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THE OKLAHOMA BAR
Journal

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Oklahoma Bar Association

table of contents

Feb. 2, 2019 • Vol. 90 • No. 3

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Civil Appeals

2018 OK 104

Establishment of the 2019 Uniform Mileage Reimbursement Rate for Expenses Paid from the Court Fund

No. SCAD-2018-74. December 19, 2018

ORDER

Pursuant to the State Travel Reimbursement Act, 74 O.S. Section 500.4, reimbursement for authorized use of privately owned motor vehicles shall not exceed the amount prescribed by the Internal Revenue Code of 1986, as amended (26 U.S.C.A. section 1 et. seq.) For 2019, the standard business mileage rate prescribed by the Internal Revenue Service is $.58 per mile.

Therefore, the 2019 mileage rate which is reimbursed by the court fund, including, but not limited to jurors, interpreters and witnesses, shall be computed at $.58 cents per mile.

DONE BY ORDER OF THE SUPREME COURT THIS 19th DAY OF DECEMBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

2019 OK 1

IN THE MATTER OF THE REINSTATEMENT OF CAROL ROSE GOFORTH TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS

SCBD 6633. January 23, 2019

ORIGINAL PROCEEDING FOR RULE 11 BAR REINSTATEMENT

¶0 Petitioner, Carol Rose Goforth, filed a petition for reinstatement to membership in the Oklahoma Bar Association. The Oklahoma Bar Association does not oppose this reinstatement. The Professional Responsibility Tribunal unanimously recommended reinstatement. After our de novo review, we find the Petitioner should be reinstated.

PETITION FOR REINSTATEMENT IS GRANTED; PETITIONER IS ORDERED TO PAY COSTS

Carol Rose Goforth, Petitioner/Pro Se.

Stephen L. Sullins, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Respondent.

COMBS, J.:

¶1 On April 4, 2018, the Petitioner, Carol Rose Goforth, filed her Petition for Reinstatement requesting she be readmitted as a member of the Oklahoma Bar Association (OBA) pursuant to Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A (RGDP). The record reflects the Petitioner graduated from the University of Arkansas School of Law in 1984 and was admitted to practice law in Oklahoma on October 18, 1984. She resided in Tulsa, Oklahoma where she worked for the law firm Doerner, Stuart, Saunders, Daniel and Anderson from October 18, 1984, through May 1, 1989. On May 15, 1989, she moved to Newark, New Jersey to accept a full-time teaching position at Seton Hall School of Law. She remained there until the summer of 1993 when she moved to West Fork, Arkansas to accept a full-time teaching position at the University Of Arkansas School Of Law in Fayetteville. She is currently a University Professor and teaches a range of business law, and practical transactional skills classes with a focus on corporations, unincorporated entities, securities regulation and transactional practice skills. The record indicates she has not been licensed to practice law in any other state.

¶2 On July 19, 1990, Petitioner was suspended from membership in the OBA for failure to pay membership dues for the year 1990.[1] One year later, this Court ordered her name stricken from the OBA membership rolls.[2] After filing her petition the Professional Responsibility Tribunal (PRT) held a hearing pursuant to Rule 6, RGDP. The Petitioner testified she regretted letting her bar license lapse but her career has been focused solely on teaching and she was even discouraged from retaining her license.[3]

She explained the law school faculty was divided between the higher paid doctrinal course teachers and the licensed, sometimes adjunct teachers, who were regarded as clinical or practical teachers.[4] She was encouraged not to be regarded as a clinical or practical teacher and therefore she let her license lapse.[5] At the time, there was no benefit in keeping her law license and it appeared even detrimental to her career.[6] She also testified that she relied upon the letter sent to her on September 12, 1991, from the OBA.[7] The letter notified her that her name had been stricken from the roll of attorneys.[8] The last paragraph of the letter also stated the letter may be disregarded if she had no intention to practice law in Oklahoma in the future.[9]

¶3 The Petitioner's educational philosophy has changed over the years.[10] She now believes there is a real need to provide law students with transactional skills training. Her ultimate goal is to expand the legal education at the University of Arkansas School of Law. She intends to initiate a supervised law clinic for upper-level law students interested in working with entrepreneurial clients.[11] This will likely include accepting pro bono clients in the state of Arkansas.[12] She will need to be licensed in Arkansas in order to reach this goal.[13] After reinstatement of her Oklahoma license she will pursue her Arkansas license through reciprocity.[14] Her goal is not to practice law in Oklahoma nor will she practice law in Arkansas for profit.[15] Any clients taken will be on a pro bono basis in an academic setting.[16] Her desire for reinstatement lies purely with helping her students develop transactional skills to enhance their education.[17]

¶4 The PRT unanimously recommends the Petitioner be reinstated. It found by clear and convincing evidence the Petitioner had shown she possesses good moral character sufficient to be admitted to the OBA, she possesses competence in the learning of the law required for readmission, and she has not engaged in the unauthorized practice of law. The PRT also recommends the Petitioner should pay all fees and expenses of the investigation, including the cost of the original and one copy of the transcript as well as requiring her to obtain twelve hours of continuing legal education and payment of her bar dues for the year in which she is reinstated. It did not recommend the Petitioner take and successfully pass the regular bar examination given by the Board of Bar Examiners of the OBA. The Respondent, OBA, waived the filing of its answer brief and recommended the adoption of the PRT's findings.

STANDARD OF REVIEW

¶5 This Court has the non-delegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of Oklahoma practitioners of the law. *In re Reinstatement of Kerr*, 2015 OK 9, ¶6, 345 P.3d 1118. Our review of the record is made de novo, in which we conduct a non-deferential, full-scale examination of all relevant facts. *State ex rel. Oklahoma Bar Association v. Hulett*, 2008 OK 38, ¶4, 183 P.3d 1014. In a proceeding involving no prior imposition of discipline for lawyer professional misconduct, the focus of our inquiry concerns 1) the present moral fitness of the applicant; 2) conduct subsequent to suspension as it relates to moral fitness and professional competence; 3) whether the attorney has engaged in the unauthorized practice of law; and 4) whether the attorney has complied with the rule-mandated requirements for reinstatement. *In re Reinstatement of Christopher,* 2014 OK 73, ¶5, 330 P.3d 1221. The PRT's recommendations concerning these matters, while entitled to great weight, are advisory in character and the ultimate decision rests with this Court. *In re Reinstatement of Pate,* 2008 OK 24, ¶3, 184 P.3d 528; *In re Reinstatement of Floyd,* 1989 OK 83, ¶3, 775 P.2d 815. Rule 11.4, RGDP, provides an applicant seeking reinstatement will be required to present stronger proof of qualifications than one seeking admission for the first time. In addition, Rule 11.5, RGDP provides in pertinent part:

> At the conclusion of the hearing held on the petition for reinstatement, the Trial Panel of the Professional Responsibility Tribunal shall file a report with the Supreme Court, together with the transcript of the hearing. Said report shall contain specific findings upon each of the following:
>
> . . . .
>
> (c) Whether or not the applicant possesses the competency and learning in the law required for admission to practice law in the State of Oklahoma, except that any applicant whose membership in the Association has been suspended or terminated for a period of five (5) years or longer, or who has been disbarred, shall be required to take and successfully pass the regular examination given by the Board of Bar Examiners of the Oklahoma Bar Associa-

> tion. Provided, however, before the applicant shall be required to take and pass the bar examination, he shall have a reasonable opportunity to show by clear and convincing evidence that, notwithstanding his long absence from the practice of law, he has continued to study and thus has kept himself informed as to current developments in the law sufficient to maintain his competency. If the Trial Panel finds that such evidence is insufficient to establish the applicant's competency and learning in the law, it must require the applicant to take and pass the regular bar examination before a finding as to his qualifications shall be made in his favor.

We have held this provision creates a rebuttable presumption that one who has been suspended for five years will not possess sufficient competency in the law to be reinstated, absent an extraordinary showing to that effect. *In re Reinstatement of Farrant*, 2004 OK 77, ¶7, 104 P.3d 567. Each application for reinstatement to the OBA must be considered on its own merits and will fail or succeed on the evidence presented and the circumstances of the attorney's case. *In re Reinstatement of Kerr,* 2015 OK 9, ¶19, 345 P.3d 1118.

ANALYSIS

I. Moral Fitness

¶6 Except for her suspension in 1990 for failure to pay dues, the record is silent as to any disciplinary actions taken against the Petitioner. Eight letters were admitted as evidence which strongly supported a finding that Petitioner possessed good moral character.[18] These letters were written by various deans and professors of the universities where she has worked as well as members of the bar. Testimony at the hearing also supported Petitioner's good moral character.[19] No contrary evidence was presented. The PRT found Petitioner had shown by clear and convincing evidence she possessed the good moral character to be readmitted to the OBA. After an examination of the record, we agree with this finding.

II. Professional Competence Sufficient for Reinstatement

¶7 Rule 11.5, RGDP, requires a petitioner for reinstatement to show they possess the competency and learning in the law required for admission. If they have been suspended or terminated for more than 5 years, there is a rebuttable presumption they will be required to retake the regular bar examination. In determining competency, our precedent has placed an emphasis on law-related work history following suspension. We have also considered other ways a petitioner has kept abreast of the law including the completion of continuing legal education courses and the reading of bar journals.

¶8 In *In re Reinstatement of Bodnar*, this Court noted some of our previous opinions had rejected a finding of competency when the petitioner's preparation had consisted mainly of completing only twelve to twenty-four hours of continuing legal education courses prior to petitioning for reinstatement. 2016 OK 12, ¶23, 367 P.3d 916. We held "if practicing attorneys must complete twelve hours a year, taking one class and reading the Oklahoma Bar Journal for three months is certainly insufficient to meet the burden for showing competency." *Id.* Our prior precedent addressed in the opinion included, *In re Reinstatement of Turner,* 1999 OK 72, 990 P.2d 861, and *In re Reinstatement of Hardin*, 1996 OK 115, 927 P.2d 545.

¶9 In *Turner,* a lawyer petitioned for reinstatement four years after his name was removed from the roll of attorneys for failure to pay his bar dues and failure to maintain his continuing legal education requirements. *Turner,* 1999 OK 72, ¶2. Mr. Turner had completed twenty-four hours of continuing legal education three years prior to filing his petition. *Id.* ¶10. He also contended he had read the Oklahoma Bar Journal, as well as other legal publications. *Id*. We held, Mr. Turner failed to prove by clear-and-convincing evidence he possessed the requisite legal skills for reinstatement. *Id.* ¶20. This Court also refused to give any weight to his work experience after his suspension because Mr. Turner had been blatantly practicing law without a license. *Id*.

¶10 In *Hardin,* a lawyer resigned from the Oklahoma Bar Association in 1990 pending disciplinary proceedings. *Hardin,* 1996 OK 115, ¶1. In 1995, he petitioned for reinstatement. Mr. Hardin presented evidence to support his competency in the law. His evidence consisted of reading the Oklahoma Bar Journal and taking eighteen hours of continuing legal education courses, all in the year preceding the filing of his petition. *Id*. ¶6. We held he failed to prove by clear and convincing evidence he now possessed the requisite legal skills to be reinstated. *Id*. ¶12.

¶11 By contrast, other opinions have given great weight to a petitioner's work experience and approved reinstatement even though the petitioner had not completed many hours of continuing legal education. In *In re Reinstatement of Jones*, a seasoned lawyer resigned in 1997 during disciplinary proceedings and petitioned for reinstatement in 2004. 2006 OK 33, ¶¶ 1, 6, 142 P.3d 380. After her resignation, she took various non-legal jobs. *Id.* ¶11. The record reflects she completed almost twenty hours of continuing legal education the year prior to filing her petition. *Id.* ¶12; *Brief in Support of Reinstatement*, p. 7 (filed December 12, 2005; SCBD 4961). She also read the Oklahoma Bar Journal over the two years before filing her petition. *Id.* This Court noted over the "past year" she had received hands-on supervised legal experience. *Jones,* 2006 OK 33, ¶¶11-12. We held, she had shown her competence and learning in the law to qualify her for readmission without re-taking the bar examination. *Id*. ¶12.

¶12 In another case, a lengthy absence from the practice of law did not prevent reinstatement when the lawyer continued taking continued legal education courses and their non-legal work experience was considered. In *In re Reinstatement of Gill,* a lawyer was licensed to practice law in Oklahoma in 1979 and was later suspended for failure to pay dues in 1983. 2016 OK 61, ¶¶ 1, 2, 376 P.3d 200. She was also licensed in 1978 to practice law in California and did so from 1981 through 1999. *Gill,* 2016 OK 61, ¶1. From 2001 through 2013, she worked for an urban land use planning company. *Id.* ¶8. She placed her California bar license on inactive status in 2002, but continued to take continuing legal education courses while working for the company. *Id.* ¶7-8. She was not practicing law for the company, however, her duties included drafting and managing contracts, assisting the management of the company's legal teams and performing work concerning environmental compliance. *Id.* ¶8. In 2014, she moved back to Oklahoma and performed clerical and administrative tasks as well as supervised legal research for a law firm. *Id.* ¶11-12. The following year she petitioned for reinstatement. *Id.* ¶1. Since 2015 she had also completed twenty-four hours of continuing legal education. *Id.* ¶14. The PRT recommended reinstatement and this Court agreed finding she possessed the competency and learning in the law required for reinstatement without re-taking the bar examination. *Id.* ¶22.

¶13 In the present matter, the Petitioner has contributed to her legal community in many ways including serving as the Arkansas Liaison to the Corporate Laws Committee of the American Bar Association (ABA) and serving as an Official Observer to the Uniform Limited Liability Company Act Draft Committee of the Uniform Law Commission.[20] Since leaving Oklahoma in 1989, she has been continuously engaged in the full-time teaching of law at ABA accredited law schools.[21] The Petitioner was promoted to University Professor at the University of Arkansas School of Law in 2012.[22] Prior to her promotion, she worked as a professor of law, associate dean and acting dean at the university.[23] During this time, the Petitioner also wrote three books/chapters and forty-four distinct journal articles on a variety of legal topics.[24] In addition, she attended numerous conferences and presentations throughout the years but she did not keep track of how many hours of continuing legal education credits she would have been eligible to receive.[25]

¶14 Over the entirety of the Petitioner's time teaching there was only one year in which she did not teach at least six credit hours at an ABA accredited law school.[26] Her teaching load for most years was between eleven and thirteen credit hours.[27] Under Rule 7 of the Rules for Mandatory Continuing Legal Education (MCLE), six hours of continuing legal education credit may be earned for each semester hour taught at an ABA accredited law school. Rule 7, Reg. 3.4, MCLE, 5 O.S. 2011, Ch. 1, App. 1-B. Her regular teaching schedule therefore amounted to an equivalent continuing legal education of between sixty-six to seventy-eight hours each year. The Petitioner's continuing legal education equivalency clearly exceeds the annually required twelve hours for licensed lawyers in Oklahoma.

¶15 The PRT found the Petitioner possessed the required competence and learning of the law and recommended her reinstatement. We agree with this recommendation. The Petitioner's extensive contributions and work experience qualify her to be readmitted to the practice of law in Oklahoma without the necessity of retaking the regular bar examination.

III. Unauthorized Practice of Law

¶16 Rule 11.1, RGDP provides a mechanism for determining whether a petitioner has engaged in the unauthorized practice of law. Paragraph (a) of the rule requires the petitioner

to submit an affidavit, attached to the petition for reinstatement, from each court clerk of the several counties in which he or she resided after suspension or termination of the right to practice law, establishing the petitioner has not practiced law in their respective courts during that period. Petitioner submitted her affidavit wherein she attests to not having engaged in the unauthorized practice of law since her suspension.[28] The affidavit also states she has contacted the counties in New Jersey and in Arkansas where she resided but they are unable to provide an affidavit affirming she has not practiced law in those counties because they have no information concerning who has appeared as counsel.[29] She provided an affidavit from Tulsa County, Oklahoma wherein the Court Clerk attests the Petitioner has not appeared before any judge in the county since her suspension.[30] She also provided a letter from the Arkansas Supreme Court confirming she has never been reported to the Unauthorized Practice of Law Committee in that State.[31] Rhonda Langley, the Investigator for the General Counsel's Office of the Oklahoma Bar Association, testified at the June 19, 2018, PRT hearing. She explained her process for determining whether a petitioner has engaged in the unauthorized practice of law.[32] She found no cause for concern.[33]

¶17 Petitioner attested to all her activities since her suspension.[34] Her activities included being asked to participate in a corporation that was in the process of being formed. She was offered the title of Vice President of Law and Policy. The position was not to be compensated and her primary role was to advocate for responsible regulation in the crypto currency community. She confirmed that her role would be outside of the corporation's legal department and she was to consult with the corporation's counsel when requested. In a May 10, 2018, letter to the bar investigator, she indicated she was not comfortable in doing all the duties the corporation was wanting her to do without having a license to practice law and this concern had been one of her earlier reasons for pursuing reinstatement.[35] However, the letter also informed the investigator that this business has now folded and therefore was no longer a driving reason for pursuing reinstatement. Since 1998, she has also performed pro bono work for a local Legal Services office.[36] Her work is uncompensated and she has no interaction with the office's clients. Her work consists of providing research and consultation to the licensed attorneys who work there.

¶18 The PRT's report found the Petitioner had proven by clear and convincing evidence she has not engaged in the unauthorized practice of law nor has she appeared in court as an attorney of record for any party or in any litigation. We find no evidence to the contrary.

