sentences imposed on Counts 1, 2, and 3. From this judgment and sentence Polo Carrillo has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-902 — Appellant Kaylin Mixon was tried by jury and convicted of Second Degree Depraved Mind Murder (21 O.S.2011, § 701.8), After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-2016-154. The jury recommended as punishment thirty (30) years in prison and the trial court sentenced accordingly, additionally ordering the assessment of a $100.00 fine. It is from this judgment and sentence that Appellant appeals. The Judgement and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recuse.

Thursday, November 29, 2018

RE-2017-1241 — Kenneth Lee Canaday, Appellant, entered a plea of guilty on February 11, 2008, to Count 1 – Pointing a Firearm at Another and Count 2 – Domestic Abuse (Assault and Battery), in Oklahoma County District Court Case No. CF-2006-7469. He was sentenced to ten years on Count 1 and one year on Count 2, suspended with all except the first four months to do. The sentences were ordered to run concurrently with Case No. CF-2000-1599. Appellant was given credit for time served. In Oklahoma County District Court Case No. CF-2008-5011 Appellant pled guilty January 9, 2009, to Attempted Robbery II, pursuant to a plea agreement. He was sentenced to ten years suspended except for the first five years to do. On January 9, 2009, following a revocation hearing, five years of Appellant's suspended sentence in Case No. CF-2006-7469 were revoked. On September 13, 2017, the State filed an application to revoke Appellant's remaining suspended sentence in CF-2006-7469 and the suspended sentence in CF-2008-5011. Following a revocation hearing held on November 28, 2017, the Honorable Timothy R. Henderson, District Judge, revoked Appellant's suspended sentences in full. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

C-2018-2 — Petitioner Christopher Adam Hicks was charged in the District Court of Tulsa County by a Fourth Amended Felony Information in Case No. CF-2015-6432 with Robbery with a Firearm (Count I); First Degree Burglary (Count II); Kidnapping (Count III); Assault and Battery with a Deadly Weapon (Count IV); Cruelty to Animals (Count V); Possession of a Firearm After Former Conviction of a Felony (Count VI); Eluding a Police Officer (Count IX); Obstructing an Officer (Misdemeanor) (Count XI); Driving Without a Driver's License (Misdemeanor) (Count XII); and Kidnapping (Count XIII), all counts After Former Conviction of Two or More Felonies. On May 10, 2017, the Honorable Kelly Greenough, District Judge, accepted Petitioner's blind pleas of guilty to all charges. Petitioner was also charged in an Amended Felony Information in Case No. CF-2016-1058, District Court of Tulsa County, with five (5) counts of Witness Intimidation (Counts I-V), After Former Conviction of Two more Felonies. On May 10, 2017, Petitioner's blind pleas of guilty were accepted by Judge Greenough. On June 26, 2017, Petitioner was sentenced in Case No. CF-2015-6432 to life imprisonment in Counts I, II, III, IV, VI and XIII, said sentences to run concurrently. Petitioner was also sentenced to

ten (10) years in prison in each of Counts V and IX; one year in prison in Count XI, and thirty (30) days in jail in Count XII, all sentences to run concurrently, with credit for time served. In Case No. CF-2016-1058, Petitioner was sentenced to five (5) years in each of the five (5) counts, said sentences to run consecutively to each other and consecutively to the sentences in CF-2015-6432. Petitioner, represented by counsel, subsequently filed a timely Motion to Withdraw Guilty Pleas in both cases. Conflict counsel was appointed. At the conclusion of a hearing on Petitioner's motion, the trial court denied the motion to withdraw the guilty pleas. Petitioner appeals the denial of his motion. The Petition for a Writ of Certiorari is DENIED. The Judgment and Sentence are AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, November 15, 2018

117,248 — Security Bank and Trust Company, successor by merger to First State Bank of Commerce, an Oklahoma state chartered bank, Plaintiff/Appellee, v. John Theodore Linthicum, individually and d/b/a TL Ranch, TL Linthicum Land & Cattle, Linthicum Angus Ranch, and JT Linthicum; Linthicum Ranchers, Inc., an Oklahoma Corporation; and Linthicum Angus Ranch, LLC, an Oklahoma Limited Liability Company, Defendants/Appellants, and Angela Asbell, individually; Doug Mayfield, individually and d/b/a Rafter M. Angus; Grove Livestock, LLC, an Oklahoma limited liability company; and John Does 1-10, individually and or entities, Defendants, and Damar Farms, Intervenor. Appeal from the District Court of Ottawa County, Oklahoma. Honorable Robert G. Haney, Judge. Defendants/Appellants John Theodore Linthicum, individually and d/b/a TL Ranch, TL Linthicum Land & Cattle, Linthicum Angus Ranch, and JT Linthicum; Linthicum Ranches, Inc.; and Linthicum Angus Ranch, LLC (collectively, Linthicum), appeal partial summary judgment granted to Plaintiff/Appellee Security Bank and Trust Company, successor by merger to First State Bank of Commerce (Bank) against Linthicum and Defendant Angela Asbell. The trial court certified the judgment as an appealable order and Bank dismissed its claims against Defendants Doug Mayfield, in-dividually and d/b/a Rafter M Angus, and Grove Livestock, LLC. The record on appeal shows the material facts were undisputed and Bank was entitled to judgment as a matter of law. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