MCLE, BAR DUES, AND APPLICATION TO ASSESS COSTS

¶19 An affidavit from the OBA's MCLE Administrator states the Petitioner does not owe any MCLE credit or any MCLE fees.[37] An affidavit from the OBA's Director of Administration states the Petitioner will owe only her current membership dues of two hundred and seventy-five dollars ($275.00) for the year of her reinstatement.[38] The OBA filed an Application to Assess Costs, pursuant to Rule 11.1 (c), RGDP. The application requests the Petitioner pay, on a date certain, the amount of two hundred and thirty-two dollars and ninety-three cents ($232.93) for the expenses related to this investigation. It indicates the Petitioner has already been invoiced directly for the costs of the transcript of the proceedings. The record also reflects no payments have ever been expended from the Clients' Security Fund on the Petitioner's behalf.

CONCLUSION

¶20 The Petitioner has complied with the rule-mandated requirements for reinstatement. We hold the Petitioner has met her burden of proof and established by clear and convincing evidence her eligibility for reinstatement without examination. Within thirty days of the date of this opinion Petitioner shall pay the costs incurred in this proceeding in the amount of two hundred and thirty-two dollars and ninety-three cents ($232.93) as required by Rule 11.1 (c), RGDP. She shall also be required to pay the current year's (2019) OBA membership dues. Upon payment of the costs assessed and her 2019 membership dues, the Petitioner shall be reinstated to membership in the Oklahoma Bar Association and her name shall be added to the roll of attorneys. Following reinstatement she shall complete mandatory continuing legal education in the same manner as other members of the bar.

PETITION FOR REINSTATEMENT IS GRANTED; PETITIONER IS ORDERED TO PAY COSTS

¶21 **ALL JUSTICES CONCUR**

COMBS, J.:

1. Ex. 27, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018; Supreme Court Order S.C.B.D. 3693 (July 19, 1990).
2. Ex. 28, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018; Supreme Court Order S.C.B.D. 3693 (September 10, 1991).
3. Tr. at 64, 57-58, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018).
4. *Id*. at 57-58.
5. *Id*. at 58.
6. *Id*.
7. *Id*. at 57.
8. Ex. 29, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
9. *Id*.
10. Tr. at 58, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018).
11. *Petitioner's Brief in Support of Reinstatement*, filed November 20, 2018, p.5.
12. *Id*.
13. Tr. at 68, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018).
14. *Id*. at 59-60.
15. *Id*. at 63, 66.
16. *Id*. at 63; *Report of the Trial Panel*, filed November 2, 2018, p.2.
17. Tr. at 62, 68-69, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018); *Petitioner's Brief in Support of Reinstatement*, filed November 20, 2018, pp.9-10.
18. Exs. 1-8, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
19. Tr. at 11, 12, 18, 21-22, 24, 39, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018).
20. *Petition for Reinstatement*, filed April 4, 2018, Ex. C., Affidavit, p.7.
21. *Id*., Ex. A., Affidavit, p.1.
22. *Id*., Ex. C., Affidavit, p.1.
23. *Id*.
24. *Id*. at pp.3-6.
25. *Petitioner's Brief in Support of Reinstatement*, filed November 20, 2018, p.12.
26. *Id*.
27. *Id*.
28. Ex. 16, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
29. *Id*.
30. Ex. 19, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
31. Ex. 20, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
32. Tr. at 75, *In re Reinstatement of: Carol Rose Goforth* (SCBD #6633; June 19, 2018).
33. *Id*. at 79.
34. Ex. 17, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
35. Ex. 18, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
36. Ex. 17, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
37. Ex. 9, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.
38. Ex. 10, *Jt. Hearing Exhibits*, for the PRT hearing held June 19, 2018.

2019 OK 2

KELLEY P. KOHLER, Petitioner-Appellee, v. CAROLYNN L. CHAMBERS, Respondent-Appellant.

Case No. 116,391. January 29, 2019

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY; HONORABLE PAMELA B. HAMMERS, TRIAL JUDGE

¶0 The parties in this case are the biological parents of R.L.K. Father received orders directing him to report for basic training and advanced individual training with the United States Army National Guard. Prior to leaving, Father filed a motion seeking an order authorizing the temporary transfer of his custody and visitation rights with R.L.K. to his spouse. Father maintained he was a "deploying parent" under the Oklahoma Deployed Parents Custody and Visitation Act. The trial court found the ODPCVA was controlling and vested Father's wife with the right to exercise visitation with R.L.K. during his absence. Mother appealed the judgment. We retained the case as a matter of first impression, and reverse the lower court ruling.

MOTION TO RETAIN PREVIOUSLY GRANTED; TRIAL COURT'S ORDER AND JOURNAL ENTRY OF JUDGMENT REVERSED

David A. Guten, Tulsa, OK, for Carolynn L. Chambers, Respondent-Appellant

Kathleen M. Egan & T. Luke Barteux, Tulsa, OK, for Kelley P. Kohler, Petitioner-Appellee

GURICH, C.J.

Facts & Procedural History

¶1 Kelley P. Kohler (Father) and Carolynn L. Chambers (Mother) are the biological parents of R.L.K., born April 17, 2012. Father filed a petition seeking to establish parentage in February 2014. On December 22, 2016, the parties entered an Agreed Decree of Paternity and Joint Custody Plan, which awarded the parties joint custody and equal visitation time with R.L.K.

¶2 On July 27, 2017, Father received an order from the Department of Defense Military Entrance Processing Station, directing him to report to initial active duty for training (IADT).[1] Under this order, Father was required to complete nine (9) weeks of basic training at Fort Jackson, South Carolina, and an additional nineteen (19) weeks of advanced individual training (AIT) in Fort Lee, Virginia.[2] During these periods of training, Father was not permitted to travel with his spouse and children.

¶3 In August 2017, Father filed a pleading entitled "Motion to Confirm Deployed Servicemember's Custodial Rights," urging application of the Oklahoma Deployed Parents Custody and Visitation Act (ODPCVA), 43 O.S.2011 §§ 150 to 150.10.[3] Specifically, Father alleged that he was being deployed, as defined by the ODPCVA; and therefore, he was entitled under the Act to

assign his custody/visitation rights with R.L.K. to his current spouse. Following an expedited hearing, the trial court sustained the motion, concluding twenty-eight (28) weeks of mandatory training qualified as deployment under the ODPCVA. Accordingly, the trial judge authorized Father's wife to exercise visitation with R.L.K. during his absence. A journal entry memorializing this decision was filed on August 25, 2017.

¶4 Mother promptly filed a motion to vacate the judgment, requesting the lower court to reconsider its decision. As her sole basis for relief, Mother argued that the trial judge erred as a matter of law by finding Father was a "deploying parent" as defined by the ODPCVA. The trial court denied Mother's motion, upholding its previous ruling that Father's absence pursuant to military orders entitled him to relief under the ODPCVA.

¶5 Mother appealed the trial court's original order finding Father's attendance of basic training and advanced individual training satisfied the definition of deployment. We retained the case to address this first impression question under the ODPCVA, and now reverse the lower court's ruling.

Standard of Review

¶6 To resolve the issue presented, we must analyze the ODPCVA and interpret its relevant provisions. When the Court examines a statute, our primary goal is to determine legislative intent through the "plain and ordinary meaning" of the statutory language. In re Initiative Petition No. 397, 2014 OK 23, ¶ 9, 326 P.3d 496, 501. Because the legislature expresses its purpose by words, the plain meaning of a statute is deemed to express legislative authorial intent in the absence of any ambiguous or conflicting language. Id. When evaluating statutory language for ambiguity, the Court considers whether the wording is susceptible to more than one reasonable interpretation. Id. Because statutory construction poses a question of law, the correct standard of review is de novo. Legarde-Bober v. Okla. State Univ., 2016 OK 78, ¶ 5, 378 P.3d 562, 564.

Analysis

¶7 Of course our paramount concern in any proceeding involving custody or visitation is the best interests of the child(ren). Birtciel v. Jones, 2016 OK 103, ¶ 7, 382 P.3d 1041, 1043. The sole legal question in this appeal is whether a military servicemember, who has received orders to report to basic training and advanced individual training, and is therefore temporarily separated from his or her children, is a "deploying parent" for purposes of the ODPCVA. Mother argues that the statute applies only to parents who have been "order[ed] to another location in support of combat, contingency operation, or natural disaster," and not those parents who receive orders solely to attend initial active duty for training. Father maintains his mandatory attendance of both training phases was the equivalent of "deployment" under the ODPCVA.

¶8 The Uniform Law Commission formally adopted the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) in July of 2012. According to the UDPCVA's Prefatory Note, the proposed enactment was designed to address unique issues which arise during the deployment of both civilian and military personnel, including: maintenance of the parent-child bond during a parent's temporary absence due to deployment; resuming normal custody and visitation following a service member's return from deployment; providing expedited procedures for resolving temporary custody arrangements due to the sudden impact of deployment orders; to prevent a deployed parent from being penalized as a result of serving his or her country; and fostering consistency and predictability among the states through application of uniform standards for deploying parents. Unif. Deployed Parents Custody & Visitation Act, Prefatory Note (2012). Very similar to early drafts of the UDPCVA, the ODPCVA was enacted by the Oklahoma Legislature during the 2011 session, and became effective May 26, 2011.[4]

¶9 In the event a parent is deployed and he or she seeks relief under the ODPCVA, the deploying parent is entitled to transfer his or her visitation rights to a step-parent, a designated family member, or another designated individual. 43 O.S.2011 §§ 150.3, 150.8.[5] The Act also creates certain rebuttable presumptions, including that it is "in the best interests of the child" for a stepparent, designated family member or another designated person to exercise the deployed party's parental duties or visitation.[6] 43 O.S.2011 § 150.8(D)(1) and (2).

¶10 In order to invoke the ODPCVA's protections in the present case, Father was required to show he was a deploying parent. Title 43

O.S.2011 § 150.1(4) defines "deploying parent" as follows:

> [A] legal parent of a minor child or the legal guardian of a child, who is a member of the United States Armed Forces, civilian personnel or contractor serving in designated combat zones and ***who is deployed or has been notified of an impending deployment.***

(Emphasis added).Obviously to ascertain the foregoing question, we must ascertain whether Father was deployed or subject to an impending deployment. Section 150.1(5) sets forth the meaning of "deployment" under the ODPCVA:

> [T]he temporary transfer of a servicemember in compliance with official orders to another location in support of combat, contingency operation, or natural disaster requiring the use of orders for a period of more than thirty (30) consecutive days, during which family members are not authorized to accompany the servicemember at government expense.

43 O.S.2011 § 150.1 (emphasis added)

¶11 It is undisputed Father was a servicemember and he received military orders requiring his temporary transfer for more than thirty days to another location; and during this period, Father's family members were not authorized to accompany him at government expense. Additionally, the parties agree Father was not acting in support of a "contingency operation" or "natural disaster." Thus, our inquiry is limited to whether Father's temporary transfer for basic training and advanced individual training was "in support of combat." However, the legislature did not define the phrase "in support of combat."

¶12 If we utilize the rudimentary meanings for the terms "in support of combat," the phrase takes on an exceptionally broad reading; in fact, virtually any service-connected activity occurring while combat operations are ongoing, could be construed as "in support of combat." Additionally, the Legislature's failure to specifically define the phrase is problematic in this case because of the overbroad application likely to result from a literal reading. As we noted in McClure v. ConocoPhillips Co., 2006 OK 42, ¶ 12, 142 P.3d 390, 395, the Legislature's failure to use a defined term in the Workplace Drug and Alcohol Testing Act created ambiguity requiring implementation of statutory rules of construction. A literal reading of "in support of combat" would be so overreaching as to create an absurd result not intended by the Legislature. See Hogg v. Okla. Cnty. Juvenile Bureau, 2012 OK 107, ¶ 7, 292 P.3d 29, 33 (explaining that this Court should "give a sensible construction when interpreting statutes and not presume that the legislature intended an absurd result."). Applying the aforementioned principles guiding statutory interpretation, we find § 150.5 is ambiguous.

¶13 Our decisions recognize that if a statute is ambiguous, the Court may look to extrinsic sources to aid us in ascertaining its meaning. See, e.g., McClure, ¶ 12, 142 P.3d at 395; Cox v. Dawson, 1996 OK 11, 911 P.2d 272, 277 ("Having determined that the statute is unclear, we may resort to available sources of interpretative assistance to determine the Legislature's intent."). Although "combat" has not been specifically defined by Oklahoma legislation, several federal and state statutes defer to Section 112 of the Internal Revenue Code of 1986. The IRC defines "combat zone" as "any area which the President of the United States by Executive Order designates . . . as an area in which Armed Forces of the United States are or have engaged in combat." 26 U.S.C. § 112(c)(2) (emphasis added). See 22 O.S.Supp.2018 § 973a (providing that veterans must provide proof that they served in a "combat zone," as defined in Section 112 of the IRC). Further, the IRC uses the phrase "serving *in support of* such Armed Forces" to mean that an individual is located "in an area designated by the President of the United States by Executive order as a 'combat zone.'" 26 U.S.C. § 7508 (West) (emphasis added). According to these sources, it is clear that Father's training was not deployment for "combat" or "in support of combat."

¶14 Another consideration which bolsters our finding in this case is found in the Armed Forces Code definition of deployment. The term deployment is defined in 10 U.S.C.A. § 991(b), and expressly excludes periods when a servicemember is "performing service as a student or trainee at a school (including any Government school)." 10 U.S.C. § 991(b)(3)(A). Additionally, the Department of the Army has concluded that "[s]oldiers are not eligible for deployment until they have completed [basic training]/advanced individual training (AIT) or [Basic Officers Leaders Course]."[7] Considering the phrase "in support of combat," in light of the federal statutes and Army Regulations, we find that Father's attendance

of basic training and advanced individual training was not deployment pursuant to 43 O.S.2011 § 150.1(5).[8]

Conclusion

¶15 We hold that Father was not a "deploying parent" because his temporary transfer was not "in support of combat, contingency operation, or natural disaster" as mandated by 43 O.S.2011 § 150.1. Thus, the trial court erred in sustaining Father's motion seeking to transfer his custody and visitation rights under the ODPCVA.

TRIAL COURT'S ORDER AND JOURNAL ENTRY OF JUDGMENT REVERSED; MATTER REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

¶16 Gurich, C.J., Wyrick, V.C.J., Winchester, Edmondson and Darby, JJ., concur;

¶17 Kauger, Colbert, Reif and Combs, JJ., dissent.

GURICH, C.J.

1. The U.S. Department of Defense defines initial active duty for training as: "[b]asic military training and technical skill training required for all accessions." U.S. Dep't of Def., *Joint Publ'n 1-02, Dep't of Def. Dictionary of Military and Assoc. Terms* 264 (Apr. 12, 2001) (as amended through Oct. 17, 2007).

2. The National Guard states that advanced individual training (AIT) follows completion and graduation from basic training. In AIT, the individual will receive training in a Military Occupational Specialty (MOS). Upon completion of AIT, the individual will be MOS Qualified. National Guard, *Advanced Individual Training* (last visited Nov. 8, 2018), https://www.nationalguard.com/basic-combat-training/advanced-individual-training.

3. The ODPCVA was amended on November 1, 2017 after Mother filed her appeal. The amendments do not affect our ruling in this case. Nevertheless, we are applying the 2011 version of the statute.

4. 2011 Okla. Sess. Laws, p. 2742. The definition of "deployment" in the ULC's 2010 draft of the UDPCVA closely resembled the meaning adopted by the Oklahoma Legislature in 2011. Compare ULC, Visitation and Custody Issues Affecting Military Personnel and their Families, (Draft April 2010) with 43 O.S.2011 § 150.1. We do note, however, the definition of deployment adopted by the Legislature in the ODPCVA differs from the definition in the final version of the UDPCVA. See Unif. Deployed Parents Custody & Visitation Act, § 102 (2017).

5. Section 150.3 reads:

> A. In order to ensure an ongoing relationship with the child while deployed, pursuant to the Deployed Parents Custody and Visitation Act, upon application to the court by the deploying parent, the court shall designate a family member or another person with a close and substantial relationship to the child to exercise his or her visitation rights, unless the court determines it is not in the best interests of the child.
>
> B. Visitation awarded pursuant to this section derives from the deploying parent's own right to custodial responsibility. Neither this section nor a court order permitting designation shall be deemed to create any separate or permanent rights to visitation.

Section 150.8 provides:

> A. If the deploying parent moves to designate a family member or another person with a close and substantial relationship with the child to exercise visitation rights, the court shall grant reasonable visitation to a member of the family of the child, including a stepparent or step sibling, with whom the child has a close and substantial relationship as defined in the Deployed Parents Custody and Visitation Act.
>
> B. Any visitation ordered by the court pursuant to this section shall be temporary in nature and shall not exceed or be less than the amount of custodial time granted to the deploying parent under any existing permanent order or agreement between the parents, with the exception that the court may take into account unusual travel time required to transport the child between the nondeploying parent and the family members allowed visitation.
>
> C. The person designated by the deploying parent to exercise visitation shall appear at the temporary order hearing.
>
> D. Rebuttable presumptions for proceedings under the Deployed Parents Custody and Visitation Act:
>
> 1. In postdissolution proceedings, there shall be a rebuttable presumption that it is in the best interests of the child for a stepparent to exercise the deployed parent's parental duties;
>
> 2. There shall be a rebuttable presumption that if the person designated by the deployed or deploying party meets the requirements of subsection A of this section, then it shall be in the best interest of the child that the person receive visitation; and
>
> 3. There shall be a rebuttable presumption that visitation by a family member who has perpetrated domestic violence against a spouse, a child, a domestic living partner, or is otherwise subject to registration requirements of the Sex Offenders Registration Act is not in the best interest of the child.
>
> E. Any temporary order issued under the Deployed Parents Custody and Visitation Act shall be enforced as any other orders relating to the care, custody and control of the child.

6. The designated family member or designated person must have a close and substantial relationship with the child, as defined by the ODPCVA. 43 O.S.2011 § 150.8(A).

7. U.S. Dep't of Army, Reg. 135-200, *Active Duty for Missions, Projects, and Training for Reserve Component Soldiers*, para. 8-3(a) (Sept. 26, 2017).

8. The parties did not point us to any authority from our sister states resolving the same question. Likewise, this Court was unable to locate any decisions from other jurisdictions on the subject; thus we have relied on the federal statutes as extrinsic aids to assist us in reaching a resolution of this statutory question.

2019 OK 3

OKLAHOMA SCHOOLS RISK MANAGEMENT TRUST, Plaintiff/Appellee, v. MCALESTER PUBLIC SCHOOLS, Defendant/Appellant.

No. 114,553. January 29, 2019

CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS, DIVISION NO. IV

¶0 Plaintiff brought a declaratory judgment action in Oklahoma County which was subsequently transferred to the District Court of Pittsburg County. Plaintiff sought a declaration it was not liable for losses sustained by McAlester Public Schools resulting from a ruptured water pipe in one of its schools. McAlester Public Schools answered, alleged breach of contract by plaintiff, and sought indemnification for its losses. The Honorable Timothy Mills, Associate District Judge, granted summary judgment for Oklahoma Schools Risk Management Trust on its request for declaratory relief and against McAlester Public Schools on its indemnity claim. McAlester Public Schools appealed the judgment. The Oklahoma Court of Civil Appeals, Division IV, affirmed the District

Court's judgment, and McAlester Public Schools sought certiorari in the Supreme Court. We hold exclusionary clauses in an insurance policy on the issue of man-made or caused events were ambiguous based upon (1) the lack of specificity in the particular clause when a similar specificity was used in other exclusionary clauses in the policy, and (2) the issue of man-made causation as applied to the particular exclusion had historically been treated by courts as ambiguous when man-made causation or a form of universal causation were not specified in the policy. We agree with McAlester Schools that OSMRT failed to show a policy-based exclusion to coverage for the event based upon earth movement and flow of water exclusions.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS

John C. Lennon, D. Lynn Babb, Pierce Counch Hendrickson Baysinger & Green, L.L.P., Oklahoma City, Oklahoma for Plaintiff/Appellee.

Rex Travis, Oklahoma City, Oklahoma, for Defendant/Appellant.

Joe Ervin, Ervin & Ervin, McAlester, Oklahoma, for Defendant/Appellant.

EDMONDSON, J.

¶1 The controversy presented by the parties is whether an insurance policy covers the damage to a school caused by the rupture of a water pipe beneath the school. We agree with McAlester Public Schools that the policy covers the event.

¶2 The Oklahoma Schools Risk Management Trust is an interlocal cooperative composed of public schools and alternative education cooperatives for the purpose of pooling their property casualty risks by a member-funded self-insurance program. The Oklahoma Schools Risk Management Trust (OSMRT) issued a Plan of Coverage to McAlester Public Schools (McAlester Schools) for the period August 15, 2012 to August 15, 2013. On August 13, 2013 a water pipe underneath one of the McAlester Schools, Parker Middle School, broke causing damage to the school.

¶3 The OSMRT brought a declaratory judgment action in District Court and sought an adjudication holding the Plan of Coverage for McAlester Schools did not cover the damage from the broken water pipe. McAlester Schools answered and alleged counterclaims for declaratory judgment and a breach of contract by OSMRT, and for indemnification for losses resulting from the damage allegedly covered by the Plan of Coverage. McAlester Schools sought damages "in an amount in excess of $75,000.00."[1]

¶4 The OSMRT filed a motion for summary judgment on its declaratory judgment cause of action. OSMRT stated the loss suffered from earth movement, or water under the ground, or "wear and tear" was excluded by the parties' agreement. OSMRT argued these policy exclusions were unambiguous.

¶5 McAlester Schools filed a response to the OSMRT's motion combined with a cross-motion for summary judgment. The text of the motion states McAlester Schools is entitled to a summary judgment.

¶6 McAlester Schools' response stated a water supply line ruptured under the school and caused "the slab to heave under a jet of high pressure water." The response stated the rupture was a "sudden event," when the water flow was turned off to the school the slab subsided, and "there is no evidence of earth movement." McAlester Schools argued "there is no evidence of any earth movement (naturally occurring, or otherwise) was any cause of the damage." It also argued the earth movement exclusion did not apply because the damage was caused by "jetting water" and not natural earth movement.

¶7 McAlester Schools also argued the policy's water exclusion language did not apply. The response argued the language in the policy did not address "the majority rule" where an exclusion clause for damage or loss resulting from water is understood as applied to naturally occurring water movement and not to water movement caused or resulting from the acts of people.

¶8 The OSMRT responded to McAlester Schools' cross-motion for summary judgment. It argued the temporal nature of the loss-creating event as either sudden or gradual has nothing to do with the coverage exclusions at issue. The OSMRT stated "there is indeed, evidence of "earth movement" as the term is used in the

Plan of Coverage, and argued the earth movement exclusion "specifically includes within its ambit: '...the action of water under the ground surface.'" The OSMRT argued the earth movement exclusion clause contained an anti-concurrent causation clause, and must be read with other language indicating "the movement of earth caused by 'the action of water under the ground surface' is still movement of the earth."

¶9 McAlester Schools replied and argued the only issue is "whether the earth movement exclusion (and, to some extent, the water exclusion) apply when the cause of the 'movement' (or 'water') is man-made as opposed to naturally occurring."

¶10 The trial court granted OSMRT's motion for summary judgment. The trial court found "pursuant to the majority teachings of *Broom,* this Court finds the relevant portions of the plan of coverage are not ambiguous [and] therefore, Plaintiff's Motion for Summary Judgment is granted."[2] McAlester Schools' motion for summary judgment was denied. McAlester Schools appealed and then sought certiorari review in this Court after the Court of Civil Appeals affirmed the trial court's judgment.

I. Procedural Issue

¶11 We must first address what appears to have been decided by the trial court, what appears to have not been decided, and the effect on this Court's review of the summary judgment. OSMRT's motion for summary judgment argued for application of more than one exclusionary clause in the policy. The exclusionary clauses invoked were (1) "earth movement," (2) "water," including "water under the ground" and (3) "wear and tear" which included as a subcategory "rust or corrosion." *Broom* relied on P*owell v. Liberty Mut. Fire Ins. Co.*,[3] where a water pipe had broken, and we discussed the relationship of this event to an earth movement exclusion in an insurance policy.[4] *Broom* did not address movement of water, or wear and tear, or rust or corrosion as separate exclusions. We did not address what factors make, or do not make, ambiguous policy exclusions other than the particular earth movement exclusion that was before the court. The trial court's journal entry granting summary judgment and expressly relying on Broom appears to grant judgment solely on the earth movement exclusion.

¶12 The Court of Civil Appeals stated McAlester Schools' property loss was caused by two factors, water movement and earth movement, and that both were excluded risks in the policy. The appellate court determined "a discussion of the earth movement exclusion is unnecessary" because "attention must be given to the water exclusion provision of the policy." McAlester Schools sought certiorari and argued the earth movement exclusion rationale in *Broom* applied to a water movement exclusion. OSMRT responded on certiorari and argued the trial court correctly determined that the earth movement exclusion applied. OSMRT also argued the appellate court correctly concluded a water exclusion barred any recovery by McAlester Schools. OSMRT did not raise on certiorari the application of a wear and tear exclusion, or application of the rust or corrosion language which OSMRT did raise in the trial court.

¶13 Generally, an appellate court will not make first instance determinations of disputed law or fact issues, and will not affirm a summary judgment based upon facts and legal issues unadjudicated by the trial court when it granted summary judgment.[5] Although a decree in equity is affirmed if it is sustainable on any rational theory when the ultimate conclusion by the trial court is correct, a party's legal argument on appeal which is not supported with authority *supplied by counsel* will be *deemed waived* when a decree is reviewed on appeal.[6] Fundamental fairness cannot be afforded except within a framework of orderly procedure, and that fairness includes giving notice of certain judicial events altering legally cognizable rights.[7] If parties invoke a rule or principle of appellate procedure for an appellate court to determine an entire cause of action with its affirmative defenses and compulsory counterclaims *on all of the theories raised before the trial court*, then the parties must actually present those claims and theories to the appellate court in a judicially cognizable form with supporting authority where all opposing parties possess an opportunity to address them before the court. We decline to hold policy exclusions raised by OSMRT in the trial court are waived due to OSMRT failing to raise them on certiorari with supporting authority supplied by counsel.

¶14 When parties submit a case on agreed facts an appellate court may apply the law to those facts as a court of first instance and direct

judgment.[8] However, this procedure is less than ideal for parties if (1) their causes of action were not presented for a *complete and final adjudication* before either the trial court or the appellate court due to a decision-making procedure used by the trial court or the actions by the parties, or (2) the parties' legal arguments before the trial court are truncated before the appellate court due to either appellate procedure or the actions by the parties. One approach taken herein appears to be that as long as parties agree on facts, but not necessarily consequences flowing from those facts, if a trial court grants a final judgment on one legal theory of recovery, then all legal theories raised in the trial court may be decided by the appellate court regardless of the supporting authority supplied on certiorari or on appeal. McAlester Schools' Answer and Counterclaim sought damages in excess of $75,000.00, and its motion for summary judgment in the trial court does not seek a judgment for any money damages, specific or otherwise. A motion for summary judgment is a motion for a judgment on the merits, and a judgment on a party's motion for summary judgment must be based upon the record in support for a judgment for that party's motion and not deficiencies in the opposing party's motion.[9] The petition in error and certiorari petition do not assign as error the trial court's denial of summary judgment to McAlester Schools. We need not reach the issue of the sufficiency of McAlester Schools' motion for judgment on breach of contract, indemnity, and declaratory judgment causes of action.[10] The issue of McAlester School's quest for summary judgment relief like OSMRT's claims for policy exclusion unresolved by our opinion herein must be decided by the trial court upon remand.[11]

¶15 Due to the nature of the trial court's decision and the arguments raised on certiorari with supporting authority supplied by the parties, we address on certiorari the earth movement exclusion and the flow of water exclusion in the policy.

II. Analysis

¶16 Generally, most property insurance is often classified as (1) An "all-risk" policy covering a loss when caused by any fortuitous peril not specifically excluded by the policy; or (2) A "named-perils" policy covering only losses suffered from a peril enumerated in the policy.[12] Once an insured under an all-risk policy shows the loss is a covered loss, then the insurer has a burden to show the loss is excluded by the policy.[13]

¶17 We first note the coverage issue discussed by the parties. OSMRT's motion for summary judgment referenced that part of the agreement identifying "covered property" where "property not covered" includes "underground pipes, flues, or drains."[14] McAlester Schools responded and stated: "The facts are not in dispute. An underground main line water pipe beneath Parker Middle School burst, due to rust or corrosion on the outside of the buried pipe."[15] McAlester Schools recognized a cause of the damage was the rupture of an underground pipe. Concerning the "Covered Property" provision of the agreement, McAlester Schools also stated: "This provision clearly excludes reimbursement for the cost to replace property not covered – here the pipe itself."[16] OSMRT states that "all are in agreement that the underground pipe itself is not covered and there is no indemnity obligation for the pipe." Further: "'underground pipes, flues or drains' are explicitly *defined* out of the term 'Covered Property' in the Plan of Coverage."[17] McAlester Schools' Cross-Motion for Summary Judgment did not seek reimbursement for the underground pipe: "Further, though the underground pipe itself may not be covered by the Plan of Coverage, nothing in the contract prevents coverage to other items damaged by the pipe's failure."[18]

¶18 The parties also discuss the nature of the agreement. McAlester Schools states the agreement is an "all-risks policy."[19] OSRMT states that it is "undisputed that this coverage structure is colloquially referred to by many as an 'All-Risks' form, although the Plan of Coverage never uses this term."[20] OSRMT states although the Plan of Coverage has the nature of all-risks nature, such characterization has no impact on the controversy.[21] Once McAlester Schools under an all-risk policy shows loss is a covered loss, then OSMRT has a burden to show the loss is excluded by the policy.[22] OSMRT has the burden to show the loss to covered property is excluded by the policy.

¶19 OSMRT argues the exclusions in the agreement apply to both naturally occurring and man-made phenomena. McAlester Schools argue the exclusions apply to only naturally occurring events and not the man-made ruptured water pipe. In *Broom v. Wilson Paving & Excavating, Inc.*, we stated the following.

> Earth movement exclusions in insurance policies "generally refer to and have historically related to catastrophic and extraordinary calamities such as earthquakes and landslides." *Peters Twp. Sch. Dist. v. Hartford Accident and Indem. Co.*, 833 F.2d 32, 35 (3d Cir.1987). Such exclusionary provisions were included in insurance policies to protect insurance companies from having to pay out on policies when catastrophic events, such as earthquakes or floods, caused damage to numerous policyholders. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 252 P.3d 668, 672–673 (2011). "[T]he reason for the insertion of the exclusionary clause ... in all risk insurance policies is to relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against." *Wyatt v. Nw. Mut. Ins. Co.*, 304 F.Supp. 781, 783 (D.Minn.1969).

Broom, 2015 OK 19, ¶ 33, 356 P.3d at 629.

We observed that other jurisdictions have found similar earth movement exclusions ambiguous when they typically list naturally occurring events describing earth movement but do not include unnatural events as well.[23]

¶20 We noted that in *Powell v. Liberty Mut. Fire Ins. Co., supra,* a water pipe exploded in the Plaintiff's house, flooding the basement and causing a shift in the foundation and extensive cracking and separation in the walls and ceiling.[24] The insurance company denied coverage under the earth movement exclusion, which excluded coverage for "[e]arth movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow; earth sinking, rising or shifting."[25] The Nevada court reversed summary judgment in favor of the insurance company, finding that because the policy "does not include clear and unambiguous language, subject to only one interpretation, that clearly excludes the damage here, [the insurance company] is unable to deny coverage of the claim if the district court determines that the claim stems from damage caused by soil movement as a direct result of the ruptured pipe."[26]

¶21 OSMRT asks the Court to read the agreement [or policy] as a whole and view the exclusions as referring to both naturally occurring and man-made events, which according to the OSMRT distinguish the present controversy from our opinion in *Broom v. Wilson Paving & Excavating, Inc., supra*. The language relied on by OSMRT to show the loss was excluded states the following.

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. Ordinance Or Law . . .
>
> b. Earth Movement
>
> (1) Earthquake, including any earth sinking, rising or shifting related to such event;
>
> (2) Landslide, including any earth sinking, rising or shifting related to such event;
>
> (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
>
> (4) Earth sinking (other than sinkhole collapse), rising or shift including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.
>
> But if earth movement, as described in b.(1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.
>
> (5) Volcanic eruption, explosion or effusion. . . . .
>
> c. Governmental Action
>
> Seizure or destruction of property by order of governmental authority. . . .
>
> d. Nuclear Hazard
>
> Nuclear reaction or radiation, or radioactive contamination, however caused, . . .
>
> e. Utility Services
>
> The failure of power, communication, water or other utility service supplied to the described premises, however caused, . . .
>
> f. War And Military Action

War, including undeclared or civil war . . .

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain, or sump; or

(4) Water under the ground surface pressing on, or flowing or seeping through;

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

But if water, as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

h. Fungus, Wet Rot Dry Rot And Bacteria…

2. We will not pay for loss or damage caused by or resulting from any of the following:

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts, or otherwise interferes with any [electrical systems, devices, appliances, etc.] . . .

b. Delay, loss of use or loss of market.

c. Smoke, vapor or gas from agricultural smugding nor industrial operations

d. (1) Wear and tear;

(2) Rust or corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

(3) Smog;

(4) Settling, cracking, shrinking or expansion;

(5) Nesting or infestation, or discharge or release of waste products or secretions by insects, birds, rodents or other animals.

(6) Mechanical Breakdown, including rupture or bursting caused by centrifugal force. . . .

(7) The following causes of loss to personal property: (a) Dampness or dryness of atmosphere;

(b) Changes in extremes of temperature; or

(c) Marring or scratching. . . .

e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. . . .

f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.

OSMRT argues the language in the agreement stating "underground pipes, flues or drains" are not covered property should be read together with the exclusionary clause language, and when so read shows that the exclusions are not ambiguous when referring to "water under the ground surface pressing on, or flowing or seeping through," and "settling, cracking, shrinking or expansion," and "earth sinking (other than sinkhole collapse), rising or shift including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty [and] . . . and the action of water under the ground surface." OSMRT states the exclusions in the agreement include both naturally occurring and man-made events. Further, it states "What is at issue here is the applicability of unambiguous coverage exclusionary language."