Friday, November 16, 2018

116,201 — SW 119th Street Marketplace LLC, Plaintiff/Appellee, v. Tony R. Meek, Defendant/Appellant, and Kristine Noblett and Earnest Noblett, Defendants. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jeff Virgin, Judge. Defendant/Appellant, Tony R. Meek, appeals from the trial court's order awarding attorney fees and costs to Plaintiff/Appellee, SW 119th Street Marketplace LLC (Landlord), following a decision in favor of Landlord in a forcible entry and detainer action. The underlying companion appeal was affirmed by this Court in *SW 119th Street Marketplace LLC v. Meek*, Case No. 115,845 (Okla. Civ. App. Nov. 17, 2017) (unpublished). In that proceeding, the trial court issued two orders: a February 2017 order that ostensibly granted judgment to Landlord on one of its two claims for relief and a second "clarifying" order in March 2017 that disposed of both claims. Landlord's application for attorney fees and costs was filed fifty-five (55) days after the first order, but within thirty (30) days of the second order. The sole issue in this appeal is whether Landlord's April 18, 2017, application for attorney fees and costs was timely filed pursuant to 12 O.S. 2011 §696.4, which requires such motions "be filed within thirty (30) days after the filing of the judgment, decree or appealable order…." Meek claims Landlord's application was untimely, asserting the first order was a final, appealable order. The record fails to show compliance with the statutes requiring service of the first order. Rule 1.26(c)(4), *Oklahoma Supreme Court Rules*, 12 O.S. Supp. 2013, Ch. 15, App. 1, further supports our conclusion that the second order, and not the first, was the one and only final judgment in this case. Upon *de novo* review, we hold Landlord's application for attorney fees and costs was timely filed. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 2)
Wednesday, November 14, 2018

116,544 — In the Matter of The Estate of Frank Kimball Berry, Deceased. Laurie Martin Berry, Appellant v. James E. Berry, II, Appellee. Appeal from an Order of the District Court of Payne County, Hon. Katherine Thomas, Trial

Judge. Appellant, Laurie Martin Berry, appeals the decision of the district court rejecting her claim that she and the Decedent, Frank Kimball Berry, had a common-law marriage. Her status as Decedent's common-law wife was challenged by the Decedent's brother, who argued that he was Decedent's sole heir pursuant to the laws of intestate succession. Although both parties presented evidence in favor of their respective positions, however, the law places the burden of producing "clear and convincing" proof on a party wishing to prove a common-law marriage. This Court cannot say the trial court erred in its extensive and carefully written decision that found a common-law marriage did not exist. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Fischer, J., concurs, and Wiseman, P.J., concurs in result.

Thursday, November 15, 2018

116,219 — Central Bank of Oklahoma f/k/a ONB Bank and Trust Company, Plaintiff/Appellant, vs. R. Paul Conrady a/k/a Richard Paul Conrady, Defendant/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, denying Central Bank of Oklahoma f/k/a ONB Bank and Trust Company's (CBO) "Motion for Leave to Enter Post-Judgment Deficiency Order." We address whether the trial court's decision is against the clear weight of the evidence. The trial court admitted an Oklahoma County Assessor Real Property Detail Sheet which listed the market value of the property as $884,399 and a document showing the sheriff's appraisers' value was $825,000. CBO asserted the property was not marketable, not worth $825,000, and is "worth what someone actually agreed to pay for it, 676,000." CBO argued Paul, due to his efforts to suppress CBO's bidding at the sheriff's sale, "should be equitably estopped today from claiming that this property is worth more than what his friend paid for it at the Sheriff's Sale." The court noted that its job would be easier if the parties had brought in a certified appraiser. At the conclusion of the evidence, the trial court took the three lowest values – the $676,000 sale price, the County Assessor's fair market value of $884,000, and the sheriff's appraisers' value of $825,000 – averaged them and set the fair market value at $795,000. Because this exceeded the amount owed under the judgment, the trial court denied the request for a deficiency order. In its order on CBO's deficiency request, the trial court found the fair market value of the Property at the time of sheriff's sale was $795,000 and denied CBO's motion. The trial court noted at the hearing that the only thing it had to decide was the Property's fair market value on the date of the sheriff's sale. The trial court's conclusion is correct. Finding no reversible error, we affirm the decision of the trial court. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., concurs, and Fischer, J., dissents.