¶22 The parties' agreement is read as a whole giving the language its ordinary and plain meaning to carry out the parties' intentions.[27] If the language used in an insurance policy is susceptible to two interpretations from the standpoint of a reasonably prudent layperson, then the language is ambiguous.[28] The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law.[29]

¶23 In the policy before us, "earth movement" is referenced to "earthquake," landslide," "mine subsidence," and "earth sinking," all similar to the language noted in *Powell v. Liberty Mut. Fire Ins. Co., supra*, which was held to be ambiguous as to the event of a ruptured pipe. In *Broom* we

noted the ambiguous nature of an earth movement exclusion in a policy as applied to a man-made event when earth movement exclusions are referenced in a policy to naturally occurring events. It is not a complete failure to reference man-made events in the policy which created the ambiguity in *Broom*, but the failure to expressly state man-made events are included in the earth movement exclusion.

¶24 We uphold "clear and unambiguous" exclusionary clauses when shown by an insurer, but a lack of specificity in the language may make an exclusion ambiguous when applied to a particular event.[30] This lack of specificity as to an event that is man-made or caused as such relates to earth movement is an issue in this controversy. The earth movement refers to mine subsidence but not expressly to ruptured water pipes. We note that other exclusions in the agreement use language attempting to include events regardless of the identified cause, *e.g.*, "nuclear reaction or radiation, or radioactive contamination, *however caused*," and "failure of power, communication, water or other utility service supplied to the described premises, *however caused*." A layperson reading these exclusionary clauses would understand a universal causation is specified in some but not all of the exclusions, with language of universal causation being intentionally omitted from the earth movement exclusion. Generally, when an insurer creates specificity in one clause of a policy and then omits it *in a similar context*, the omission is considered purposeful and should be given meaning.[31] OSMRT's omission of language referencing universal causation occurs in an exclusionary clause which has historically been understood as referring to naturally caused events.

¶25 The "water exclusion" clause references water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces; or basements, whether paved or not; or doors, windows or other openings. Like the earth movement exclusion, the language is not specific as to natural causes, man-made causes, or to use the language found elsewhere in the policy, "however caused." Similar to the earth movement exclusion, some courts have determined a water movement exclusion applies to flow based upon natural causes when the policy is ambiguous.[32]

¶26 OSMRT states the policy should be read as a whole and an underground water pipe is not covered property and damages caused from the rupture of a non-covered property should be excluded pursuant to the exclusionary clause. Reading the policy as a whole does not allow us to conflate the policy-defined category of what is covered property with the exclusion. The policy-defined event defining an exclusion is based upon the type or nature of the event and in this agreement the exclusion is not defined based upon, or with reference to, the description of the non-covered property. This Court will not undertake to rewrite the insurance agreement or make for either party a better contract than the one which was executed.[33]

¶27 We hold exclusionary clauses in an insurance policy on the issue of man-made or caused events were ambiguous based upon (1) the lack of specificity in the particular clause when a similar specificity was used in other exclusionary clauses in the policy, and (2) the issue of man-made causation as applied to the particular exclusion had historically been treated by courts as ambiguous when man-made causation or a form of universal causation were not specified in the policy. We agree with McAlester Schools that OSMRT failed to show a policy-based exclusion to coverage for the event based upon earth movement and flow of water exclusions.

III. Conclusion

¶28 The standard for appellate review of a summary judgment is de novo and an appellate court makes an independent and nondeferential review testing the legal sufficiency of the evidential materials used in support and against the motion for summary judgment.[34] The summary judgment for Oklahoma Schools Risk Management Trust is reversed and the controversy is remanded to the District Court for additional proceedings consistent with this opinion.

¶29 GURICH, C.J.; EDMONDSON, COLBERT, REIF, and DARBY, JJ., concur.

¶30 WYRICK, V.C.J. (by separate writing); KAUGER, WINCHESTER, and COMBS, JJ., dissent.

Wyrick, V.C.J., with whom Winchester, J., joins, dissenting:

¶1 This case is about whether an insurance contract covers a particular incident – not whether the contract *ought* to cover it, but whether it actually does. In my view, it doesn't. So I respectfully dissent.

¶2 The event at issue is damage to a school that was caused when a water main buried under the school ruptured, causing water to be released at high pressure. That water pressed up against the ground under the foundation of the school and extensively damaged the school's foundation and walls.

¶3 The insurance policy at issue excludes from coverage "loss or damage caused directly or indirectly by . . . [w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors, or paved surfaces."[1] This is so "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[2]

¶4 The plain text of the contract thus excludes from coverage the event that damaged the school. The only way around this is to declare that the exclusion is ambiguous; so that is what the majority does. While it gives scant attention to the water exclusion – focusing instead almost entirely on the earth-movement exception – the majority quite conclusorily states that "some courts have determined a water movement exclusion applies to flow based upon natural causes when the policy is ambiguous."[3] But what about the exclusion is ambiguous? As best I can tell, the majority is lumping the water exclusion in with the earth-movement exclusion and concluding that the exclusion is ambiguous because it does not specify whether it applies to only natural events or both natural and man-made events.

¶5 But lack of specificity doesn't signal ambiguity; it signals breadth. A mother who tells her child to eat his vegetables isn't likely to be sympathetic when the child eats his carrots but leaves his broccoli untouched because "Mom, you didn't say that I had to eat my carrots *and* my broccoli." This is so because we understand a term to include everything that naturally falls within the term's plain meaning, unless otherwise specified or unless context dictates otherwise. Even if that weren't so, the water exclusion's statement that it applies "regardless of any other cause" strengthens the conclusion that the exclusion applies to all losses caused by underground water pressing up against foundations, regardless of whether that water came from a pipe or an aquifer.

¶6 To be clear, I don't fault McAlester Public Schools for thinking that this event ought to be covered – I, for one, would want insurance that protects my property from bursting water mains. Unfortunately, the school district bought insurance that does not, and courts are not (or at least they shouldn't be) in the business of rewriting contracts, even if a court's view of the equities tilts in the insured's favor. On that point, it's worth remembering that the insurer is the Oklahoma Schools Risk Management Trust, which is managed by Oklahoma public school officials and whose members are self-insuring Oklahoma school districts like the McAlester Public Schools.[4] The Trust didn't deny the claim in bad faith; it denied it because the loss is plainly excluded. The district court agreed, and so did the Court of Civil Appeals. The plain language of the exclusion plainly barred this claim then, and it continues to do so now.

¶7 The judgment below should be affirmed.

EDMONDSON, J.

1. Record on Accelerated Appeal, Tab 8, Defendant's [McAlester Schools'] Answer and Counterclaims, prayer for relief, p. 6.

2. Journal Entry of Judgment referencing *Broom v. Wilson Paving & Excavating, Inc.*, 2015 OK 19, 356 P.3d 617.

3. 127 Nev. 156, 252 P.3d 668 (2011).

4. *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

5. *Evers v. FSF Overlake Associates*, 2003 OK 53, ¶¶ 18-19, 77 P.3d 581, 587.

6. *Matter of Estate of Vose*, 2017 OK 3, n. 1 & ¶ 10, 390 P.3d 238, 242.

Due to our disposition of the procedural issue we need not determine the underlying nature of the declaratory judgment action which became merged into the judgment which was appealed. *Cf. Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, ¶ 55, 394 P.3d 1224, 1243 (declaratory judgment is neither strictly legal nor equitable and assumes the character of the nature of the controversy).

7. *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 38, 396 P.3d 210, 224.

8. *Rist v. Westhoma Oil Co.*, 1963 OK 126, 385 P.2d 791, 792; *Landy v. First National Bank & Trust Co. of Tulsa*, 1962 OK 12, 368 P.2d 987, 989.

9. *Osage Nation v. Board of Commissioners of Osage County,* 2017 OK 34, n. 87, 394 P.3d 1224, 1246 (an adjudication in the form of summary judgment is on the merits of a controversy); *Spirgis v. Circle K Stores, Inc.,* 1987 OK CIV APP 45, 743 P.2d 682 (approved for publication by Supreme Court) (motion for summary judgment must be based upon the record in support for a judgment on the merits for that motion). *See, e.g., Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007) (cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another) quoting *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979).

10. This appeal was prosecuted pursuant to Rule 1.36 which provides for the trial court filings to serve as the appellate briefs and the assignments of error on appeal are those listed in an appellant's petition in error which are supported by argument and authority. *Gaasch Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 4, 412 P.3d 1151. *See also Matter of Termination of Parental Rights*, 1993 OK 10, 847 P.2d 768, 770 (review of an opinion by the Court of Appeals is limited to those issues before us on certiorari).

11. *Parker v. Elam*, 1992 OK 32, 829 P.2d 677, 682 (a judgment, reversed and remanded, stands as if no trial has been held on remand from a reversed judgment; and the parties are entitled to introduce additional evidence, supplement the pleadings, expand issues, unless expressly or specifically limited by the appellate proceedings in error).

12. *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006); *Opera Boats, Inc. v. La Reunion Francaise,* 893 F.2d 103, 105 (5th Cir.1990).

13. *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978); *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 257 Cal. Rptr. 292, 770 P.2d 704, 711 (1989); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 413 F.Supp.2d 295, 300-301 (S.D.N.Y. 2006).

14. Plaintiff's [OSRMT's] Motion for Summary Judgment, p. 3.

15. Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 5.

16. Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 16.

17. Plaintiff's [OSRMT's] Response to Defendant's Cross-Motion for Summary Judgment, at pp. 2-3.

18. Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at p. 17.

19. Defendant's [McAlester Public Schools'] Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, at pp. 2, 4.

20. Plaintiff's [OSRMT's] Response to Defednant's Cross-Motion for Summary Judgment, at p. 2.

21. Plaintiff's [OSRMT's] Response to Defednant's Cross-Motion for Summary Judgment, at p. 2.

22. *See* authority cited in note 13, supra.

23. *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

24. *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631.

25. *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631, quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d at 670.

26. *Broom*, 2015 OK 19, ¶ 38, 356 P.3d at 631, quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d at 674.

27. *BP America, Inc. v. State Auto Property and Casualty Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835.

28. *Haworth v. Jantzen*, 2006 OK 35, ¶ 13, 172 P.3d 193, 196. *See also Hensley v. State Farm Fire and Casualty Company,* 2017 OK 57, ¶ 36, 398 P.3d 11, 23 (a patent ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used).

29. *Max True Plastering Co. v. U.S.F. & G. Co.*, 1996 OK 28, 912 P.2d 861, 869.

30. *BP America, Inc. v. State Auto Property and Casualty Ins. Co.*, 2005 OK 65, ¶ 11, 148 P.3d 832, 838 (insurer showing a clear and unambiguous exclusion clause will be judicially enforced); *Zurich American Insurance Company v. ACE American Insurance Company*, 165 A.D.3d 558, 86 N.Y.S.3d 468, 469 (2018) citing *Neuwirth v. Blue Cross & Blue Shield of Greater N.Y., Blue Cross Assn.*, 62 N.Y.2d 718, 719, 476 N.Y.S.2d 814, 465 N.E.2d 353 (1984) (the burden of establishing that a claim falls within a policy's exclusionary provisions rests with the insurer); *Clark v. Prudential Property and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003), (burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred).

31. *See, e.g., O'Connell v. Liberty Mutual Fire Ins. Co.*, 43 F.Supp.3d 1093, n. 3, 1097 (D. Mont. 2014) (it is a general rule of contract interpretation that if a contract includes a level of specificity in one context and then omits that specificity in a similar context, such an omission is purposeful and should be given meaning); *Dixon v. State Mut. Ins. Co.*, 1912 OK 594, 126 P. 794 (maxim expressio unius est exclusio alterius, mention of one thing implies exclusion of another, is applied to construction of insurance policy).

32. *See, e.g., Cantanucci v. Reliance Ins. Co.*, 43 A.D.2d 622, 349 N.Y.S.2d 187, 190-191 (1973) (by construing the exclusion to apply only to water below the surface due to natural causes, effect is given to the well-settled principle that provisions of an insurance policy are to be harmonized and that ambiguities must be resolved in favor of the insured).

33. *Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, ¶ 32, 398 P.3d 11, 22.

34. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 183, 187-188; *Nelson v. Enid Medical Associates*, 2016 OK 69, 376 P.3d 212, 216.

Wyrick, V.C.J., with whom Winchester, J., joins, dissenting:

1. ROA, Doc. 3, Pl.'s 1st Am. Pet. for Declaratory Relief, at Ex. 1: "Plan of Coverage No. CPO-0071579-03," Form CP-11: "Div. 1 – Causes of Loss – Special Form" § B(1)(g)(4), at 2.

2. *Id*. § B(1), at 1.

3. Majority Op. ¶ 25.

4. Oklahoma Schools Risk Management Trust, https://www.osrmt.org (last visited Jan. 28, 2019).

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE *OKLAHOMA INDIGENT DEFENSE SYSTEM* BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2020 pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2020 (July 1, 2019 through June 30, 2020) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

ADAIR, ATOKA, BLAINE, CANADIAN, CARTER, CHEROKEE, COAL, CRAIG, DELAWARE, HASKELL, HUGHES, JOHNSTON, KINGFISHER, LATIMER, LOGAN, LOVE, MARSHALL, MAYES, MURRAY, MUSKOGEE, NOWATA, OSAGE, PITTSBURG, PAWNEE, PAYNE, PONTOTOC, ROGERS, SEMINOLE, SEQUOYAH, WAGONER

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2020 (July 1, 2019 through June 30, 2020). Offers may be submitted for complete coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 21, 2019.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2020 OFFER TO CONTRACT **TIME RECEIVED:**
_____ COUNTY / COUNTIES **DATE RECEIVED:**

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2020 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, March 21, 2019 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 22, 2019, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 22, 2019, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 29th, 2019, at a *place to be announced***.

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2020 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2015, FY-2016, FY-2017, FY-2018 and FY-2019 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2661 or by email to brandon.pointer@oids.ok.gov**.

REQUEST FOR OIDS FY-2020 OFFER-TO-CONTRACT PACKET

Name: _____ OBA #: _____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest: _____

_____

Calendar of Events

February

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

7 **OBA Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066

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

12 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; 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 Dittrich 405-705-3600 or Brittany Byers 405-682-5800

13 **OBA Communications Committee meeting;** 12:15 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Dick Pryor 405-740-2944

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

18 **OBA Closed** – Presidents Day

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

OBA Bench and Bar Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David B. Lewis 405-556-9611 or David Swank 405-325-5254

20 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

21 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

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

OBA Mock Trial Committee meeting; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066

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

OBA Legal Internship Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact H. Terrell Monks 405-733-8686

March

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

7 **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

Opinions of Court of Civil Appeals

2019 OK CIV APP 2

IN THE MATTER OF THE ASSESSMENT FOR TAX YEAR 2012 OF CERTAIN REAL PROPERTIES OWNED BY CLIFTON THRONEBERRY AND E.W. CROWE, TRUSTEES OF PIPELINE INDUSTRY BENEFIT FUND AND LOCAL NO 798 JOURNEYMEN AND APPRENTICES PLBG & PIPEFITTING: CLIFTON THRONEBERRY AND E.W. CROWE, TRUSTEES OF PIPELINE INDUSTRY BENEFIT AND LOCAL NO 798 JOURNEYMEN AND APPRENTICES PLBG & PIPEFITTING, Petitioners/Appellees, vs. KEN YAZEL, TULSA COUNTY ASSESSOR, Respondent/Appellant, and TULSA COUNTY BOARD OF EQUALIZATION, TULSA COUNTY BOARD OF TAX ROLL COLLECTIONS, and TULSA COUNTY TREASURER, Respondents.

Case No. 115,701. April 6, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE LINDA G. MORRISSEY, JUDGE

AFFIRMED

Thomas G. Potts, David T. Potts, JAMES, POTTS & WULFERS, Tulsa, Oklahoma, and

Kelly F. Monaghan, Lori Gilliard, HOLLOWAY, MONAGHAN, KING, Tulsa, Oklahoma, for Petitioners/Appellees,

Leisa S. Weintraub, TULSA COUNTY ASSESSOR'S OFFICE, Tulsa, Oklahoma, for Respondent/Appellant.

Bay Mitchell, Judge:

¶1 Respondent/Appellant Ken Yazel, Tulsa County Assessor (Assessor) appeals from a journal entry of judgment entered in favor of Petitioners/Appellees Clifton Throneberry and E.W. Crowe, Trustees of Pipeline Industry Benefit Fund (PIBF) and Local No.798 Journeymen and Apprentices PLBG & Pipefitting (Local 798) (collectively, Property Owners). At issue before the court was the ad valorem tax assessment of two parcels in Tulsa County for the years 2012-2015. Property Owners claimed they were entitled to an exemption because the properties were used exclusively for a nonprofit school. We find no reversible errors of law and competent evidence to support the trial court's ruling. Accordingly, we affirm.

¶2 The property at issue in this case consists of two parcels in Tulsa, Oklahoma. The first parcel (the 8400 Property) includes two buildings. One building houses the Local 798 Training Center, which provides education and training in the vocation of welding (the Training Center). The other is the PIBF administrative building (the Administrative Building), where PIBF employees handle matters for the Training Center, as well as three other trust or benefit funds. The second parcel (the 8330 Property) includes three buildings. The first building stores welding material and supplies and provides space for overflow instruction; the second stores materials, supplies, and equipment used in the Training Center; and the third contains lathes where "coupons" (samples) are prepared for the students to use in their training.

¶3 Both parcels had been granted an exemption from ad valorem taxes since at least 1970. In 2012, the Assessor revoked Property Owners' tax exemption, based in part on information obtained by his staff through a cursory tour of the properties. Property Owners appealed to the Tulsa County District Court pursuant to 68 O.S. 2011 §2880.1(A) after formal appeals to the Tulsa County Board of Equalization were denied. After a non-jury trial, the court found that the 8330 Property is used exclusively to serve a nonprofit school and thus was entirely exempt from ad valorem taxation under the Oklahoma Constitution. The court found further the Training Center on the 8400 Property was completely exempt but the Administrative Building was only 25% exempt because it serves other non-exempt functions.[1] The trial court ordered the Tulsa County Treasurer to refund all of the ad valorem taxes Property Owners had paid under protest for the 8330 Property and a portion of the amounts paid on the 8400 Property.

¶4 This case involves mixed questions of fact and law. "In a non-jury trial the court's find-

ings [of fact] are entitled to the same weight and consideration that would be given to a jury's verdict. The trial court's findings will not be disturbed for insufficient evidence if there is any competent evidence — including reasonable inferences [derivative of] the same — to support them." *Soldan v. Stone Video*, 1999 OK 66, ¶6, 988 P.2d 1268, 1269 (footnotes omitted). Questions of law, of course, are reviewed *de novo. Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845 (citation omitted).

¶5 The Oklahoma Constitution provides, in part, that "property used exclusively for nonprofit schools or colleges . . . shall be exempt from taxation[.]" Okla. Const. Art. 10, §6(A). Title 68 O.S. 2011 §2887(3) also provides that "All property of any college or school, provided such property is devoted exclusively and directly to the appropriate objects of such college or school within this state and all property used exclusively for nonprofit schools and colleges" shall be exempt from ad valorem taxation.

¶6 Assessor contends the Training Center is not a nonprofit school as contemplated by the provisions above. "Nonprofit school" has not been defined by statutes or case law. Assessor acknowledges that the Training Center provides education and is considered an exempt nonprofit organization by the IRS. Assessor claims, however, that serving an educational purpose is not sufficient to qualify as a school. In support of this argument, Assessor cites to definitions of "public school" and "private school" located in unrelated areas of the Oklahoma statutes. *See* 70 O.S. 2011 §§1-106 and 21-101(2). Assessor also relies on a New Jersey case which adopted a narrow definition of school. *See New Jersey Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth*, 147 N.J. 171, 685 A.2d 1309 (1996). Assessor further points to several facts which, according to Assessor, support finding the Training Center is not an exempt school: Assessor notes there is no evidence that the Training Center is accredited or licensed as a school or college and discusses the ownership of the property, the Training Center's relationship to The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, and the sources of funding for the Training Center.

¶7 Assessor, however, cites to no Oklahoma authority requiring a narrow definition of "school." Nor does Assessor cite to any law providing that the factors Assessor mentions are relevant to determining whether a property is being used exclusively as a nonprofit school. Rather, the Oklahoma Supreme Court has consistently held that "used exclusively" in Article 10, §6 means "the use to which the property is dedicated and devoted." *See In re Real Prop. of Integris Realty Corp.*, 2002 OK 85, ¶9, 58 P.3d 200, 203-04; *Immanuel Baptist Church v. Glass*, 1972 OK 79, ¶12, 497 P.2d 757, 760; *Cox v. Dillingham*, 1947 OK 250, ¶9, 184 P.2d 976, 978 ("It is immaterial what name the institution, organization, or society may bear, or who may own the property in question. But it is the use to which the property is dedicated and devoted which constitutes the test as to whether it is exempt.").

¶8 The evidence at trial established that the Training Center maintains a written curriculum, including a fourteen-week class schedule which is offered three times a year. Students are instructed utilizing standard industry textbooks and hands-on training. The school has five instructors with a minimum of seventeen years of expertise. Successful students receive a certificate of completion at the end of the fourteen-week course. There is no requirement that students applying to the Training Center be a member of any union; rather, the Training Center is free and open to the public. Students who complete training are not required to work for union employers. The record demonstrates that the property is "dedicated and devoted" to instructing students in the vocation of welding. Accordingly, the trial court did not err by finding the Training Center qualifies as a "nonprofit school" under Article 10, §6 and 68 O.S. 2011 §2887(3).

¶9 In a related argument, Assessor argues the Administrative Building is not used exclusively as a nonprofit school or college. Assessor notes that, of the twenty-six employees who work in the Administrative Building, there is no employee who is exclusively designated to work for the Training Center. Assessor acknowledges, however, that in Oklahoma, "If part of the property is exempt it should not be valued as an entirety, but where the exempt and nonexempt portions are not physically separable it is proper to value the property as a whole and then deduct the value of the exempt portion." *Chapman v. Draughons Sch. of Bus.*, 1955 OK 206, ¶4, 287 P.2d 903, 905. Assessor failed to convince the trial court that the lack of an employee dedicated solely to the Training Center renders the trial court's ruling awarding a partial

exemption erroneous. We find no error in that regard.

¶10 AFFIRMED.

SWINTON, P.J., and GOREE, V.C.J., concur.

Bay Mitchell, Judge:

1. The trial court found that the total assessed value of the Training Center included the assessed value of the building plus one-half of the assessed value of the land, the total of which equals 69% of the total assessed value of the 8400 Property. The taxable assessed value for the Administrative Building also included the assessed value of the building plus one-half of the assessed value of the land, the total of which equals 31% of the total assessed value of the 8400 Property. Accordingly, the 25% tax exempt amount for the Administrative Building was 7.75% (31% x 25%) of the total assessed value of the Administrative Building.

2019 OK CIV APP 3

OKLAHOMA PUBLIC EMPLOYEES ASSOCIATION, MIKE HANCOCK, DORIS LONG, BRADLEY DAFTARI, MARK BARNES, STANLEY PHILPOT, LESTER ROWLAND, MARY MAYES, CARREL BROWN, WANDA SANDEFUR & TERRY FAULKENBERRY, Plaintiffs/Appellees/ Counter-Appellants, vs. STATE OF OKLAHOMA ex rel., OKLAHOMA TOURISM and RECREATION DEPARTMENT, Defendant/Appellant/ Counter-Appellee.

Case No. 115,902. November 20, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON, TRIAL JUDGE

AFFIRMED IN PART AND REVERSED IN PART

Kevin R. Donelson, FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees

Sam R. Fulkerson, Brandon D. Kemp, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Oklahoma City, Oklahoma, for Defendant/Appellant

JERRY L. GOODMAN, JUDGE:

¶1 State of Oklahoma, ex rel. Oklahoma Tourism and Recreation Department (OTRD) appeals the trial court's February 24, 2017, Order Following Remand requiring OTRD to provide a severance benefit package to several State employees (Employees) represented by the Oklahoma Public Employees Association (OPEA) pursuant to the "Lake Murray Lodge Statute," 74 O.S.Supp.2006, § 2242.1 (LMLS). The trial court found Oklahoma's State Government Reduction-in-Force and Severance Benefits Act (RIF) provisions (74 O.S.2011 and Supp. 2012, §§ 840-2.27A through 840-2.27I), "were not applicable" to Employees, but the LMLS was, and further ruled that the LMLS was constitutional.

¶2 OTRD appeals contending that, though the trial court correctly found the RIF provisions "were not applicable" to Employees, it erred when it found the LMLS applied to Employees and further erred when it found the LMLS to be constitutional.

¶3 OPEA counter-appeals the same order, claiming the trial court erred when it found the RIF provisions "were not applicable" to Employees. OPEA contends Employees "were entitled to severance benefits" prescribed by both LMLS and RIF,[1] and further agreed that the LMLS is constitutional.

¶4 In this first impression case, we are asked to interpret the two severance package statutes and define their relationship to each other. Based on our review of the facts and applicable law, we hold Employees are subject to the RIF statutes, if they otherwise qualify; that under these facts Employees are not eligible for the severance benefits pursuant to the LMLS, and; we need not address the constitutionality of the LMLS. The trial court's order is affirmed in part, and reversed in part.

BACKGROUND

¶5 This is the second appeal to this Court by these parties. This Court has previously addressed this matter in appeal No. 110,034, styled *Oklahoma Public Employees Association; Mike Hancock; Doris Long; Bradley Daftari; Mark Barnes; Stanley Philpot; Lester Rowland; and Mary Mayes v. State Of Oklahoma, ex rel., Oklahoma Tourism and Recreation Department (OPEA I)*.[2] At the conclusion of our opinion in *OPEA I*, this Court stated:

> The matter is remanded to the trial court to make a finding of fact as to whether Affected Employees were in fact subject to the RIF Act. Next, the matter is remanded to the trial court with directions to order the parties to address the apparent conflict between § 2242.1 and § 840-2.27D. Because the constitutionality of these statutes may be involved, the Assistant Attorney General representing OTRD shall comply with

the notice requirements of 12 O.S.2011, § 2024(D).

¶6 Following remand, an evidentiary hearing was held, and the trial court entered an Order Following Remand on February 24, 2017, which made findings of fact and conclusions of law.[3] The Order states:

> 1. The provisions of the RIF Act are not applicable to the Plaintiffs;
>
> 2. The Lake Murray Lodge Statute is applicable to the Plaintiffs and the OTRD must comply with [the LMLS;]
>
> 3. The Lake Murray Lodge Statute applies both to land owned and leased by the State of Oklahoma, and;
>
> 4. The Lake Murray Lodge Statute is constitutional.[4]

¶7 Both parties have appealed. The OPEA, on behalf of Employees, claims both the RIF Act and the LMLS applies to them, and not just the LMLS. The OTRD also appeals, claiming the LMLS does not apply to Employees, and that the LMLS is unconstitutional.

¶8 The appellate record contains the following additional facts necessary to our analysis of the trial court's order.

¶9 Employees were, at the time of the filing of their August 10, 2011, Petition for Declaratory Judgment and Injunctive Relief, "tenured, classified employees."[5]

¶10 According to the 2013 affidavit of the Executive Director of the OTRD,[6] in 2011, the OTRD considered closing seven of its 35 parks due to budgetary shortfalls. Of those seven parks, the OTRD owned only two (Heavener Runestone State Park and Boggy Depot State Park). The five other parks were not owned by the OTRD, but were leased from third parties.[7] However, ultimately, OTRD did not close any parks. Rather, it transferred either ownership or operation, or both, to third parties, pursuant to its authority set out in 74 O.S. 2011, § 2224, thereby necessitating the transfer of those Employees working at those positions to be reassigned to other parks.[8]

¶11 OTRD employees assigned to work at those parks were notified they would be transferred to new duty positions within the Department at the same rate of pay, benefits, and classification. In some instances, the new duty positions were at various distances from their current posts.[9] Most transferred; some did not. Some retired or voluntarily separated from service to work elsewhere. Others refused to report to work at the new duty station and sued the OTRD for failing to provide them severance benefits pursuant to provisions set out in the RIF and LMLS severance statutes. The OTRD refused to provide severance benefits, claiming the employees were not separated from service, but merely transferred, and the RIF provisions were therefore not applicable.

STANDARD OF REVIEW

¶12 We are asked to interpret the meaning of statutes and review the trial court's application of fact to those statutes. We do so using the *de novo* standard of review.

The issues of a statute's constitutional validity and of its construction and application are questions of law subject to *de novo* review. *Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736; *Butler v. Jones ex rel., State ex rel., Okla. Dep't of Corrections,* 2013 OK 105, ¶ 5, 321 P.3d 161; *Gilbert v. Security Finance Corp. of Okla*, 2006 OK 58, ¶ 2, 152 P.3d 165. Under that standard on appeal, this Court assumes plenary, independent, and non-deferential authority to reexamine the lower tribunal's legal rulings. *Lee,* 2016 OK 97, ¶ 6, 381 P.3d 736; *Crownover v. Keel,* 2015 OK 35, ¶ 12, 357 P.3d 470; *Butler,* 2013 OK 105, ¶ 5, 321 P.3d 161.

Brown v. Claims Mgmt. Res. Inc., 2017 OK 13, ¶ 10, 391 P.3d 111, 115.

ANALYSIS

I.

Applicability of RIF Provisions under these Facts

¶13 This issue was raised in both the OTRD's petition in error and Employees' counter-petition in error. The trial court held the RIF provisions "were not applicable" to Employees.[10] We interpret the trial court's choice of phrase to mean that, under these facts, Employees do not meet the requirements of the RIF provisions. The OTRD contends that decision was correct; Employees argue it was error. We agree with the OTRD and hold that, under the facts presented, the individual Employees have failed to show they qualify for RIF severance benefits, and the trial court's holding on this issue was correct.

¶14 Section 2.27D of the RIF statutes states:

> Severance benefits shall be given to the following categories of affected employees: permanent classified affected employees ... (emphasis added).

¶15 The record reflects that Employees were admittedly tenured, classified employees. Therefore, Employees, if they otherwise qualify by meeting the prerequisites of the RIF provisions, would be entitled to those benefits. The narrower question is, however: did Employees meet the RIF requirements? We first examine those requirements.

¶16 Section 840-2.27B provides definitions under the RIF provisions.

¶17 "Affected employees" means classified employees in affected positions, §2.27B (2). "Affected positions" means positions being abolished or positions which are subject to displacement action, §2.27B (3). "Displacement" or "displace" means the process of an employee accepting an offer of employment to an occupied or funded vacant position, §2.27B (5). "Reduction-in-force" means abolition of positions in an agency or part of an agency and the corresponding nondisciplinary removal of affected employees from such positions through separation from employment or through displacement to other positions. Reduction-in-force may also include reorganizations, §2.27B (11). "Reorganization" means the planned elimination, addition or redistribution of functions or duties either wholly within an agency, any of its subdivisions, or between agencies, §2.27B (12). "Severance benefits" means employee benefits provided by the State Government Reduction-in-Force and Severance Benefits Act to affected employees separated through a reduction-in-force, §2.27B (13).

¶18 Therefore, under the facts in this case, to qualify for severance benefits under the RIF provisions, an applicant must be an Affected Employee, i.e., a classified employee, serving in an affected position that was either abolished or subject to a displacement action, such as in the case wherein the employee currently occupying a position is displaced by another employee accepting an offer of employment into that same position, and who as a result of being displaced by another employee, was separated from service with the State.

¶19 Alternatively, a classified employee who was separated from service due to a reduction in force because their position was reorganized, i.e., the position no longer exists due to "planned elimination, addition or redistribution of functions or duties either wholly within an agency," §2.27B(12), would also qualify for severance benefits.

¶20 It appears from this record that despite the transfer of the ownership and/or operations of the state parks to third parties, none of Employees were separated from service as a result of OTRD's actions. Rather, they were offered their same state jobs, duties, rates of pay, and seniority, albeit at a different duty position. "A state agency shall have sole and final authority to designate the place or places where its employees shall perform their duties." 74 O.S.2011, § 840-4.19.

II.

Distance from Work not a Factor

¶21 We reject Employee's argument that the trial court must consider "the distance of available work from his residence" as found in 40 O.S.2011, § 2-408(1). That phrase is part of the Employment Security Act of 1980, which codifies the qualifications for unemployment benefits. The Employment Security Act will provide benefits to unemployed persons who cannot obtain "suitable work" as defined in § 2-409. Section 2-408(1) expands the § 2-409 factors defining "suitable work" to include "length of his unemployment, his prospects for obtaining work in his customary occupation, the distance of available work from his residence and prospects for obtaining local work."

¶22 The Employment Act's purpose is to financially assist an unemployed person while they are seeking gainful employment, while the RIF act is designed to financially assist an already-employed state employee's involuntary transition to unemployment. The two statutes are at cross-purposes and this Court will not graft a requirement from one to the other. The requirement to consider distance from work when determining whether a job is suitable for purposes of unemployment benefits is not found in the RIF statutes, and is not compatible with any of its purposes.

¶23 Under these facts, the trial court's order that Employees have not demonstrated they are otherwise eligible for severance benefits under the RIF statutes is supported by the record and is affirmed.

III.

Employees Claim the LMLS is Applicable to them and OTRD Must Comply with the LMLS

A. The Lake Murray Lodge Statute

¶24 In 2005, the Legislature enacted the Oklahoma Tourism, Parks and Recreation Enhancement Act, 74 O.S.2011, §§ 2200 through 2276.3. Included in the Act was the following provision, under the subsection "Operations Personnel."

> The following offices and positions in the Oklahoma Tourism and Recreation Department shall be in the unclassified service and shall not be subject to the Merit System of Personnel Administration:
>
> 5. Any position in the Division of State Parks utilized in the operation and administration of state resorts, cabins, lodges, and golf courses. 74. O.S. 2011, § 2242.

¶25 In 2006, § 2242 of the Act was amended to add § 2242.1. This amendment is composed of two sentences, only the second of which is relevant to this appeal.[11] That section states:

> Further, the Oklahoma Tourism and Recreation Department is hereby directed to develop a severance package for all employees of the Department affected by the closure of any state lodge or park facility owned by the Department.

This is the Lake Murray Lodge Statute (LMLS).

¶26 Clearly, the Legislature intended to offer severance packages to all, i.e., classified and unclassified employees of the OTRD. Such is permitted by the RIF statutes:

> Pursuant to this section and Section 840-5.1A of this title, state agencies may provide severance benefits provided by this subsection to regular unclassified employees with one (1) year or more continuous state service who are separated from the state service for budgetary reasons; however, state agencies shall offer regular unclassified state employees with one (1) year or more continuous state service who are separated from the state service the same severance benefit as the affected employees in a reduction-in-force if the unclassified employees' separation is as a result of the conditions causing the agency to implement a reduction-in-force. (Emphasis added).