Monday, November 19, 2018

116,860 — Ronald Christopher Wilson, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an Order of a Three-Judge Panel of The Workers' Compensation Court, Hon. L. Brad Taylor, Trial Judge. Claimant seeks review of a panel's order affirming the trial court's denial of benefits against the Fund, finding that Claimant is not permanently totally disabled and stating that it was following the opinion of the court-appointed independent medical examiner. Claimant asserts that the IME opinion should be read as finding that Claimant is PTD for purposes of MITF liability. However, the IME report clearly states that Claimant is not PTD as a result of a combination of injuries because Claimant worked without restrictions, doing heavy labor, for nearly 20 years before his latest, 2013 injury to his arms and hands. Title 85 O.S.2011 § 404 makes MITF's liability dependent on a worker being rendered PTD due to a combination of injuries. Thus, the lower tribunal properly relied on the IME's report. We find the order is not against the clear weight of the evidence and is in accord with law. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Tuesday, November 20, 2018

116,865 — George W. Barnett, III, Plaintiff, vs. The University of Tulsa, Defendant/Appellee, and Christopher Barnett, Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge, denying Appellant Christopher Barnett's amended motion to quash a subpoena duces tecum. The question presented on appeal is whether this denial was an abuse of discretion. Christopher asserts the trial court erred by denying his amended motion to quash pursuant to the Oklahoma Citizens Participation Act (OCPA). We conclude Christopher failed to show the OCPA applies to his motion to quash.

This lawsuit was brought by George Barnett, not TU. There is no lawsuit against Christopher, only a discovery request in the form of a subpoena duces tecum. TU's discovery request does not seek legal or equitable relief. The Discovery Code contains its own provision for abuse of the discovery process. The OCPA applies where dismissal of a legal action is sought, which is not the case here. Christopher asserts that if the OCPA does not apply, the trial court erred in denying his motion to quash and failing to limit the subpoena's scope. After full review of the record, we conclude the information sought in the subpoena duces tecum was relevant to the proceedings and Christopher failed to show that the information was protected or privileged. Finding no abuse of discretion in the trial court's decision to deny the motion to quash, we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Fischer, J., concurs, and Thornbrugh , C.J., concurs specially.

(Division No. 3)
Tuesday, November 20, 2018

116,129 — AgSecurity Insurance Company, Plaintiff/Appellant. v. Greg and Dana Sue McBride, individually and as parents and next friends of C. McBride, deceased minor; Heidi Fly, individually and as personal representative of the Estate of Leonard Fly; Jennifer Fly, individually and as natural parent and guardian of G. Fly, a minor; and Amanda Kraemer, as personal representative of the Estate of Matthew Joseph Kraemer, Defendants/Appellees. Appeal from the District Court of Bryan County, Oklahoma. Honorable Mark Campbell, Trial Judge. Plaintiff/Appellant AgSecurity Insurance Company (AgSecurity) appeals the trial court's order denying its motion for summary judgment and granting motions for summary judgment of Defendants/Appellees Greg and Dana McBride, Jennifer Fly, Amanda Kraemer, and Heidi Fly (Appellees) relating to the limits of an insurance policy issued by AgSecurity. Appellees sought coverage arising out of an automobile accident, and the parties disagreed on the amount of the policy limits. We find that AgSecurity's insured was required to comply with the mandatory insurance requirements under the Oklahoma Motor Carrier Act. However, we find that the amount of coverage that should be imputed to the policy is the statutory minimum. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion by Swinton, P.J. Mitchell, J., concurs; Goree, V.C.J., dissents.