74 O.S.2011 and Supp. 2012, § 840-2.27D.

¶27 The LMLS uses the term "severance package." This phrase is not defined in the LMLS; however, the RIF statute, §840-2.27B(13), uses the term "severance benefits." As the purpose of both the LMLS and RIF statutes are to define those individuals who may be eligible for additional compensation in the event of an involuntary separation from state service, we interpret the LMLS term "severance package" to be the functional, if not practical, equivalent to the RIF term "severance benefit."

¶28 The LMLS next uses the phrase "all employees of the Department affected . . . ." The inclusion of the words "of the Department" is arguably superfluous, as the LMLS is directed specifically to the Oklahoma Tourism and Recreation Department, and no other. Thus, the phrase can be reduced to its essentials thusly: "All employees . . . affected." Section §840-2.27B(2) of the RIF statutes defines "Affected Employees." We again equate the phrase "All employees . . . affected" as used in the LMLS as the equivalent of "Affected Employees" as used in the RIF statutes.

¶29 Further, the LMLS uses the "closure of any state lodge or park facility owned by the Department" as the event which, if it results in an employee's separation of service from the OTRD, will bestow eligibility to that employee to the RIF provisions. We do not interpret the LMLS to compel the OTRD to create a separate, parallel, RIF-like severance package protocol; instead, the LMLS is merely the means by which an unclassified OTRD employee may become eligible for RIF benefits, if otherwise qualified.

¶30 Our interpretation of these phrases as described is further guided by a few basic premises. First, both RIF and LMLS define those employees who may be entitled to additional benefits because of involuntary severance from state service. Second, the RIF statutes only permit severance benefits to be paid to "Affected Employees," and no other. Third, an interpretation of the LMLS that does not bring the OTRD's employees under the RIF statutes, and thus permit the possibility of severance benefits, would ignore the clear intent of the LMLS to provide such benefits. Therefore, we reject the OTRD's argument regarding the phrase "all employees of the Department

affected by the closure . . ." which ties the word "affected" to the word "closure" (of any state lodge or park facility). That interpretation would lead to uncertainty and would not qualify an unclassified OTRD employee as an Affected Employee, which by RIF definition is the only classification of employee eligible to claim severance benefits.

> In the interpretation of statutes, we do not limit our consideration to a single word or phrase. Instead, we 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; *McNeill, supra,* 1998 OK 2 at ¶ 11, 953 P.2d at 332. "Words and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context and they must harmonize with other sections of the act to determine the purpose and intent of the legislature." *McNeill, supra,* at ¶ 11, citing *Groendyke Transport Inc. v. Gardner,* 1960 OK 153, 353 P.2d 695.

State ex rel. Oklahoma State Dep't of Health v. Robertson, 2006 OK 99, ¶ 7, 152 P.3d 875, 878.

¶31 Reading §§ 2242, 2242.1, and 840-2.27D together, we hold the Legislature intended to allow otherwise qualified OTRD unclassified employees, who were separated from service due to "conditions causing the agency to implement a reduction-in-force" to be offered the same RIF benefits as would be offered to classified employees under similar circumstances, assuming they otherwise qualified for those RIF benefits.

¶32 Applying this interpretation of the LMLS to the facts, Employees would not be eligible for the RIF benefits set out in the LMLS, as they, as classified employees, were already subject to the RIF statutes, assuming they otherwise qualified. Nowhere in the statutes can be found the suggestion that otherwise qualified Employees should be offered severance benefits pursuant to both the RIF and LMLS, or one if not the other, simply because they are OTRD employees whose job descriptions were set out in the LMLS. Such an interpretation, i.e., permitting double benefits, would lead to an absurdity.

¶33 Turning to the trial court's order in this regard, the trial court held:

> The Lake Murray Lodge Statute is applicable to plaintiffs and the OTRD must comply with the LMS statute;

¶34 The trial court's statement that "the Lake Murray Lodge Statute is applicable to the plaintiffs" is accurate only in a broad, general sense in that otherwise qualified unclassified employees of the OTRD would come within the LMLS ambit. However, under these facts, Employees are already subject to the RIF statutes, rendering the intent of the LMLS unnecessary as to them. Therefore, we reverse the trial court's order, and hold the OTRD must comply with the LMLS by providing otherwise qualified unclassified OTRD employees severance benefits pursuant to the RIF statutes.

IV.

Scope of LMLS

¶35 The trial court held: "The LMS statute applies both to land owned and leased by State." The OTRD contends this was error. We agree.

¶36 The trial court's ruling is erroneous because the LMLS clearly applies only to "any state lodge or park facility owned by the Department." This does not include any state lodge or park facility "leased" by the Department. The term "lease" is not found in the LMLS, and cannot be injected into the definition. Owning property and leasing property describe distinct ownership interests.

¶37 Our analysis need not proceed further, however, as under the evidentiary material in this case, only one of Employees was previously assigned to work at properties actually owned by the OTRD, Heavener Runestone State Park. The remaining Employees were previously assigned to positions on property leased from third-party owners.

¶38 Further, according to the record, that single employee was not previously assigned to property owned by the OTRD which contained a state lodge or park facility. The LMLS uses the modifier "facility" when addressing OTRD property. Had the Legislature intended the LMLS to refer to parks in general, it would not have so modified that term.

¶39 Therefore, we hold the trial court's expansive interpretation of the LMLS to include all property owned and leased by the OTRD was erroneous. The LMLS applies only to property owned by the OTRD. Further, none of

Employees were previously assigned to such property, and therefore cannot avail themselves of the LMLS provisions at this time.

V.

Is the LMLS Constitutional?

¶40 Because we have held that, under these facts the LMLS does not afford Employees any severance benefits because they have not established eligibility for any benefits generally provided for in the LMLS, we need not address the OTRD's claim the LMLS is unconstitutional.

CONCLUSION

¶41 We hold the Employees, as classified employees, are subject to the RIF statutes, and, if they otherwise show eligibility under the RIF statutes, they could be entitled to severance benefits. To the degree the trial court's order holding that the RIF provisions "are not applicable" to Employees can be interpreted to mean they are subject to, but have not established their eligibility for, RIF benefits, it is affirmed.

¶42 We hold Employees, as classified employees, are not subject to the LMLS under these facts, as they are already subject to the RIF statutes. To the degree that the trial court's order can be interpreted to mean that "any" unclassified OTRD employee is subject to the LMLS, and thus subject to the RIF statutes, such is affirmed.

¶43 We hold the LMLS applies to OTRD property owned, but not leased, by the OTRD. Further, the LMLS applies only to such owned property possessing a state lodge or park facility, but not to parks in general.

¶44 We do not address the constitutionality of LMLS.

¶45 The trial court's order is affirmed in part and reversed in part.

¶46 **AFFIRMED IN PART AND REVERSED IN PART.**

BARNES, P.J., and RAPP, J., concur.

JERRY L. GOODMAN, JUDGE:

1. Appellee's Answer Brief, November 8, 2017, p. 1.

2. Though the style of *OPEA I* reflects the names of seven employees represented by OPEA, this is not to suggest the class of plaintiffs is limited. The actual number of employees, some of whom are not members of the OPEA, range from six (Snodgrass Affidavit R. 390-392); seven (*OPEA I* and Appellee's Answer Brief, p. 3), eight (Hughes affidavit R. 57), and "approximately ten" (R. 48 and Second Amended Petition, R. 79).

3. The State of Oklahoma did not intervene to address the constitutionality issue.

4. R. 498-499,

5. R. 2; Answer Brief, November 6, 2017, p. 1.

6. R. 390-391.

7. Beaver Dunes (City of Beaver (operator) and Pioneer Parks (owner)); Brushy Lake State Park (City of Sallisaw); Lake Eucha State Park (City of Tulsa); Adair State Park (Adair County (operator), City of Stillwell (owner)); Wah-Sha-She State Park (Osage Nation (operator), U.S. Army Corps of Engineers (owner)). Moreover, the City of Heavener now operates Heavener Runestone State Park, and the Chickasaw Nation operates Boggy Depot.

8. We note one of the conditions of transferring a state park to a third party is "The consideration for the property transfer shall be the agreement of the recipient to continue public recreation use of the property and to manage the property without an operating subsidy from the Department or Commission, § 2224 (4)." Thus, to comply with this requirement, no OTRD employee may continue to work at the transferred park.

9. The distances between the old and new duty posts ranged from 20 miles to 120 miles.

10. The trial court's choice of words is arguably ambiguous. If by being "inapplicable" the trial court meant the RIF provisions would never be available to otherwise qualified Employees, such would be error. This does not appear, however, to be the position of either party, and we do not interpret it so.

11. The first portion of the LMLS reads:

> Each employee at Murray State Park or Lake Murray Lodge who has a minimum of two (2) years' continuous service with the Oklahoma Tourism and Recreation Department at Murray State Park or Lake Murray Lodge on the date of closure of the facility shall have the opportunity to obtain employment with any successor operator of a resort or park facility located on the lands held by the Oklahoma Tourism and Recreation Department, provided the employee is qualified and eligible for any such employment.

There is no issue raised regarding this portion of the statute.

2019 OK CIV APP 4

JIMMIE DWAYNE BASLER, Taxpayer, residing in Rogers County, State of Oklahoma, for himself and for all taxpayers of Rogers County, Oklahoma, Plaintiff/Appellant, vs. MATERIAL SERVICE OF OKLAHOMA, INC., f/k/a MATERIAL SERVICE CORPORATION, Defendant/Appellee, Mike Helm, Dan Delozier, and Kirt Thacker, as Trustees of the Rogers County Finance Authority, as Assignee of Material Service Corporation, of that certain judgment rendered in favor of Material Service Corporation, against the Board of County Commissioners of Rogers County, Oklahoma, in the District Court of said County, Case No. CJ-2004-234; and RCB Bank, as Trustee for the holders of the Rogers County Finance Authority, Rogers County, Oklahoma Bonds, as holder of that certain judgment rendered in favor of Material Service Corporation against the Board of County Commissioners of Rogers County, Oklahoma, in the District Court of said County, Case No. CJ-2004-234; as security for the Bonds, and Christopher Neal Begley, and APAC-Central, Inc., a Delaware corporation, and Board of County

Commissioners of Rogers County, Oklahoma, Defendants.

Case No. 116,442. December 21, 2018

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE SHEILA A. CONDREN, TRIAL JUDGE

AFFIRMED

Jack E. Gordon, Jr., GORDON & GORDON, LAWYERS, Claremore, Oklahoma, and

Thomas H. Williams, THOMAS H. WILLIAMS, LAW OFFICE, PLLC, Claremore, Oklahoma, for Plaintiff/Appellant,

Elizabeth C. Nichols, ELIZABETH C. NICHOLS, PC, Edmond, Oklahoma, for Defendant/Appellee.

ROBERT D. BELL, PRESIDING JUDGE:

¶1 Plaintiff/Appellant, Jimmie Dwayne Basler, appeals from the trial court's order dismissing his putative taxpayer action against Defendant/Appellee, Material Service of Oklahoma, Inc., f/k/a Material Service Corporation (MSC). The trial court dismissed Plaintiff's petition for failure to state a claim upon which relief can be granted and on the ground Plaintiff lacks standing to bring the suit. For the reasons set forth below, we affirm.

¶2 The instant suit emanates from a jury verdict in Rogers County District Court Case No. CJ-2004-234. In that case, MSC sued the Rogers County Board of Commissioners (County) for, inter alia, the unconstitutional taking of property (inverse condemnation). Specifically, MSC asserted County wrongfully interfered with its right to conduct limestone mining operations on MSC's leased property from May 2000 until August 2003. Following extensive trial litigation and appeals, a jury trial in 2009 resulted in a verdict for MSC and a damage award of $12,500,000.00. This Court affirmed the award in *Material Serv. Corp. v. Rogers County Bd. of Comm'rs*, 2012 OK CIV APP 17, 273 P.3d 880. That opinion also sets forth in greater detail the facts and procedural history of the underlying case. County's petition for rehearing before this Court, its petition for a writ of certiorari to the Oklahoma Supreme Court, and its petition to vacate the judgment in the district court were all denied. MSC thereafter sold its leasehold interests to Defendant APAC-Central, Inc. County paid the judgment in 2012 with funds from bond sales, secured by a taxpayer-approved sales tax.

¶3 Plaintiff filed the instant suit in 2013 purporting to represent the taxpayers of Rogers County. Plaintiff's suit seeks a determination that all payments made by APAC-Central to MSC for the lease assignment belong to County for the benefit of the Rogers County taxpayers. The suit is premised on Plaintiff's claim that the jury award to MSC in the underlying litigation was for a permanent taking and, therefore, once the underlying judgment was paid to MSC, County became the owners of the lease. Plaintiff argues neither the original petition, jury instructions, verdict, nor judgment specify whether County's taking of MSC's property was partial or total, and he seeks an opportunity to prove the taking was total/permanent. Plaintiff also seeks to establish a resulting and/or constructive trust of the lease royalty payments.

¶4 The trial court initially dismissed Plaintiff's suit on the singular ground that his petition failed to state a claim upon which relief can be granted. *See* 12 O.S. 2011 §2012(B)(6). The court specifically found Plaintiff is seeking to collaterally attack the underlying judgment, which has been upheld on review. Upon reconsideration, the trial court reaffirmed its initial ruling and added a second ground for dismissal: Plaintiff lacks standing to pursue claims of unjust enrichment and estoppel by judgment. From said judgment, Plaintiff appeals.

¶5 This matter stands submitted for accelerated appellate review without appellate briefs on the trial court record pursuant to Rule 4(m), Rules for District Courts, 12 O.S. Supp. 2013, Ch. 2, App., and Rule 1.36, Oklahoma Supreme Court Rules, 12 O.S. Supp. 2013, Ch. 15, App. 1. This Court's standard of review of a trial court's order granting a motion to dismiss is *de novo. Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶4, 230 P.3d 853. "Under this standard, we have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal ruling." *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841.

¶6 We agree with MSC and the trial court that Plaintiff's claims are nothing more than a collateral attack on the underlying judgment in an attempt to redefine the jury's verdict of a temporary taking into a permanent taking. As this Court unequivocally stated in the first sentence of *Material Serv. Corp. v. Rogers County Bd.*

of Comm'rs, the jury verdict and award in the underlying case was "for a temporary taking." *Id.*, 2012 OK CIV APP 17at ¶1. Indeed, the opinion repeatedly stated the case concerned a "temporary" taking and a large part of our discussion was dedicated to the proper measure of damages for a "temporary" regulatory taking. There is no dispute as to whether the underlying judgment was one for a temporary versus a permanent taking; that issue has already been conclusively decided. Plaintiff's petition failed to state a cause of action upon which relief can be granted.

¶7 We further agree that Plaintiff lacks standing to assert his claims. In *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶7, 163 P.3d 512, the Oklahoma Supreme Court reiterated:

> The three threshold criteria of standing are (1) a legally protected interest which must have been injured in fact i.e., suffered an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision.

"[A] taxpayer possesses standing to seek equitable relief when alleging that a violation of a statute will result in an illegal expenditure of public funds or the imposition of an illegal tax." *Oklahoma Pub. Employees Ass'n v. Oklahoma Dept. of Cent. Services*, 2002 OK 71, ¶10, 55 P.3d 1072. *Accord Fent*, 2007 OK 27, 163 P.3d 512.

¶8 Here, Plaintiff attempts to establish his injury-in-fact as a taxpayer of Rogers County, seeking assignment of the lease to County, all money paid or to be paid by APAC-Central for the lease, a finders' fee and attorney fees. None of his claims constitute equitable relief, nor do they challenge an illegal expenditure of public funds. Additionally, in light of the above discussion regarding failure to state a claim, Plaintiff cannot show he is likely to obtain a favorable court decision regarding ownership of the lease. Upon *de novo* review of the instant record, we hold the trial court correctly dismissed Plaintiff's petition.

¶9 AFFIRMED.

JOPLIN, J., and BUETTNER, J., concur.

Applicants for February 2019 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given Feb. 26-27, 2019.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

Erika Louiez Artinger
Logan Ashton Blackburn
Brian Gary Bond
Charles Ellis Hart
Carrie L Kincade
Tamara Webster Kinyanjui
Jonathan Lance Kurz
Erin Lalani Monroe
Matthew Carson Porter
Valerie Marie Salem
Andrew Lawrence Junk Winningham
Charles Martin Woner

NORMAN

Ryan Paul Caron
Erin Nicole Fuller
Amos Teah Kofa
Nathan Alan Lobaugh
Margaret Spence Moon
Jaron Tyler Moore
Ashton Nichole Paschal-Wilson
Raymond Dale Rieger
Jacob Marland Sargent
Christine Suzanne Schem
Alina Ruth Carlile Sorrell
Jose Alberto Villarreal
Bailey Malone Warren

OKLAHOMA CITY

Joshua Wayne Anderson
Jason Craig Bollinger
Jessica Lyn Brown
Farrah Yong Burgess
Jeffrey Taylor Cummings
Allison Jane Daugherty
David Anthony Davis
Joseph Lee DeGiusti
Anthony Bruce Dickenson
Anja du Toit
Joseph Albert Griffin
Rilee Dean Harrison
Javier Giovanny Hernandez
Taylor Nathan Kincanon
Lisa Leigh Lopez
Brittany Faithe McMillin
Taylor Anthony Moult
Bryan Ashton Don Muse
Hunter Christian Musser
Christie Ann Porter
Kristen Annette Prater
Marjon Jacqueline Creel Stephens
Brandt Steven Sterling
Jonathan Kyle Tully
Carson Quay Turner

TULSA

Jessica Christine Allen
Erik Sven Anderson
Aisosa Arhunmwunde
Jeffrey Douglas Bacon Jr.
Zackary Austin Brown
James Linden Curtis
Rodney Gavin Fouts
Jose Valentin Gonzalez
Logan Andrew Harrison
Christopher James Hollingsworth
Priscilla Jean Jones
Ronald Cecil Jones II
Henry Herman Klaus
Mary Estelle Leavell
Michael Vincent Martin
Ashley Swindell Nix
Colton Loy Richardson
Hope Elizabeth Sheppard-Mahaffey

Paul Alan Sims

Keaton Anthony Michael Taylor

Natalie Anne Tupta

Nicholas Charles Williams

Emily Kathleen Wilson

John Paul Yeager

Jazmin Guadalupe Zaragoza

OTHER OKLAHOMA CITIES AND TOWNS

Misbauddin Ahmed, Moore

Jacob William Allison, Nichols Hills

Wriley Kenneth Anderson, Moore

Scott Thomas Beyea, Lawton

Allison Nicole Biscoe, Weatherford

Krystal Brooke Browning, Duncan

Shondra Beth Brumbelow-Neal, Moore

Isaiah Nathaniel Brydie, Owasso

Darrell Leon Buck, Yukon

Whitney J. Dockrey Miller, Shawnee

Donald Martin Fahrny, Depew

Mollie Miranda Jo Fields, Blanchard

William Richard Frank, Moore

Stacy Nichole Fuller, Owasso

Paige Nicole Green, Yukon

Lindsay Nicole Hearn, Broken Arrow

Lindon Thomas Hogner, Bixby

James Derick Hopper, Broken Arrow

Nekanapeshe Peta James, Wagoner

Brayden Micah Jennings, Moore

Leslie Lanay Jones, Piedmont

Zachariah Ahmad Kanaa, Moore

William Ray Keene, Pawhuska

Tiffany Amber Lueck, Broken Arrow

Kelby Winson Luna, Sulphur

Daniel Patrick McClure Jr., McLoud

Jacob Alan McDonald, Dewey

Amity Eileen Ritze, Broken Arrow

Dalton Bryant Rudd, Davis

Colton Grant Scott, Claremore

Brent Allen Smith, Tahlequah

Kelly Rae Sweeney, Oologah

Spencer Byron Torbett, Okmulgee

Miroslava I. Vezirska-Gabrovski, Bethany

OUT OF STATE

James Edward Blaise, Tomball, TX

Candace Lee Carter, Shady Shores, TX

Jason Lee Cotton, Sherman Oaks, CA

Emilee Noelle Crowther, Odessa, TX

Robert Evan Davis, Montrose, CO

Edward Fonseca, Littleton, CO

Lauren Ashley Fournier, Manhattan, KS

Colin Wade Holthaus, Topeka, KS

John Marshall Homra, Jackson, TN

Dallas Myrl Howell, Parks, AZ

Brian Edward Jackson, Waldorf, MD

Joshua Welch Jackson, Fort Smith, AR

Francisco Jasso Jr., Amarillo, TX

Thomas Richard Jones III, Pasadena, MD

Michelle Kruse, Rowlett, TX

Andrea Lynne Mills, Derby, KS

Garrad Duane Mitchell, Marietta, GA

Andrew Edward Polchinski, Dallas, TX

Morgan Taylor Lee Smith, Terrell, TX

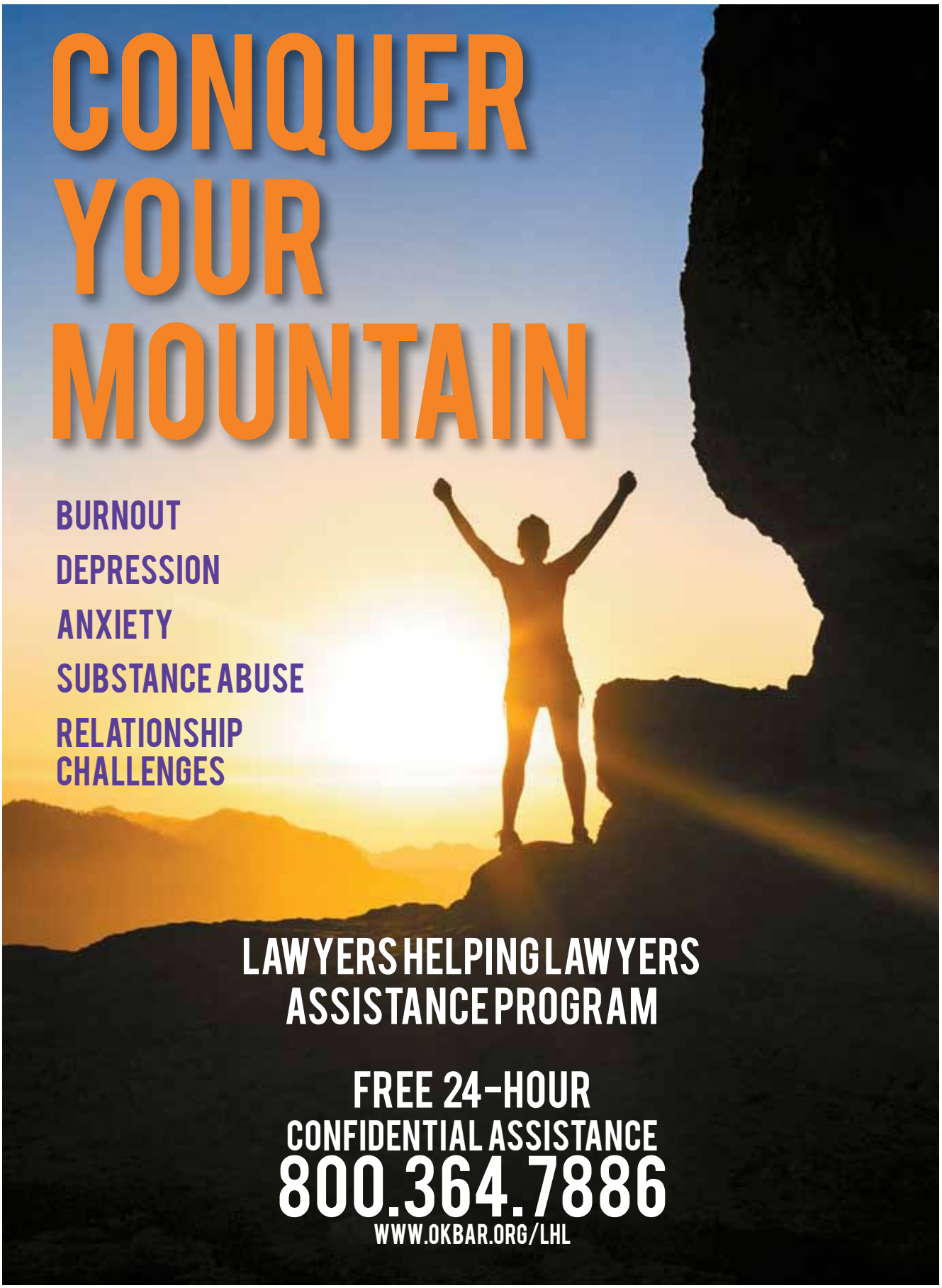
James Arthur Trummell, Henderson, NV

Gentry Carlin Wahlmeier, Alma, AR

Nicholas Weeks, Elkins, AR

Brandon Jacob Williamson, Perryton, TX

Dakota James Wrinkle, Abilene, TX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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, January 17, 2019

RE-2017-915 — On September 30, 2013, Appellant Tina Marie Stroud, represented by counsel, entered pleas of *nolo contendere* to Count 1, Possession of a Firearm After Former Conviction of a Felony, Count 2, Possession of a Controlled Dangerous Substance (CDS) – Methamphetamine, Count 3, Possession of Paraphernalia, and Count 4, Possession of CDS-Marijuana in Delaware County Case No. CF-2013-113. She was sentenced to ten (10) years for Counts 1 and 2, and fined $100 for Count 3 and $500 for Count 4. That same date, Stroud entered a plea of *nolo contendere* in Delaware County Case No. CF-2013-297 where she was charged with Count 1, Endeavoring to Manufacture CDS – Methamphetamine and Count 2, Harboring a Fugitive. She was sentenced to thirty (30) years for Count 1 and ten (10) years for Count 2. Stroud's sentences were suspended pending completion of the Regimented Treatment Program (RTP), subject to terms and conditions of probation. The sentences in Case No. CF-2013-297 were ordered to be served concurrently with Stroud's sentences in Case No. CF-2013-113. On July 26, 2017, the State filed an Application to Revoke Stroud's suspended sentences in Delaware County Case Nos. CF-2013-113 and CF-2013-297 alleging numerous probation violations. On August 24, 2017, at the conclusion of the revocation hearing, the District Court of Delaware County, the Honorable Alicia Littlefield, Special Judge, revoked Stroud's suspended sentences in full. The revocation of Stroud's suspended sentences in Delaware County Case Nos. CF-2013-113 and CF-2013-297 is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.; Hudson, J.; Kuehn, J.; Rowland, J..

RE-2017-1243 — On January 12, 2017, the State of Oklahoma filed Applications to Revoke Jeffrey Taylor Gragg, Jr.'s suspended sentences in Muskogee County Case Nos. CM-2015-523, CF-2015-1122, and CF-2015-1195, alleging Gragg committed multiple probation violations, including the commission of new offenses as alleged in Muskogee County Case No. CF-2017-1087. On December 4, 2017, the District Court of Muskogee County, the Honorable Mike Norman, District Judge, revoked Gragg's suspended sentences in full. The revocation of Gragg's suspended sentences in Muskogee County Case Nos. CM-2015-523, CF-2015-1122 and CF-2015-1195 is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2018-540 — Petitioner Marquis Lashaun Porter, while represented by counsel, entered blind pleas of guilty to First Degree Burglary (Count I) and Domestic Abuse (Count II) in the District Court of Comanche County, Case No. CF-2017-156. The pleas were accepted by the Honorable Scott D. Meaders, District Judge, on February 2, 2018, and Petitioner was sentenced in Count I to twenty (20) years imprisonment with eight (8) of those years suspended and in Count II, four (4) years in prison to run concurrent with Count I. Petitioner was also given credit for time served. On February 9, 2018, Petitioner filed a *pro se* Motion to Withdraw Guilty Plea. Conflict counsel was appointed, and on March 8, 2018 a hearing was held on Petitioner's motion before the Honorable Scott D. Meaders, District Judge. Petitioner's motion was denied and he now appeals that denial to this Court. The Petitioner for a Writ Of Certiorari is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-79 — Appellant Jared Edward Ball was tried by jury and found guilty of Robbery with a Firearm (Count I) (21 O.S.2011, § 801) and Possession of a Firearm After Former Conviction of a Felony (Count II) (21 O.S.Supp.2014, § 1283), in the District Court of Tulsa County, Case No. CF-2016-6371. The jury recommended as punishment imprisonment for thirty-five (35) years in Count I and three (3) years in Count II. The trial court sentenced accordingly, ordering the sentences to run concurrent. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

J-2018-919 — On July 10, 2018, Appellant G.P., was charged as a juvenile with Possession

of a Firearm after a Felony Adjudication in Comanche County Case No. JDL-2018-105. On August 21, 2018, the District Court of Comanche County, the Honorable Lisa Shaw, Associate District Judge, adjudicated G.P. delinquent. G.P. appeals. The District Court's order adjudicating G.P. delinquent is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Dissents; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2017-1263 — On November 4, 2015, Appellant Roy Lonnie Thompson, represented by counsel, entered a no contest plea to an amended charge of Assault with a Dangerous Weapon in Muskogee County Case No. CF-2015-189. Thompson was sentenced to five (5) years, all suspended, and ordered to complete a six month inpatient program. On September 18, 2017, the State filed an Application to Revoke Thompson's suspended sentence alleging he committed the new offense of Assault and Battery with a Deadly Weapon as charged in Muskogee County Case No. CF-2017-973. On November 30, 2017 the District Court of Muskogee County, the Honorable Norman D. Thygesen, Associate District Judge, revoked Thompson's suspended sentence in full. The revocation of Thompson's suspended sentence in Muskogee County Case No. CF-2015-189 is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur in results; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-685 — Charlee Ray Kays Adams, Appellant, was tried by jury for the crimes of Count I - Accessory to Murder and Count II - Robbery in the First Degree in Case No. CF-2015-201 in the District Court of Craig County. The jury returned a verdict of guilty and recommended as punishment 25 years imprisonment on Count I and 10 years on Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence Charlee Ray Kays Adams has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

Thursday, January 24, 2019

RE-2017-915 — Following a non-jury trial, Appellant Loren Don Hall was found guilty of Carrying a Firearm While Under the Influence in Beckham County District Court Case No. CM-2017-24. Appellant was convicted and sentenced to six months imprisonment, with all six months suspended. Appellant appeals from the Judgment and Sentence imposed. The Judgment and Sentence of the trial court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, January 18, 2019

116,300 — Jimmy Long and Jimmy Long Truck Country, LLP, Plaintiffs/Appellees, v. Brian McCamey and Jessica McCamey, Defendants/Appellants. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Lawrence Langley. Defendants/Appellants Brian and Jessica McCamey appeal a judgment entered against them and in favor of Plaintiffs/Appellees Jimmy Long and Jimmy Long Truck Country, LLP. Because the McCameys have failed to present a record showing the trial court erred, we AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

116,562 — In the Matter of L.A.H.: Krystal Hayes, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Doris Fransein, Judge. Appellant, Krystal Hayes, the natural Mother of L.A.H. seeks review of the trial court's October 27, 2017 order terminating Mother's parental rights to L.A.H. The trial court found there was evidence to support the child's deprived adjudication and she should continue to be adjudicated as a deprived child. The court further found the State of Oklahoma provided clear and convincing evidence that Mother's parental rights should be terminated pursuant to 10A O.S. Supp.2016 § 1-4-904(B)(9). L.A.H. was born on June 23, 2016 to the natural Mother, Krystal Hayes. Mother's boyfriend, not the child's father, cared for the baby while Mother worked. On or about August 11, 2016, Mother took the baby to an urgent care clinic because L.A.H. was not feeding and cried continuously. Prior to August 19, 2016, the baby's symptoms worsened, her eye began to cross and she had a seizing tremor in her wrist with her arm drawn to her body. Also during this time period, the boyfriend tried to choke Mother and exhibited instances of frustration in caring for L.A.H. On August 19th, Mother left L.A.H. with the maternal grandmother, as Mother began to suspect the boyfriend was out of his depth taking care of L.A.H. and may have injured her. The maternal grandmother noticed L.A.H. was having trouble eating and was

largely non-responsive and decided to take the baby to the doctor, where the grandmother was directed to take the child to the hospital. At the hospital, L.A.H. was diagnosed with subdural hemorrhaging, requiring burr holes to relieve the pressure, an occipital fracture and a zygomatic arch fracture. The attending doctor believed the injuries were due to at least three abusive impacts. L.A.H. was placed in emergency D.H.S. (Department of Human Services) custody on August 22, 2016. A police detective interviewed Mother on August 19, 2016, at which time Mother provided much of the information used at trial regarding how she suspected her boyfriend was having trouble caring for L.A.H. and may have injured her. The trial court found Mother proved herself ill equipped to deal with the issues of recognizing and reasonably responding to the child's needs, especially with respect to the current increased level of care L.A.H. needed. The trial court found the child's deprived adjudication should continue and that the natural Mother's parental rights should be terminated pursuant to 10A O.S. Supp.2016 § 1-4-904(B)(9). The Oklahoma Supreme Court adopted the clear-and-convincing evidence standard for the party seeking to terminate a parent's parental rights to their child. *Matter of Adoption of Darren Todd H.*, 1980 OK 119, ¶ 18, 615 P.2d 287, 290. Mother's first proposition of error on appeal asserts the trial court erred when it did not dismiss the underlying deprived case on November 28, 2016, because the trial court lost jurisdiction of the case when the natural Father was not deemed to be an unfit parent, citing as authority 10A O.S. Supp.2009 § 1-4-602. Under the authority provided by § 1-4-602, the court was not obligated to ignore the petition allegations as they related to the natural Mother, nor did the statute provide any direction for the court to dismiss the deprived petition due to the findings regarding the Father. Mother's second proposition of error alleges she was impermissibly deprived of her right to a jury trial on the issue of the termination of her parental rights. We agree "[i]t is fundamental that a parent has a constitutional right to trial by jury in termination of parental rights proceedings. *A.E. v. State*, 1987 OK 76, 743 P.2d 1041. Under the facts presented in this case, we do not find the trial court acted arbitrarily, as the record does not reveal a jury trial demand was made by Mother or on her behalf. Mother's third proposition of error on appeal asserts the trial court improperly denied Mother's request for a continuance made on the morning of trial. Mother has not demonstrated the denial of her motion to continue was an abuse of discretion and operated counter to the ends of justice, as Mother was unable to show anything might have been accomplished had the continuance been granted. Mother's final proposition asserts the trial court erred in finding the then-recently enacted statute defining "failure to protect" expanded the definition to include Mother's inaction in protecting the child from abuse and neglect, though she was considered the non-abusing parent. In 2016, 10A O.S. Supp.2016 § 1-1-105 (25) was added to the statute. Mother asserts she was not aware of her boyfriend's abuse of L.A.H. and her parental rights should not be terminated. The trial court found the minimizing of the boyfriend's violent behavior was not credible and Mother had every reason to know something was wrong and L.A.H. was suffering as a result. Mother's inaction to reasonably protect L.A.H. from her boyfriend puts her squarely within the bounds of the failure to protect definition, 10A O.S. Supp.2016 § 1-1-502(25). For the reasons provided, the October 27, 2017 order sustaining the State's petition to terminate Mother's parental rights to L.A.H. is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,589 — Anna Nicole Miskovsky, Plaintiff/Appellee, v. Gladys Ann Miskovsky and Frank Miskovsky, III, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Donald Easter, Trial Judge. Defendants/Appellants Gladys Ann Miskovsky and Frank Miskovsky, III, (Parents) appeal a protective order entered against them. Parents' daughter, Petitioner/Appellee Anna Nicole Miskovsky (Daughter), sought the protective order after Parents refused to cease contact with Daughter, despite her requests. Parents claim that the trial court abused its discretion by finding evidence of harassment and by refusing to hear evidence regarding an alleged theft of personal property by Daughter. The trial court's rulings were not against the weight of the evidence nor contrary to governing principles of law and we AFFIRM. Opinion by Buettner, J.; Goree, C.J., concurs and Joplin, P.J., concurs in result.