(Division No. 4)
Thursday, November 8, 2018

116,116 — In the Matter of the Estate of Anita Telenius Wright, a deceased person, Patricia Chamberlain, Appellant, v. Thomas L. Wright, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Kirby, Trial Judge. The trial court movant, Patricia Chamberlain (Patricia), appeals an Order denying her motion to vacate an Order and Final Decree of Distribution entered in the probate matter of In re Anita Telenius Wright (Anita). Thomas L. Wright (Thomas) is the personal representative in that probate. Thomas Wright filed an ancillary probate for his mother's, Anita, estate. He alleged that his mother, a Texas resident, owned a Tract of land in Oklahoma. The estate was probated and the tract distributed in accord with Anita's Will to the Anita Wright Trust. The Tract was acquired in the name of Anita's husband, Clayton, during their marriage. Clayton remarried the appellant, Patricia. Clayton died. Patricia now claims an interest in the Tract by conveyance from Clayton and by inheritance from Clayton. Precisely what percentage of interest she claims cannot be ascertained from the Appellate Record. Patricia moved to vacate the Anita Oklahoma probate decree. The trial court denied the motion for lack of standing and noted Patricia's contrary position in Clayton's Texas probate. After review, this Court finds that it is not possible under the Appellate Record to determine whether the Anita Trust and Patricia are claiming separate undivided interests or whether their claims are overlapping as to interest, in whole or in part. However, the Appellate Record does show a basis for a claim of ownership interest in the Tract by Patricia and that her claimed interest in the Tract is affected by the Anita Oklahoma probate due to the diverse legal descriptions of percentage ownerships contained in all of the documents in the Appellate Record. Therefore, this Court holds that the trial court erred by denying the motion to vacate on the ground that Patricia lacked standing or interest in the Anita Oklahoma probate. This Opinion does not express any view regarding what percentage interests, if any, are owned by the competing parties, as that is a threshold, first instance task for the trial court to decide. Thus, the denial of the motion to vacate is reversed without prejudice to renewal if the trial court determines that the competing parties do not claim the same, or overlapping, interest in the Tract. REVERSED

AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., dissents.

Tuesday, November 13, 2018

116,165 — Noval Seniorcare, LLC, Plaintiff/Appellee, v. Oklahoma Employment Security Commission, and Assessment Board, Defendants/Appellants. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge. The Oklahoma Employment Security Commission (Commission) and Oklahoma Employment Security Commission Assessment Board (Board) appeal a judgment in favor of Noval Senior Care, LLC (Noval) entered in an appeal by Noval of an administrative decision entered by both the Commission and Board. Noval is a licensed home health care agency. McPherson, an individual Noval had engaged to provide home health care services, filed for unemployment compensation. During this administrative process, Board assessed unemployment taxes for McPherson. Noval protested and the Board ruled that McPherson was an employee and not an independent contractor as urged by Noval. The criteria for whether a person is an employee or independent contractor for unemployment compensation matters are broader than matters covered by the common law. Freedom from control both in the contract for hire and in fact is one special factor which determines an individual's status. This clearly means total freedom and that is not the case here. Noval has gone to great lengths in its contract for hire to denominate individuals as independent contractors. However, control in fact exists because it is required by law and regulation covering home health care agencies. Therefore, this Court finds that the individual involved here is an employee of Noval for purposes of unemployment compensation matters, including assessment of unemployment taxes. Therefore, the District Court erred in reversing the decision of the Board and Commission. The judgment of the District Court is reversed and the cause is remanded with instructions to affirm the decision of the Board and Commission. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Wednesday, November 14, 2018

116,248 — Don J. Head, Plaintiff/Appellant v. Jamie M. Green, Defendant/Appellee. Appeal from an Order of the District Court of Grady County, Hon. John Herndon, Trial Judge. The plaintiff, Don J. Head (Father), appeals an order awarding custody of C.J.G., a child of the parties, to the defendant, Jamie M. Green (Mother). C.J.G. was nine years of age at the time of trial. Although the parties were never married, prior proceedings established paternity and custody with Father. A temporary order changed custody based upon allegations and a finding of excessive force by Father spanking C.J.G. with a belt and leaving bruises and marks, Mother obtained temporary custody. Mother filed a motion to modify custody and after a trial the trial court did so by awarding custody to Mother and making support and visitation arrangements. In his appeal, Father admits striking C.J.G. with a belt. Father devotes a substantial part of his argument to the proposition that a custodial parent has the right to discipline a child and that includes spanking. Father asserts that the trial court erred by not recognizing this principle. First the trial court did not rule that custody would be changed because Father, as custodial parent, spanked the child. Likewise, the trial court did not rule that a custodial parent did not have the discretion to discipline a child. As shown by the trial court's comments in ruling, and as shown by the evidence, Father injured the child and used excessive force. Father admitted to use of the belt on at least five occasions. Father cites no law, and there is none, that permits a custodial parent to injure a child in the name of discipline. The trial court did find the existence of a material, substantial change of conditions. The decision of the trial court awarding custody of C.J.G. to Mother is not against the clear weight of the evidence or contrary to law. The judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,626 — Carl J. Morony, Plaintiff/Appellant, v. New Cingular Wireless, PCS, LLC, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rebecca B. Nightingale, Trial Judge. Carl J. Morony, the trial court plaintiff (Morony), appeals the Order denying his motion to vacate an Order modifying a Temporary Injunction and his motion for leave to file a response to the defendant's, AT&T Wireless Services of Tulsa, Inc. d/b/a AT&T Wireless Services (AT&T), Motion for an expedited hearing. AT&T was duly substituted for its predecessor New Cingular Wire-