116,613 — In the Matter of : Joe L. Norton, Jr. Revocable Living Trust: Shane Lewis, Petitioner/Appellee, v. Frances G. Norton, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G.

Glassco, Trial Judge. The trial court entered a temporary injunction, enjoining Trustee, Frances G. Norton, from selling or transferring any assets of the Joe L. Norton, Jr. Revocable Living Trust [Trust] until further order of the court. We hold the issues are moot because Frances G. Norton has been removed as trustee and a successor trustee has been appointed to serve without bond and with all powers enumerated in the Oklahoma Trust Code and within the terms of the Trust. The Appellee's motion to dismiss the appeal is granted. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,785 — Wells Fargo Bank, N.A., Plaintiff/Appellee, v. Eric L. Jackson and Donnita A. Jackson, Defendants/Appellants. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Darrell Shepherd, Trial Judge. Defendants/Appellants Eric and Donnita Jackson appeal from a summary judgment granted to Plaintiff/Appellee Wells Fargo Bank, N.A. (Bank) in its action to foreclose its mortgage on certain real property owned by Defendants. The evidence shows the loan is in default and Defendants did not enter into a Loan Modification Agreement. Further, there was no evidence to support an inference that Plaintiff discriminated against Defendants based on their age or race. Accordingly, Plaintiff was entitled to summary judgment on its foreclosure claim and on Defendants' counterclaim for discriminatory housing practices as a matter of law. We affirm. Opinion by Goree, C.J.; Joplin, J., and Buettner, J., concur.

117,018 — In the Matter of K.C., Deprived Child: State of Oklahoma, Petitioner/Appellee, v. Leota Meadows and Scott Coffey, Respondents/Appellants. Appeal from the District Court of Garfield County, Oklahoma. Honorable Brian N. Lovell, Judge. Respondents/Appellants Leota Meadows (Mother) and Scott Coffey (Father) appeal a judgment terminating their parental rights to K.C. Following a bench trial, the court terminated Mother's parental rights for failure to comply with a placement agreement and for failure to correct the conditions that led to the deprived adjudication. The trial court terminated Father's parental rights for failure to comply with a placement agreement, failure to correct the conditions leading to the deprived adjudication, for previous criminal conviction for child abuse, and for prior adjudication of deprived status on the basis of child abuse. The Oklahoma Supreme Court issued its order consolidating Mother's and Father's appeals. The judgments are supported by clear and convincing evidence and we AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

117,100 — In Re: The Name Change of Lamone Morlee Johnson, Petitioner/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jeff Virgin, Trial Judge. Lamone Morlee Johnson, Pro Se Petitioner/Appellant, applied to the Cleveland County District Court for a name change. The court clerk's office mailed Petitioner a letter explaining the necessity to publish notice pursuant to 12 O.S. §1633. Petitioner filed a request asking the court to exempt his case from the publication requirement and the trial court denied that relief. The application for change of name was not denied and the case remains pending. The court's determination is not a final order. Denial of a request for exemption from a statute requiring publication is not an interlocutory order appealable by right, 12 O.S. §952(b)(2), and the district court did not certify the order for immediate appeal. 12 O.S. §952(b)(3). This court has no jurisdiction and the appeal is dismissed as premature. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

(Division No. 2)
Thursday, January 10, 2019

115,582 — Alan Benefiel, Plaintiff/Appellee, vs. Christa Benefiel and Jewel Boulton, Defendants, and American Eagle Title Insurance Company, Appellant. Proceeding to review a judgment of the District Court of Seminole County, Hon. Timothy Olsen, Trial Judge. American Eagle Title Insurance (AETI), appeals a fee award in favor of Alan Benefiel that was apportioned between fee-bearing and non-fee-bearing claims. It is the burden of the party *seeking a fee* in an apportionment situation to show that *all time claimed was related to a fee-bearing matter*, not that of the court or opposing parties to untangle the prevailing party's submissions. Further, claims are not "inextricably intertwined" simply because a movant "intertwines" time spent on fee-bearing and non-fee-bearing matters in the same timesheet entry, or addresses both fee-bearing and non-fee-bearing claims in the same proceeding or motion. Benefiel's submissions in the fee proceeding are inadequate to allow any reasoned assessment of which claim the fees are properly related to. Where, as here, this award's reasonableness cannot be tested for want of a record, it must be reversed for want of requisite evidentiary sup-

port. *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶ 18, 977 P.2d 357. REVERSED AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Friday, January 11, 2019

116,261 — Robert S. Howard, Jr., I, L.L.C., an Oklahoma limited liability company (a/k/a Hat Top Mesa, L.L.C. and f/k/a Howard & Danos Consulting, L.L.C.); Robert S. Howard, Jr., II, L.L.C., an Oklahoma limited liability company (f/k/a Howard & Danos Land, Co., L.L.C.); and Robert S. Howard, Jr., individually, Plaintiffs/Appellants, vs. John A. Bachelor, III, individually; John A. Bachelor, III, P.C., an Oklahoma professional corporation; Centennial Law Group, an association of professional corporations; Jacob A. Bachelor, CPA, individually; Bachelor Integrity Accounting PC, an Oklahoma professional corporation; First Bank Trust Co., an Oklahoma State Banking Corporation; and W. Allen Gates, individually, Appellees, and Affinity Ventures LLC, an Oklahoma limited liability company; Affinity Ventures Capital Corporation, an Oklahoma corporation; Benevolent Holdings Corporation, an Oklahoma corporation; Jerri L. Hargis, individually; Peter Goldring, individually; Peter Reagan, individually; H&D Financing, LLC, an Oklahoma limited liability company; H&D Investment Fund, LLC, an Oklahoma limited liability company; and Preferred Class Investors of H&D Investment Fund, LLC, an Oklahoma limited liability company, Defendants. Appeal from Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. Appellants Robert S. Howard, Jr., an individual, Robert S. Howard, Jr., I, L.L.C., and Robert S. Howard, Jr., II, L.L.C. (collectively Howard plaintiffs) appeal the district court's journal entry granting the motions for summary judgment filed by Appellees. We find that the Howard plaintiffs failed to file their tort claims in this case within the two-year statute of limitations required by 12 O.S.2011 § 95 (A)(3). Likewise, the Howard plaintiffs failed to file their fraud claims within two years after the date they discovered, or should have discovered, the fraud. Howard's breach of oral contract claims are also barred for failure to file the suit within the three-year statute of limitations set out in 12 O.S.2011 § 95(A)(2). Finally, Howard failed to establish any disputed material fact showing that Centennial Law Group breached any term of the parties' written contract. Therefore, the district court's judgment in favor of Appellees John A. Bachelor, Jacob A. Bachelor, First Bank Trust Co., and W. Allen Gates is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., concurs; and Wiseman, P.J., concurs in result.

(Division No. 3)
Friday, January 11, 2019

116,275 — Leslie Brown, Jr., Leslie David Brown, III, Plaintiffs/Appellants, vs. Carol McCullom, Debbie Keener, Harbor Insurance Co., and State Farm Insurance Co., Defendants/Appellees, and Tulsa Auto Salvage, Defendant, Leslie Brown, Jr., Plaintiff/Appellant, vs. Insurance Auto Auctions, Inc., and Clint Smith, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Dana Kuehn, Trial Judge. Plaintiffs/Appellants, Leslie Brown, Jr., and Leslie David Brown, III, appeal from the trial court's judgment denying their motion to reconsider the order denying a second request to disqualify the trial judge; denying their motion to vacate the summary judgment in favor of Defendants/Appellees; and granting Defendants' motion for sanctions against Plaintiffs for frivolously filing the motions to vacate and reconsider. On August 31, 2016, the trial court entered a final judgment adjudicating the last remaining claim against the last remaining party in this matter. Plaintiffs filed untimely motions to vacate the final judgment and to disqualify the trial judge. The trial court denied both motions and sanctioned the Plaintiffs for filing the motions. After reviewing the trial court's order, we cannot find the trial court abused its discretion and AFFIRM. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,685 — Roger L. Price, Plaintiff/Appellee, vs. Board of Commissioners of Pawnee County, Oklahoma, Defendant/Appellant, and Oklahoma Public Employees Retirement System, Third-Party Defendant. Appeal from the District Court of Pawnee County, Oklahoma. Honorable Patrick Pickerill, Trial Judge. Defendant/Appellant Board of County Commissioners of Pawnee County (the Board) appeals from an order awarding Plaintiff/Appellee Roger L. Price (Price) $34,060.50 in incidental damages after Price succeeded in obtaining an alternative writ of mandamus against the Board. The damages represented the retirement benefits Price could have begun receiving at an earlier date had the Board not wrongfully withheld his salary and retirement contributions while he

was suspended from his position. The Board's sole proposition of error on appeal is whether the court erred by awarding incidental damages. Title 12 O.S. 2011 §1460 broadly provides that a successful plaintiff in a mandamus action "shall recover the damages which he shall have sustained[.]" Accordingly, we find the court did not err and AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

116,913 — (Consolidated w/116,917) Impact Roofing of Oklahoma, LLC, and/or Alpha & Omega Roofing Renovations, LLC, Petitioners, vs. Filiberto Torres and The Workers' Compensation Commission, Respondents. Appeal from the Workers' Compensation Commission. Petitioners, Impact Roofing of Oklahoma, LLC (Impact), and Alpha & Omega Roofing Renovations, LLC (A&O), appeal from the Workers' Compensation Commission's order finding Respondent, Filiberto Torres (Claimant), was an employee of A&O at the time of his work-related injury and, because A&O is uninsured, Impact is liable for payment of Claimant's workers' compensation benefits as the general contractor. Impact was the general contractor on a residential roofing job in Edmond, Oklahoma, and A&O was the subcontractor. A&O's owner, Prisciliano Rocha, claimed he then orally subcontracted the job to two men, who were to supply all materials and labor. Rocha did not require the men to supply evidence of workers' compensation insurance or an exempt status form, and he paid the men in cash and/or by check. At trial, Rocha claimed he did not know the whereabouts of either man. Claimant appeared at the work site on the morning of March 10, 2015, along with about fourteen (14) other workers. Claimant concedes he did not have a conversation with anyone regarding whether he was hired for the job or the amount he would be paid. Claimant testified he assumed he was hired, was not concerned with the wage amount, and overheard other workers discuss being paid by the day. Although denied by Rocha, Claimant testified Rocha told the workers to make groups and start working, gave the workers instructions regarding the number of nails to be used with each shingle, supplied Claimant with tools and fielded questions from Claimant on three separate occasions. On his second day on the job, Claimant fell from the roof and sustained severe injuries to multiple body parts. The evidence clearly indicates Claimant entered into an implied contract for employment with A&O. As the subcontractor, A&O was tasked with providing the labor for the Edmond job. The evidence also supports a finding that Rocha gave instructions to the workers and supplied Claimant with tools. We agree with the ALJ that Rocha's allegation that he subcontracted the job to two men was disingenuous and without merit. The actions of representatives of A&O and Impact after the accident also fail to indicate the culpability of any other party. We also find Claimant was not acting as an independent contractor. Because A&O was uninsured, Impact is liable as the prime contractor for Claimant's compensation pursuant to 85A O.S. Supp. 2013 §36(A). The order of the Commission is SUSTAINED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Thursday, January 10, 2019

116,449 — Damian Laber, Plaintiff/Appellant, v. State of Oklahoma, ex rel. Board of Regents of the University of Oklahoma, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rebecca Nightingale, Trial Judge. Plaintiff, Damian Laber, (Dr. Laber) appeals the trial court's Order denying his motion for attorney fees in this breach of employment contract action. This Court finds the underlying nature of the present action was not one for labor or services rendered as required by Title 12 O.S.2011 § 936. Thus, the trial court did not err in denying Dr. Laber's request for attorney's fees pursuant to Title 12 O.S.2011 § 936. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., dissents.

Thursday, January 17, 2019

116,918 — First United Bank and Trust Company, an Oklahoma Banking Corporation, Plaintiff/Appellee, v. Buck Hammers a/k/a Buck L. Hammers a/k/a Buck Leon Hammers, Defendant/Appellant, and Jody Hammers a/k/a Jo-Lynn Hammers; Jane Doe, spouse of Buck Hammers, if any; John Doe, spouse of Jody Hammers, if any, Defendants, and National Livestock Credit Corporation, Defendant/Appellee. Appeal from the District Court of Bryan County, Hon. Mark Campbell, Trial Judge. In this mortgage foreclosure and lien foreclosure action, Defendant/Appellant Buck Hammers appeals from a judgment of the trial court granting summary judgment to Plaintiff/Appellee First United Bank and Trust Company (First United) foreclosing on certain real property and various equipment owned by Hammers and rendering judgment *in rem* and *in per-*

sonam against Hammers, and granting summary judgment to Defendant/Appellee National Livestock Credit Corporation (NLCC) on its interest in the real property and its liens on the equipment and setting the lien priorities between First United and NLCC. The trial court also ordered Hammers to turn over possession of the equipment to First United and/or NLCC so that they may foreclose on and sell the subject equipment. The only issue presented on appeal is whether the United States of America is "a necessary party" because of the federal crimes for which Hammers was indicted and subsequently found guilty of having committed. It is undisputed the United States has claimed no interest in any of the real or personal property involved in this appeal nor that any determination has been made by a federal court that the United States claims any interest in any of the real or personal property involved in this case as a result of Hammers' conviction. We conclude based on the record presented, that the United States has not been established as a necessary party to these proceedings. Accordingly, we affirm the trial court's judgment granting summary judgment to First United and NLCC, foreclosing their liens, establishing their lien priorities, and ordering that possession of the subject equipment be delivered to First United and/or NLCC so it can be foreclosed and sold. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Wednesday, January 16, 2019

117,203 — Brad D. Asher; Kirby L. Jones, Jr.; Armando Belmonte; Floyd Kendrick; Larry Martinez; Steve Cartwright; Kevin Smith; David Walton; Gary Southard; Micah Kendrick; Caleb Beck; Ricky Spradlin; Steve Thoma; Carson Clayton; Eron Gibson; Joseph Chandler; Warren Harvey, Jr.; Jim Self; Aaron Gregory; Billy Capps; Patrick Skaggs; Edward Perkins; Derek Hoefgen; John Miller; James Patterson; Ron Reno; Tim Nicholson; Eric Moore; Billy Spain, Jr.; Wayne Bethany; Steve Anderson; Craig Ivy; Cougun Ledford; Jesse Gerken; Robert Calvin; Jason Thompson; Lavelle Cole; Rickey Carroll; Sharon Carwright; Daniel "Kevin" Polovina; Phillip Hudgings; Denzel Clark; Matthew Moss; Ted Zellers; Terry Matthews; David Britt; Allan Seher; Perry Carpenter; Khamphachanh Nassath; and Jeremy Voss, Plaintiffs/Appellants, vs. Parsons Electric, L.L.C.; P1 Group, Inc.; and Whiting-Turner Contracting Company, Defendants/Appellees. Appellants' Petition for Rehearing and Brief, filed January 11, 2019, is *DENIED*.

(Division No. 2)
Friday, January 11, 2019

115,853 — Oak Tree Partners, LLC, an Oklahoma Limited Liability Company, Plaintiff/Counterclaim Defendant/Appellee, vs. Tracy Williams, Defendant/Counterclaim Plaintiff/Appellant, and Jeffrey O. Bolding, Third-Party Defendant/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Monday, January 14, 2019

116,903 — Kylee Summers, Plaintiff/Appellant, vs. Jacob Williams, Defendant/Appellee. Appellant's Petition for Hearing with Brief in Support, filed November 21, 2018, is *DENIED*.

(Division No. 4)
Tuesday, January 8, 2019

116,165 — Noval Seniorcare, LLC, Plaintiff/Appellee, vs. Oklahoma Employment Security Commission, and Assessment Board, Defendants/Appellants. Appellee Noval Seniorcare's Petition for Rehearing filed on December 3, 2018, is hereby *DENIED*.

Friday, January 11, 2019

116,911 — Dillon S. Rose, Petitioner, vs. Berry Plastics Corp., Safety National Casualty Corp., and The Workers' Compensation Commission, Respondents. Respondents' Petition for Rehearing is hereby *DENIED*.

Tuesday, January 22, 2019

115.715 — In re the Marriage of: Steven William McCroskey, Petitioner/Appellee, vs. Jamie Sue McCroskey, Respondent/Appellant. Appellee's Petition for Rehearing is *DENIED*.

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