less, PCS LLC (Cingular) and is the successor in interest for all purposes in this matter, however, the parties generally refer to "Cingular" when referring to the defendant and that will be continued here. The decision of the trial court to deny Morony's motion to vacate and motion for leave to respond is affirmed. Morony has not demonstrated that the trial court's decision is contrary to law or an abuse of discretion. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Rapp, J.; Barnes. P.J., and Goodman, J., concur.

Thursday, November 15, 2018

117,137 — Jackson Robert Walsh, Plaintiff/Appellee, vs. State of Oklahoma ex rel. Department of Public Safety, Defendant/Appellant. Appeal from an Order of the District Court of Canadian County, Hon. Barbara Hatfield, Trial Judge, reversing the revocation of Jackson Robert Walsh's (Walsh) driver's license. Department of Public Safety (DPS) asserts the district court erred by setting aside the revocation of Walsh's driving privileges. DPS asserts it established that Walsh was in actual physical control (APC) of his vehicle while under the influence of an intoxicant pursuant to 47 O.S.2011, § 754. Walsh disagrees, asserting he was not in APC because there was no evidence that he was operating the vehicle or that it had the ability to self-propel. According to the arresting officer's testimony, on pulling up to the vehicle he observed the brake lights on, the vehicle's engine to be running, the car's transmission in the drive position, and Walsh's foot on the brake pedal. After tapping on the window, he observed Walsh's eyes to be red and watery and his face sweating. The Officer testified that when Walsh rolled the window down, he detected a strong odor associated with intoxicating beverages coming from the vehicle. Walsh appeared confused, became agitated when asked to exit the vehicle, and had difficultly answering questions about where he had come from. After review of the facts and circumstances in this case, we conclude there was probable cause to believe Walsh "had been driving or was in actual physical control of a vehicle" while intoxicated. Accordingly, the district court's order was in error and is reversed. The ALJ's order of revocation is af-firmed. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Friday, November 16, 2018

115,968 — Geral Palffy, Petitioner/Appellant, vs. Victor Palffy, Respondent/Appellee. Appeal from an Order of the District Court of Garfield County, Hon. Dennis W. Hladik, Trial Judge. Geral Palffy (Wife) appeals a Decree of Dissolution of Marriage, which, *inter alia*, awarded the parties joint custody of their minor child. Based on this record, we find Wife's brief is reasonably supportive of her allegation of error. Although Husband was the minor child's primary caregiver during the parties' marriage, Husband's mental health issues and erratic behavior as reflected in this record are significant factors that should be reassessed upon remand. The Decree of the trial court awarding the parties joint custody of the minor child with Husband designated as the primary custodian and Wife having visitation is therefore in error and is reversed. The case is remanded to the trial court for further proceedings to determine the child's best interest in a new custody determination. Upon remand, the trial court shall appoint a guardian ad litem to investigate all matters concerning the best interest of the minor child and to objectively advocate on behalf of the minor child pursuant to 43 O.S.2011 and Supp. 2017, § 107.3. The Decree is affirmed in all other respects. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 2)
Friday, November 16, 2018

116,907 (Companion with Case Nos. 109,478 and 110,818) — Jeffrey P. and Kathy L. Nees, Mark A. Camp, Trustee of the Mark A. Camp 2005 Trust, Camille L. Camp, Trustee of the Camille L. Camp 2005 Trust, Samuel Edward II, Jenny C. Dakil, Charles W. and Connie J. Hollen, G. Mike Jolley and Jennie L. Jolley Family Trust, P. Mark and P. Megan Moore, Jamshid and Cheryl F. Motiei, Stanton M. and Kerry S. Nelson, Michael D. and Gail M. Sellers, Robert A. and Carol L. Stoops, William D. and Angela L. Wright, Individually and on behalf of others similarly situated, Plaintiffs/Appellees, vs. Ashton Grove, L.C., W. Dow Hamm III Corporation, Ashton Grove Master Association, Inc., Ashton Grove Estates Section I Community Association, Inc., William Dow Hamm III, William Dow Hamm Jr., and Jonathan H. Brindsen, Defendants/Appellants, and City of Norman, Appellee. Appellant's Petition for Rehearing filed May 15, 2013 is hereby *DENIED*.

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